



Law Council  
OF AUSTRALIA

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

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**Senate Legal and Constitutional Affairs  
Legislation Committee**

**5 November 2014**

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## Executive Summary

1. The Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth) (the Bill) forms part of the Government's *Operation Sovereign Borders* Policy and aims to improve the efficiency of the current system for assessing protection claims and issuing protection visas.
2. Key amendments relate to: the increase of Executive and non-Executive powers to detain and transfer people at sea and the restriction of the court's ability to invalidate such actions; the reintroduction of Temporary Protection Visas (TPVs) and the introduction of the Safe Haven Enterprise Visa (SHEV); the introduction of fast track processing for the 'legacy caseload', including the removal or restriction of merits review; the removal of most references to the *Convention relating to the Status of Refugees* (Refugee Convention) in the *Migration Act 1958* (Cth) and the requirement to consider Australia's *non-refoulement* obligations; clarifying that babies born in Australia or in offshore processing centres will have the same designation under the Migration Act as their parents; and allowing the Minister to cap the number of protection visas issued.
3. The Law Council supports efforts to enact a clear, fair and efficient system for assessing protection claims and issuing protection visas. It considers that certainty of the legal framework for the determination protection claims is urgently needed, especially for the 'legacy caseload'.
4. The Law Council considers that the Bill's proposed amendments depart from the accepted standards of protection for asylum seekers in international and domestic law, key rule of law principles, and procedural fairness guarantees. The Law Council's view of these standards, principles and guarantees is set out in its *Asylum Seeker Policy* (Policy), approved on 6 September 2014.<sup>1</sup> For example, the Law Council observes that many of the proposed measures are retrospective in application and contrary to the Policy, which states that in order to adhere to rule of law principles, laws and policies affecting asylum seekers must not have retrospective application.<sup>2</sup>
5. Further, several of these changes (such as removing the obligation for the Executive to consider international obligations and the creation of an excluded category of persons – 'excluded fast track review applicant') potentially conflict with the principle of *non-refoulement*, which prohibits states from returning refugees to countries where his or her life or freedoms are threatened. Moreover, the proposed amendments – especially the removal or restriction of merits review – are likely to lead to more applications to the High Court based on common law judicial review principles. This will undoubtedly lead to further inefficiencies, and prolong the process of determining Australia's protection obligations.
6. Most importantly, the Law Council considers that access to independent legal or migration advice for asylum seekers under Australia's jurisdiction is fundamental to promote compliance by Australia with its international law obligations and to be consistent with the rule of law. The provision independent advice at an early stage of the refugee status determination process will reduce inefficiencies and help ensure that asylum seekers are not at risk of returning to a place of risk, in accordance with

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<sup>1</sup> Law Council of Australia, *Asylum Seeker Policy*, (6 September 2014) ('LCA Policy'), available at: [http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/AsylumSeeker\\_Policy\\_web.pdf](http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/AsylumSeeker_Policy_web.pdf).

<sup>2</sup> LCA Policy at [9(f)].

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Australia's international obligations. Such advice is critical given the changes contained in the Bill, including the fast track process, which involves substantially reduced review rights, the exercise of Ministerial discretion at the primary decision-making level and a limited ability to introduce new material following the initial assessment of status. These combine with complex changes in other legislation, including the proposals to place the burden of demonstrating claims on the applicant without any assistance from a third party. Without legal advice, the Law Council is concerned that:

- a. Asylum seekers will be left without help to make significant legal applications, and
  - b. Immigration officials will be left to make decisions on poorly prepared and incomplete applications.
7. The Law Council also observes that the Bill appears to infringe upon traditional rights and freedoms outlined in the Terms of Reference of the Australian Law Reform Commission's *Review of Commonwealth Laws for Consistency with Traditional Rights, Freedoms and Privileges*.<sup>3</sup>
8. The Law Council recommendation is that the Bill not be passed. However, if this recommendation is not adopted the Law Council recommends that amendments be made to the Bill to ensure that it more appropriately aligns with rule of law principles, procedural fairness and Australia's international law obligations. Further, it urges the Committee to recommend asylum seekers' lack of access to free and independent legal advice, including for those cohorts covered by this Bill, must be immediately addressed.

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<sup>3</sup> See: <http://www.alrc.gov.au/inquiries/freedoms/terms-reference>. For example, if the Bill were passed it would include laws which would appear to:

- deny procedural fairness to persons affected by the exercise of public power;
- inappropriately delegate legislative power to the Executive;
- give executive immunities a wide application;
- retrospectively change legal rights and obligations; and
- restrict access to the courts.

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## Summary of Recommendations

9. The Law Council's primary recommendation is that the Bill not be pursued as currently drafted.

10. If, the Bill is pursued, the Law Council recommends the following changes be made:

### *Schedule 1*

- That the Schedule should not apply retrospectively;
- That the proposed sections stating that the failure to consider, defective consideration or inconsistency with international obligations do not invalidate authorisations or the exercise of certain powers be removed (sections 22A, 75A);
- That the proposed sections excluding natural justice from the authorisation and exercise of certain powers be removed (sections 22B, 75B); and
- The proposed exclusion from AD(JR) Act review of the Minister's decisions under section 75D, 75F or 75H be omitted (Part 2, Item 31).

### *Schedule 2*

- As TPVs are subject to inherent limitations, if they are to be reintroduced, they should only constitute a form of 'bridging visa' while people await the determination of their claim, rather than the final outcome once an individual has been found to engage the protection obligations;
- That holders of all types of non-permanent visas are eligible to apply for permanent protection if they are still found to be owed protection after the expiration of their first term of temporary protection;
- That holders of permanent and temporary visas are permitted to sponsor family members to migrate to Australia, including unaccompanied minors sponsoring their parents or next of kin;
- That holders of temporary visas are permitted to depart and return to Australia in exceptional circumstances, such as the death or imminent death of a family member; and
- Criteria are provided for a SHEV to be included in the body of the Bill as it is in relation to TPVs, preferably as an independent class of visa.

### *Schedule 4*

- Free independent legal advice for fast tracked applicants should be provided;
- The proposed amendments under Subdivision C be amended to ensure that the Immigration Assessment Authority (IAA) has a duty to consider all new information and evidence provided by the Applicant, including any new claims for protection, new information provided orally or in writing, and any further primary or secondary evidence;
- The written reasons provided pursuant to new sub-section 474EA(1) are sufficiently detailed, and that a minimum quota of publishable decisions be

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determined by Parliament to ensure that the Public has access to a range of varied decisions;

- The new sub-section 473FA(1) be amended to include the word 'fair';
- The amendments should extend the jurisdiction of the Federal Circuit Court to include judicial review of screening out decisions which are affected by jurisdictional error;
- The Committee recommend the reinstatement for Immigration Advice and Application Assistance Scheme (IAAAS) funding for all applicants subject to the 'fast track' process, including the IAA, process; and
- The definition of 'excluded fast track review applicant' is removed from the Bill, or in the alternate:
  - Sub-sections 5(1)(a)(ii) to (iv), as well as (v) and (vi) be removed from the definition;
  - Greater guidance is provided around the meaning of 'reasonable explanation', 'manifestly unfounded claim' and 'bogus documents'. Any such guidance – for example, in the Explanatory Memorandum – must not detract from the fact that applications must be assessed on an individual basis, according to the applicant's particular claims.
  - The Minister be required provide an explanation to the applicant of why their documents are considered bogus, or their claims are considered manifestly unfounded, and be provided with an opportunity to respond;
  - The obligation to put adverse information to the applicant at sub-sections 57(1)(a) and (3)(b) is broadened beyond the provision of personal information to material that was relied upon by the decision maker, such as country information;
  - Excluded fast track review applicants have access to the Refugee Review Tribunal (RRT), or at the very least, access to an independent merits review system such as the existing Independent Protection Assessment system, insofar as this is in accordance with Australia's international obligations; and
  - The benefit of informing fast track applicants of what review pathways are open to them pursuant to new subsections 66(2)(e) and (f) extend to excluded fast track review applicants concerning information about judicial review in addition to information that the decision is not merits reviewable.

#### *Schedule 6*

- Consider the ways in which procedural fairness can be guaranteed to these children. For example, the Explanatory Memorandum should be amended to make it explicit that, pursuant to proposed sub-section 198(1C) at Item 7 of Part 1, if a child is mandatorily removed (who also is effectively temporarily in Australia), then removal of the mother or child should only occur if neither mother nor child 'needs to be in Australia'. Although these needs may be linked, both the mother and child should have those potential needs recognised; and

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- The proposed amendments should not apply retrospectively.

## Introduction

11. The Law Council welcomes the opportunity to provide the following comments to the Senate Legal and Constitutional Affairs Legislation Committee (the Committee) as part of its inquiry into the provisions of the Bill.
12. The Bill was introduced into the House of Representatives on 25 September 2014 and forms part of the Coalition Government's *Operation Sovereign Borders* Policy which it has sought to implement in legislation<sup>4</sup> since outlining its key features prior to the 2013 Federal Election.<sup>5</sup> This Bill amends a range of legislation.<sup>6</sup>
13. This submission is based on and reiterates the position adopted in the Law Council's Policy, approved on 6 September 2014. Given its Directors' support for the principles contained in the Policy, which are based on international law and rule of law principles, this submission highlights the degree to which the Bill's provisions comply with the Policy principles. In addition, the submission highlights the critical need for legal advice for asylum seekers which it urges the Committee to carefully consider in its inquiry into the Bill.
14. The submission focuses in particular on Schedules 1, 2, 4, 5, and 6 of the Bill. The Law Council has not been able to comment on every aspect of the Bill and an absence of comment should not be taken as endorsement of those measures. The

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<sup>4</sup> The Bill follows the introduction of the Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2013 on 4 December 2013; the Migration Amendment (Visa Maximum Numbers Determinations) Bill 2013 on 9 December 2013; the Migration Amendment Bill 2013 on 12 December 2014 (which received Royal Assent on 27 May 2014); the Migration Amendment Bill (No. 1) 2014 [Provisions] on 27 March 2014; the Migration Amendment (Character and General Visa Cancellation) Bill 2014 on 24 September 2014; and the Migration Amendment (Protection and Other Measures) Bill 2014 on 25 September 2014. The Government has also introduced legislative instruments, such as the *Migration Amendment (Bridging Visas—Code of Behaviour) Regulation 2013* that was made on 12 December 2013 and was open to disallowance to 14 July 2014, when the motion to disallow was voted down in the Senate: Commonwealth, *Parliamentary Debates: Proof*, Senate, 14 July 2014, 80-6, available at: [http://parlinfo.aph.gov.au/parlInfo/download/chamber/hansards/1ff3c533-adda-4fbc-8fc3-2e90e18c76eb/toc\\_pdf/Senate\\_2014\\_07\\_14\\_2666.pdf;fileType=application%2Fpdf#search=%22chamber/hansards/1ff3c533-adda-4fbc-8fc3-2e90e18c76eb/0000%22](http://parlinfo.aph.gov.au/parlInfo/download/chamber/hansards/1ff3c533-adda-4fbc-8fc3-2e90e18c76eb/toc_pdf/Senate_2014_07_14_2666.pdf;fileType=application%2Fpdf#search=%22chamber/hansards/1ff3c533-adda-4fbc-8fc3-2e90e18c76eb/0000%22). For the Law Council's submissions, see: Law Council of Australia, Submission to Senate Legal and Constitutional Affairs Legislation Committee, Inquiry into the Migration Amendment (Protection and Other Measures) Bill 2014, 4 August 2014 ('Protection Bill submission'), available at: [http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-2800-2899/2871\\_-\\_Migration\\_Amendment\\_Protection\\_Obligations\\_and\\_Other\\_Measures\\_Bill\\_2014.pdf](http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-2800-2899/2871_-_Migration_Amendment_Protection_Obligations_and_Other_Measures_Bill_2014.pdf) and Law Council of Australia, Supplementary Submission to Senate Legal and Constitutional Affairs Legislation Committee, Inquiry into the Migration Amendment (Protection and Other Measures) Bill 2014, 10 September 2014, available at: [http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-2800-2899/2889\\_-\\_Migration\\_Amendment\\_Protection\\_Obligations\\_and\\_Other\\_Measures\\_Bill\\_2014\\_-\\_Supplementary\\_Submission.pdf](http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-2800-2899/2889_-_Migration_Amendment_Protection_Obligations_and_Other_Measures_Bill_2014_-_Supplementary_Submission.pdf); and Law Council of Australia, Submission to Senate Legal and Constitutional Affairs Legislation Committee, Inquiry into the Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2013, 23 January 2014 ('Protection Obligations submission'), available at: <http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-2700-/2774-MigrationAmendmentRegainingControlOverAustraliasProtectionObligationsBill2013.pdf>. The Law Council has recently provided the Senate Legal and Constitutional Affairs Legislation Committee in support of the submission made to the Committee on this Bill by one of its Constituent Bodies, the Law Institute of Victoria.

<sup>5</sup> Liberal Party of Australia and The Nationals, *The Coalition's 'Operation Sovereign Borders' Policy* (July 2013).

<sup>6</sup> The Bill amends the following legislation: the *Migration Act 1958* (Cth), the *Migration Regulations 1994* (Cth); the *Maritime Powers Act 2013* (Cth), the *Immigration (Guardianship of Children) Act 1946* (Cth) and the *Administrative Decisions (Judicial Review) Act 1977* (Cth).

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New South Wales Bar Association (NSW Bar) has provided detailed commentary on various aspects of the Bill, which complements the Law Council's submission.

## Key Features of the Bill

15. In addition to amending various legislative instruments, the Bill also aims to give legislative effect to a number of the Government's asylum seeker policies including introducing 'fast track' processing and re-introducing Temporary Protection Visas (TPVs). It also responds to a number of recent judicial decisions and proceedings.<sup>7</sup>
16. The Bill is long and complex. It contains the following Schedules of Amendments:
  - Schedule 1—Amendments relating to maritime powers;
  - Schedule 2—Protection visas and other measures (including the provisions that reintroduce TPVs);
  - Schedule 3—Act-based visas;
  - Schedule 4—Amendments relating to fast track assessment process (this includes the establishment of a new IAA);
  - Schedule 5—Clarifying Australia's international law obligations (this includes changes to removal powers and changes to the definition of 'refugee');
  - Schedule 6—Unauthorised maritime arrivals and transitory persons: newborn children; and
  - Schedule 7—Caseload management.
17. The Bill follows the introduction of other amendments to the Migration Act that also relate to the assessment of protection visa claims and the rights of protection visa applicants, which have also been the subject of Law Council submissions to this Committee.<sup>8</sup>

## The Law Council's Asylum Seeker Policy

18. The Law Council's Policy was settled by the Law Council's Directors on 6 September 2014 following consultation with its Constituent Bodies and Committees and extensive consideration of Australia's international obligations and rule of law principles. As outlined in the Policy, the Law Council believes that all people seeking Australia's protection should be treated with humanity and dignity.

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<sup>7</sup> These include: *Plaintiff M61/2010E v Commonwealth of Australia* [2010] HCA 41 and *Plaintiff M70/2011 v Minister for Immigration and Citizenship* [2011] HCA 32; *Plaintiff M150 of 2013 v Minister for Immigration and Border Protection* [2014] HCA 25 and *Plaintiff S297/2013 v Minister for Immigration and Border Protection* [2014] HCA 24; *CPCF v Minister for Immigration and Border Protection and Anor*, concerning 157 asylum seekers detained on the High Seas by Australian authorities and subsequently transferred to Nauru. The matter was before the full court of the High Court of Australia on 14-15 October 2014 and judgment is pending; and *Plaintiff B9/2014 v Minister for Immigration* [2014] FCCA 2348 concerning the legal status of baby Ferouz, born to Rohingya asylum seekers in Brisbane in November 2013, on appeal to the Federal Court.

<sup>8</sup> See above n 1.

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19. The Policy highlights the relevant rule of law and international human rights law principles that ought to be observed when developing and implementing laws and policies concerning asylum seekers. It reiterates the position that every person has a legal right to seek and enjoy asylum from persecution – a right that is protected under the *Universal Declaration of Human Rights* and other international conventions to which Australia is a party.<sup>9</sup> Chief among Australia’s obligations is the principle of *non-refoulement*, which prohibits states from returning refugees to countries where his or her life or freedoms are threatened.
20. The Policy makes the point that to be effective and sustainable, Australia’s laws, regulations and policies must be developed with due regard to regional efforts to address irregular migration. Further, the conditions of immigration detention must also be humane and dignified. The Policy takes into account the legal framework that applies to the interception of boats carrying asylum seekers by Australian authorities.

## Legal advice

21. The Law Council's Policy stipulates that all people seeking protection in Australia should have access to legal assistance to understand their legal rights and the legal processes that apply to the determination of their protection status.<sup>10</sup>
22. This issue is critical in the context of the current Bill, particularly given:
- a. Its proposed fast track processes – which involve substantially reduced (or excluded) review rights, the exercise of Ministerial discretion early in the process, and a very limited ability to introduce new material later in the process; and
  - b. The reintroduction of TPVs, which require claims to be made afresh every three years and will involve a substantial administrative burden. Without legal assistance, Australian immigration officials will be left to make decisions on poorly prepared and incomplete applications.
23. Such changes combine with other recently introduced complex, and often retrospective legislative amendments, such as those proposed in the Migration Amendment (Protection and Other Measures) Bill 2014 (the Protection Bill), which proposes to place the onus on the applicant to demonstrate his or her claim.<sup>11</sup>
24. The Law Council holds very serious concerns that protection visa applicants will have little capacity to understand these and other changes that affect them – including what forms of protection they can validly apply for; the requirements and obligations for setting out their claims; the process for assessment; their rights of

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<sup>9</sup> Art 14 of the *Universal Declaration on Human Rights*, G.A. res. 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810, (10 December 1948) ('UDHR'). See also the *Convention relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) and the *Protocol relating to the Status of Refugees*, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967) (collectively, 'the Refugee Convention'); the *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 277 (entered into force 23 March 1976) ('the ICCPR'); the *Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty*, opened for signature 15 December 1989, GA res 44/128 (entered into force 19 July 1991) ('Second Optional Protocol to the ICCPR'); the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) ('the CAT'); and the *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 3 (entered into force 2 September 1990) ('the CROC').

<sup>10</sup> LCA Policy at [5], [7(b)], [9(c)] and [10(c)].

<sup>11</sup> Protection Bill, Schedule 1, Part 1, Item 1, new s 5AAA.

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review; their ability to be reunited with their immediate family members; their long term protection options; and the likelihood of removal.

25. The inherent risk is that an applicant with a legitimate claim will nevertheless fail and be returned. The Law Council considers it to be essential to help mitigate this risk, and to aid administrative efficiency, that the Australian Government provide asylum seekers with publicly funded legal advice early in the application process.
26. If passed, this Bill will highlight the Council's concerns regarding the IAAAS and Primary Application Information Service (PAIS).

#### The Immigration Advice and Application Assistance Scheme

27. On 31 March 2014, the Government announced the removal of all funding for people arriving in Australia without a valid visa, including arrivals by boat. The Law Council has previously opposed the removal of funding from the IAAAS.<sup>12</sup> Until its removal, limited forms of migration and legal assistance were available to asylum seekers in Australia.
28. The Law Council considers that the IAAAS is a necessary measure to protect and promote the rule of law. It is also a mechanism to ensure that the proposed fast track assessment process in Schedule 4 of the Bill – designed to improve efficiency and add clarity to the existing system – operate effectively, particularly given the complexity of proposed legislative reform.

#### PAIS

29. The Law Council acknowledges that the Government has commenced a tender process for the provision of 'additional support' to particularly 'vulnerable' asylum seekers, including unaccompanied minors,<sup>13</sup> known as the PAIS.
30. Only a small number of asylum seekers will be eligible for PAIS, to be determined at the discretion of the Department of Immigration and Border Protection (the Department). PAIS Providers will not play a role in determining eligibility.
31. Although it is unclear at this stage what exactly this support entails, the Law Council generally welcomes the PAIS, as it considers that independent, professional advice is urgently needed particularly for those most vulnerable protection visa applicants. However, a number of key aspects of the PAIS remain unclear. The Law Council suggests the Committee seek clarification on whether the PAIS will apply to, in particular, those affected by Schedules 2 (Temporary Protection Visas) and 4 (fast track processing). The Law Council considers that for the PAIS to be effective, the following issues should be addressed:
  - The 'additional support' to be provided under the scheme must prioritise independent legal advice;

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<sup>12</sup>Law Council of Australia, 'Law Council concerned by removal of IAAAS Funding' (Media Release, 2 April 2014), available at: [http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/mediaReleases/1409 --\\_Law\\_Council\\_concerned\\_by\\_removal\\_of\\_IAAAS\\_Funding.pdf](http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/mediaReleases/1409 --_Law_Council_concerned_by_removal_of_IAAAS_Funding.pdf).

<sup>13</sup>The Hon Scott Morrison MP, Minister for Immigration and Border Protection, 'End of taxpayer funded immigration advice to illegal boat arrivals saves \$100 million' (Media Release, 31 March 2014), available at: <http://www.minister.immi.gov.au/media/sm/2014/sm213047.htm>

- How officials at the Department will determine whether a person who falls within one of the stated categories will meet requirements and be referred to the PAIS;
- Knowing whether all unaccompanied minors, or families with young children will have access to the PAIS. The growing body of evidence<sup>14</sup> confirms the particular vulnerability of children in immigration detention environments or those issued with short term, temporary visas such as bridging visas;
- Why only the Department is able to make referrals to the PAIS. In contrast in the IAAAS scheme applicants could self-nominate for assistance. Also there may be systemic benefit if independent experts were able to make referrals to the PAIS, or make referral suggestions to the Department; and
- Why the best interests of the Government is a criterion for the grant of legal assistance, marking a significant departure from the principles of access and equity that underpin legal aid generally. Eligibility of applicants for PAIS will be determined by the Department, including for cases in which assistance with resolution of protection claims would otherwise be in the best interest of the Government.

32. The Law Council strongly encourages the Committee to consider and to recommend remedies to address asylum seekers' lack of access to legal advice in its inquiry into the Bill.

## Schedules of the Bill

### Schedule 1 – Maritime Powers

33. The Law Council questions the extension of Executive power, the removal of procedural fairness guarantees, limitations on the court's ability to invalidate Executive actions, and the undermining of Australia's compliance with its international obligations which are proposed under this Schedule.

#### Overview

34. This Schedule extends the power of the Executive to stop asylum seeker boats at sea, to detain them for potentially long periods, and take them to another country, regardless of whether there is an agreement with the particular country in place. It restricts the court's capacity to invalidate government actions at sea, provides that the rules of natural justice do not apply to certain key actions, and suspends Australia's international obligations in the context of powers exercised under the *Maritime Powers Act 2013* (Cth).

35. Specifically, the Bill removes the reference in the *Maritime Powers Act* to the limitation of the exercise of powers outside Australia in accordance with international law.<sup>15</sup> In particular, the Bill provides the following:

<sup>14</sup> This evidence is currently being reviewed by the Australian Human Rights Commission as part of its *National Inquiry into Children in Immigration Detention 2014*, due to report shortly. Details of the Inquiry are available at: <https://www.humanrights.gov.au/national-inquiry-children-immigration-detention-index>

<sup>15</sup> Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth) ('Caseload Bill') at Schedule 1, Part 1, Item 1.

- An authorising officer<sup>16</sup> authorising maritime powers (including, for example, the detention and transfer of persons intercepted at sea)<sup>17</sup> is not required to consider Australia's international obligations (including, for example, the principle of *non-refoulement*), or the international obligations or domestic law of another country.<sup>18</sup> This also applies in relation to the exercise of certain maritime powers (including the powers to detain and transfer persons);<sup>19</sup>
- An authorisation of maritime powers is not invalid because of a defective consideration by the authorising officer of Australia's international obligations, or the international obligations or domestic law of another country.<sup>20</sup> This also applies in relation to the exercise of certain maritime powers;<sup>21</sup> and
- An authorisation of maritime powers is not invalid if it is inconsistent with Australia's international obligations.<sup>22</sup> This also applies in relation to the exercise of certain maritime powers.<sup>23</sup>

36. The Minister's power is extended in relation to the removal and detention of a vessel or aircraft to a place either inside or outside the migration zone for such time until a decision is made on the destination of the vessel, or the Minister exercises his or her discretion under the Act.<sup>24</sup> The Minister may also give directions about powers exercised by maritime officers concerning detaining and moving vessels, aircraft and other conveyances, and the people therein – pursuant to sections 69, 69A, 71, 72 and 72A – provided that it is 'in the national interest' (section 75F(5)).

37. Maritime powers are also extended and created for maritime officers concerning detention on a vessel, and the destination of that vessel. This allows a vessel or aircraft to be detained for any period reasonably required to decide on the destination; to consider whether the destination is to be changed; to enable the Minister to make a determination under certain powers; to travel to the destination; or to make and put into effect arrangements relating to a person's release.<sup>25</sup>

38. Furthermore the Bill clarifies that a continuous exercise of powers does not end merely because the destination to which a vessel, aircraft or person is to be taken (or caused to be taken) is changed.<sup>26</sup> The effect of this amendment is to avoid any doubt that a change of destination by maritime officers under subsections 69(3A) or 72(4B) could interrupt the continuous exercise of powers. This may include pausing a journey to a destination for operational reasons.

<sup>16</sup> *Maritime Powers Act 2013* (Cth) s 16(1).

<sup>17</sup> *Ibid* pt 3. This includes powers with regard to: boarding vessels, installations and aircraft; entering on land; obtaining information; search; things found or produced; detaining vessels, aircraft and other conveyances; placing and moving persons; arrest; and, requiring conduct to cease.

<sup>18</sup> Caseload Bill, Schedule 1, Part 1, Item 6, new s 22A(1)(a).

<sup>19</sup> *Ibid* Item 19. Pursuant to new s 75A(1)(a), namely the exercise of powers under new ss 69, 69A, 71, 72, 74, 72A, 75D, 75F, 75G or 75H.

<sup>20</sup> *Ibid* Item 6, new s 22A(1)(b)

<sup>21</sup> *Ibid* Item 19. Pursuant to new s 75A(1)(b), namely the exercise of powers under ss 69, 69A, 71, 72, 74, 72A, 75D, 75F, 75G or 75H.

<sup>22</sup> *Ibid* Item 6, new s 22A(1)(c)

<sup>23</sup> *Ibid* Item 19. Pursuant to new sub-s 75A(1)(c), namely the exercise of powers under ss 69, 69A, 71, 72, 74, 72A, 75D, 75F, 75G or 75H.

<sup>24</sup> *Ibid*. Pursuant to new ss 75D (exercising powers between countries); 75F(the Minister's directions about exercise of powers) and associated 75G (compliance with directions given under 75F); or 75H (certain maritime laws do not apply to certain vessels detained or used in the exercise of powers)

<sup>25</sup> *Ibid* Items 15-19. See, for example: new sub-s 72(3) and (4) and associated amendments; new s 72A; and new s 75C.

<sup>26</sup> *Ibid* Item 5: amends s 11 of the *Maritime Powers Act 2013* (Cth).

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39. The rules of natural justice do not apply to the authorisation of, or exercise of, certain maritime powers.<sup>27</sup> The court's ability to declare certain Executive and non-Executive actions invalid is further limited by:
- a. Those provisions which state that the authorisation or exercise of certain maritime powers is not invalid due to, for example, a failure to consider Australia's international obligations, or the international obligations or domestic law of another country;<sup>28</sup> and
  - b. The exclusion from review by the Federal Court under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (AD(JR) Act) – of decisions by the Minister under sections 75D<sup>29</sup>, 75F<sup>30</sup> and 75H.<sup>31</sup> For example, this includes directions given by the Minister about the exercise of powers including the detention of persons, or taking them to a destination.
40. Further changes under this Schedule include that the Minister's guardianship under the *Immigration (Guardianship of Children) Act 1946* (Cth) does not apply to children detained or moved outside Australia in vessels, aircraft or other conveyances under the Maritime Powers Act.<sup>32</sup>

#### The Law Council's Policy - naval interdiction and summary return

41. This Schedule is inconsistent with the Law Council's Policy.<sup>33</sup> The Law Council considers that all rescues, interdictions, interceptions, 'push-backs', 'tow backs', and transfers of persons at sea by Australian government personnel of vessels carrying suspected irregular arrivals should comply with the international law of the sea, international refugee law, and international human rights law.
42. The Law Council considers that every person rescued or intercepted at sea by Australian personnel who expresses a fear for their safety if returned to their country of origin has a right to access effective procedures for the determination of their refugee or complementary protection claims.<sup>34</sup> Transferring at sea a person claiming protection to the authorities of the state from which the person fears harm, without processing the person's claim in accordance with minimum international standards on the determination of refugee status, risks *refoulement*.<sup>35</sup>

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<sup>27</sup> Ibid Item 6 and 19, new s 22B, which relates to the authorisation powers under Division 2 of Part 2, and new s 75B, which relates to the exercise of powers under section 69, 69A, 71, 72, 72A, 74, 75D, 75F, 75G or 75H.

<sup>28</sup> Ibid, new ss 22A, 75A.

<sup>29</sup> Ibid Item 19, new s 75D (exercising powers between countries).

<sup>30</sup> Ibid. Under new s 75F, the Minister may give directions about exercise of powers including the detention of a vessel or aircraft (s 69 of the *Maritime Powers Act 2013* (Cth)), taking a vessel or aircraft to a destination (new s 69A), placing or keeping persons (s 70 *Maritime Powers Act 2013* (Cth)), detaining persons on vessels or aircraft and taking them to another destination (s 72 *Maritime Powers Act 2013* (Cth)), and additional provisions relating to taking a person to a destination (new s 72A).

<sup>31</sup> Ibid, new s 75H (certain domestic maritime laws do not apply to certain vessels detained or used in exercise of powers).

<sup>32</sup> Ibid, Schedule 1, Part 2, Items 32-5.

<sup>33</sup> LCA Policy. See specifically, [21]-[24].

<sup>34</sup> Pursuant to the Refugee Convention; the ICCPR; the Second Optional Protocol to the ICCPR; the CROC and, the CAT.

<sup>35</sup> The principle of *non-refoulement* and other relevant obligations in Conventions to which Australia is party apply to all people seeking asylum in Australia regardless of their mode or time of arrival. These obligations are set out at LCA Policy at [7]. Australia's obligations apply whenever Australia exercises 'effective control' over people within its jurisdiction, including on the High Seas. The International Court of Justice considered this issue in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep 136. In doing so, it referred to Communications made by the United Nations Human

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43. Expedited asylum processing (including 'enhanced screening') at sea of persons rescued or intercepted at sea may not meet minimum international standards. Indeed, the summary maritime expulsion or return of a person claiming protection to the frontiers of a third country which lacks effective asylum procedures may amount to indirect *refoulement*.<sup>36</sup> This would include summary return on an interdicted vessel, by transfer onto a life boat or other vessel (including the vessel of a third state or a private or commercial vessel).
44. The Policy also states that the following obligations arise in respect of naval interdiction and summary return:
- a. Ensuring the safety of life at sea,<sup>37</sup>
  - b. Treating all people in its custody or control humanely,<sup>38</sup> and
  - c. Respecting freedom of navigation on the high seas.<sup>39</sup>

#### The Law Council's Policy - sovereign nations

45. The Law Council's Policy stipulates that Australia must respect the sovereign maritime boundaries and areas of other countries.<sup>40</sup>
46. Proposed sections 22A and 75A provide that the authorisation/ exercise of certain maritime powers is not invalid because of a failure to, or defective consideration of, Australia's international obligations, or the international or domestic obligations of another country; or if it is inconsistent with Australia's international obligations. This includes the power to detain asylum seekers at sea and take them to another country, regardless of whether an agreement with the country is in place. The Law Council agrees with the NSW Bar's comments that these sections increase the likelihood that the exercise of powers under the Maritime Powers Act will violate Australia's obligation to respect the sovereignty of other States.
47. The NSW Bar also considers that new section 75C increases the likelihood that the exercise of powers under the Act will violate Australia's obligation to respect the sovereignty of other States and will contravene Article 2(4) of the *Charter of the United Nations*, in the same respect as proposed new section 22A. The NSW Bar does not consider that section 75C(2) – that requires compliance with section 40 if the destination is 'in' another country – is an adequate safeguard against the Maritime Powers Act being exercised in a manner which involves the violation of the

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Rights Committee (HRC), such as in *Lopez Burgos v Uruguay* (at [109]). In that case, the HRC found that 'jurisdiction' is not spatial, but rather, it is personal and based on the 'relationship between the individual and the State in relation to a violation of any of the rights set forth in the [ICCPR], wherever they occurred' – see: *Lopez Burgos v Uruguay*, UN Doc CCPR/C/13/D/52/1979 (29 July 1981) 176, [12.2].

<sup>36</sup> *Hirsi Jamaa and Others v Italy*, App. No. 27765/09, European Court of Human Rights, 23 February 2012.

<sup>37</sup> Art 98(1) of the *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994) ('UNCLOS'). See also Chapter V, Reg 33(1) of the *International Convention for the Safety of Life at Sea*, opened for signature 1 November 1974, 1184 UNTS 2 (entered into force 25 May 1980).

<sup>38</sup> See, for example: UDHR, ICCPR (Articles 2, 7 and 10) and the *International Covenant on Economic, Social and Cultural Rights*, opened for signature 19 December 1966, 993 UNTS 3 (entered into force in 3 January 1976) ('the ICESCR').

<sup>39</sup> Article 110 UNCLOS: Interference with the freedom of navigation of foreign vessels outside territorial sea is only permissible under treaty arrangements (including in the case of rescue at sea), with authorisation of the flag State, or in cases such as slave trading or piracy.

<sup>40</sup> Article 2 of the UNCLOS provides that the sovereignty of a coastal state extends to its territorial sea. Under UNCLOS coastal states also enjoy certain rights in their contiguous and exclusive economic zones.

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sovereignty or territorial integrity of other States or the violation of Article 2(4) of the *Charter of the United Nations*.

48. Further, under the law of State responsibility, which determines the responsibility under international law for the actions of State and non-State actors, Australia will be responsible for the actions of any vessel and its master or crew, acting in accordance with a direction given under the Maritime Powers Act. The actions of the vessel, master and crew will be treated, under international law, as acts of the State of Australia. Accordingly, where a vessel, acting under a direction issued under the Act, enters the territory of another State without authorisation, including the territorial sea of that State, Australia will be responsible under international law for the violation of that State's territorial integrity.<sup>41</sup>

#### The Law Council's Policy - detention

49. The Law Council's Policy stipulates that Australia must refrain from arbitrarily or unlawfully detaining asylum seekers contrary to international human rights law,<sup>42</sup> including by incommunicado detention. It further emphasises that detention of asylum seekers should not be discriminatory (e.g. based on the country of origin, the mode or manner of a person's arrival into Australia); maximum limits should be imposed to guard against indefinite detention; decisions to detain should be subject to procedural safeguards including procedural fairness guarantees and the ability to challenge the lawfulness of the detention, Executive decisions concerning the detention should be subject to judicial review; and detention of children is unlikely ever to comply with the 'best interests of the child'.<sup>43</sup>
50. The Schedule's proposals do not accord with these principles in a number of ways. As the NSW Bar has noted, new section 72A expands the existing powers of maritime officers to detain persons without any due process or review. This is not consistent with the prohibition on arbitrary detention under Article 9 of the *International Covenant on Civil and Political Rights* (ICCPR) or the United Nations High Commissioner for Refugees (UNHCR) *Detention Guidelines: guidelines on the Applicable criteria and standards relating to the detention of asylum-seekers and alternatives to detention*, which state that asylum seekers should only be detained as a measure of last resort,<sup>44</sup> the Law Council's Policy<sup>45</sup> or its *Principles Applying to the Detention of Asylum Seekers*.<sup>46</sup> The proposed detention power is open-ended other than the requirement that the detention period be 'reasonably required'. There is the potential for prolonged periods of detention. If this power is to be retained it should be subject to a maximum time period to encourage expeditious decision-making and judicial oversight mechanisms (for example, the Schedule proposes that where the Minister makes a direction concerning this power, it will not be subject to judicial review under the AD(JR) Act).<sup>47</sup>

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<sup>41</sup> Such violation will involve a breach of Article 2(4) of the *Charter of the United Nations*, which is a breach of a peremptory norm under international law and one of the most serious breaches of international law in which a State may engage.

<sup>42</sup> Article 9 ICCPR.

<sup>43</sup> LCA Policy at [10].

<sup>44</sup> Office of the United Nations High Commissioner for Refugees, 'Detention Guidelines: guidelines on the Applicable criteria and standards relating to the detention of asylum-seekers and alternatives to detention' (2012), Guideline 4.1 [28], available at: <http://www.unhcr.org/505b10ee9.html>.

<sup>45</sup> LCA Policy at [10(b)].

<sup>46</sup> Law Council of Australia, *Policy Statement: Principles Applying to the Detention of Asylum Seekers*, 22 June 2013 ('LCA Detention Statement'), available at: [http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/Final\\_PDF\\_18\\_Oct\\_Asylum\\_Seekers\\_Principles.pdf](http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/Final_PDF_18_Oct_Asylum_Seekers_Principles.pdf).

<sup>47</sup> Caseload Bill, Schedule 1, Part 1, Item 19, new ss 72A, 75F and Part 2, Item 31.

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## The Law Council's Policy - *non-refoulement*

51. The Law Council's Policy stipulates that Australian authorities must respect the obligation of *non-refoulement* (including by transfers at sea to a vessel of the country of origin).
52. The Law Council acknowledges that the Government wishes to clarify the scope of its obligations under international law.<sup>48</sup> However, it considers that the Schedule does not accord with rule of law principles<sup>49</sup> or Australia's voluntarily assumed international obligations.
53. International human rights instruments to which Australia is party<sup>50</sup> do not automatically give rise to enforceable legal rights or obligations under Australian domestic law.<sup>51</sup> While it is within the power of the legislature to decide to change the application of international obligations,<sup>52</sup> Australia may be liable at the international level for breaches of instruments to which it is party. Although there may be practical limitations on the level to which some of these obligations can be enforced, there are a variety of mechanisms for promoting compliance with international obligations.<sup>53</sup> In his inaugural speech to the United Nations Human Rights Council on 8 September 2014, the United Nations High Commissioner for Human Rights stated:

*Australia's policy of off-shore processing for asylum seekers arriving by sea, and its interception and turning back of vessels, is leading to a chain of human*

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<sup>48</sup> Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth) ('Explanatory Memorandum'), available at: [http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fems%2Fr5346ems\\_a065619e-f31e-4284-a33e-382152222022%22](http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fems%2Fr5346ems_a065619e-f31e-4284-a33e-382152222022%22). The Explanatory Memorandum (at 17) provides that the omission of 'In accordance with international law, the exercise of powers is limited in places outside Australia' in s 7 of Div 2 of Part 1 of the *Maritime Powers Act 2013* (Cth) is for the purpose of merely reflecting that 'intention that the interpretation and application of such obligations is, in this context, a matter for the executive government, noting that the executive government is accountable to the international community for its compliance with those obligations'.

<sup>49</sup> See: Law Council of Australia, *Policy Statement: Rule of Law Principles* (March 2011), available at: <http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/PolicyStatementRuleofLaw.pdf> ('LCA Rule of Law Principles'). For example: Principles 2 (the law should be applied to all people equally and should not discriminate between people on arbitrary or irrational grounds), 4 (everyone should have access to competent and independent legal advice), 6 (the Executive should be subject to the law and any action undertaken by the Executive should be authorised by law), 7 (no person should be subject to treatment or punishment which is inconsistent with respect for the inherent dignity of every human being) and 8 (States must comply with their international legal obligations whether created by treaty or arising under customary international law).

<sup>50</sup> Australia is a party to the seven key international human rights treaties and has also signed or ratified a number of optional protocols to those treaties. The instruments include: the Refugee Convention; the ICCPR; the ICESCR; the CAT; and the CROC.

<sup>51</sup> *Minister for Immigration v Teoh* (1995) 183 CLR 273 and *Dietrich v The Queen* (1992) 177 CLR 292.

<sup>52</sup> See for example: *Al-Kateb v Godwin* (2004) 208 ALR 124, [19] (Gleeson CJ): 'Courts do not impute to the legislature an intention to abrogate or curtail certain human rights or freedoms (of which personal liberty is the most basic) unless such an intention is clearly manifested by unambiguous language, which indicates that the legislature has directed its attention to the rights or freedoms in question, and has consciously decided upon abrogation or curtailment.'

<sup>53</sup> For example, the United Nations Human Rights Committee may consider individual communications alleging violations of the rights set forth in the ICCPR by States parties to the *First Optional Protocol to the International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 302 (entered into force 23 March 1976), pursuant to the conditions set out at art 5(2). Equivalent complaints procedures are available under other instruments.

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*rights violations, including arbitrary detention and possible torture following return to home countries.*<sup>54</sup>

54. The NSW Bar also observes that proposed new section 75C is inconsistent with Australia's *non-refoulement* obligations.
55. The NSW Bar considers that sub-sections 69(2)-(3A) – that expressly allow maritime officers to take vessels to places outside Australia without consideration of whether this would result in *refoulement* or otherwise place people's lives at risk – is likely to result in breaches of Articles 32 and 33 of the Refugee Convention. It further notes there is no prohibition on returning people to countries that are not a signatory to the Refugee Convention. Further, the fact that such actions will occur outside of Australian waters does not obviate Australia's obligations under international law.<sup>55</sup>

#### The Law Council's Policy - Executive power

56. The Law Council's Policy stipulates that, in order to comply with the rule of law:
- a. Executive discretion relating to the detention of asylum seekers must be subject to prescribed limits and to judicial review,<sup>56</sup> and
  - b. Australian authorities must provide accessible, timely and effective remedies for alleged violations of Australia's international human rights law obligations.<sup>57</sup>
57. Proposed new sections 22B and 75B provide that the rules of natural justice do not apply to certain actions<sup>58</sup>. This removes protection against wrongful decision making. In particular, the NSW Bar has suggested that these proposed amendments could risk breaching Article 32 of the Refugee Convention, which provides that a refugee may only be expelled after due process has been followed. This is contrary to what the NSW Bar understands to be the principle in *Plaintiff M70/2011 v Minister for Immigration and Citizenship* – that persons who claim to have a well-founded fear of persecution should not be returned to the country from which they fled unless their claims have been assessed and rejected.<sup>59</sup>
58. Proposed amendments to the Schedule 1 of the AD(JR) Act seek to exclude review by the Federal Court of decisions by the Minister under sections 75D<sup>60</sup>, 75F<sup>61</sup> and 75H<sup>62</sup> and conflicts with the Law Council Policy.

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<sup>54</sup> Mr. Zeid Ra'ad Al Hussein, 'Opening Statement' (Speech delivered at the Human Rights Council 27<sup>th</sup> Session, Geneva, 8 September 2014) 7, available at: [http://hrhc.org.au/wp-content/uploads/2014/09/AdvancedCopy\\_HRCOpeningStatement\\_Sep2014.pdf](http://hrhc.org.au/wp-content/uploads/2014/09/AdvancedCopy_HRCOpeningStatement_Sep2014.pdf).

<sup>55</sup> For example, Committee Against Torture, *Decision: Communication No. 323/2007* UN Doc CAT/C/41/D/323/2007 (11 November 2008) ('*JHA v Spain*'), [8.2]. The Committee found that Spain had obligations under the CAT in respect of persons rescued by Spain in international waters. By parity of reasoning, the same obligations apply under the ICCPR and the Refugee Convention.

<sup>56</sup> LCA Policy at [10(b)].

<sup>57</sup> *Ibid* at [22(g)]. See also Article 2 ICCPR.

<sup>58</sup> Caseload Bill, Schedule 1, Part 1, Items 6 and 19. Namely, Division 2 of the *Maritime Powers Act 2013* (Cth), concerning the authorisation of the exercise of maritime powers – new s 22B; and the exercise of powers under ss 69, 69A, 71, 72, 72A, 74, 75D, 75F, 75G or 75H – new s 75B.

<sup>59</sup> (2011) 244 CLR 144 at [94], [215], [233] and [237].

<sup>60</sup> *Ibid* Item 19, new s 75D (exercising powers between countries)

<sup>61</sup> *Ibid*. Under new s 75F, the Minister may give directions about exercise of powers including the detention of a vessel or aircraft (s 69 of the *Maritime Powers Act 2013* (Cth)), taking a vessel or aircraft to a destination (new s 69A), placing or keeping persons (s 70 *Maritime Powers Act 2013* (Cth)), detaining persons on vessels

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59. As the NSW Bar points out, without recourse to the Federal Court, litigants will have to bring any judicial review challenges in the High Court, based on common law judicial review principles. This is likely to increase the costs and delays to all parties, compared to the more efficient and streamlined judicial review procedures available in the Federal Court which should be available.

#### The Law Council's Policy - retrospectivity

60. The Law Council questions the need for retrospective application of the proposed amendments. This is contrary to the Law Council's Policy<sup>63</sup>. Retrospectivity has the potential to unfairly:

- a. Penalise persons for taking actions which were lawful at the time that they were taken; and
- b. Sanction actions which were unlawful at the time, depriving innocent parties of their legitimate entitlement for redress for breach of the law.

#### Recommendation

61. The Law Council suggests that the Committee recommend that this Schedule not be enacted.

62. If the Committee is minded to recommend the Schedule, the Law Council suggests that the Committee recommend:

- That the Schedule should not apply retrospectively;
- That the proposed sections stating that the failure to consider, defective consideration or inconsistency with international obligations do not invalidate authorisations or the exercise of certain powers be removed (sections 22A, 75A);
- That the proposed sections excluding natural justice from the authorisation and exercise of certain powers be removed (sections 22B, 75B); and
- The proposed exclusion from AD(JR) Act review of the Minister's decisions under section 75D, 75F or 75H be omitted (Part 2, Item 31).

## **Schedule 2 – Temporary Protection Visas**

63. The Law Council acknowledges the urgent need for the Government to deal with the many thousands of asylum claims that have yet to be fully assessed. It supports an efficient, fair approach to the assessment of protection claims and welcomes efforts to bring certainty and dignity to the lives of vulnerable men, women and children. It supports access to work rights, and also acknowledges that TPVs are a step to ensure people, and especially families with children are out of restricted detention environments.

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or aircraft and taking them to another destination (s 72 *Maritime Powers Act 2013* (Cth)), and additional provisions relating to taking a person to a destination (new s 72A),

<sup>62</sup> Ibid, new s 75H (certain domestic maritime laws do not apply to certain vessels detained or used in exercise of powers).

<sup>63</sup> LCA Policy at [9(f)].

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64. However, the current proposal for TPVs is inconsistent with the Law Council's Policy. The Law Council questions the necessity of the reintroduction of TPVs for those found to genuinely invoke Australia's protection obligations, as they do not provide durable protection outcomes, potentially contribute to mental health issues as a result of associated uncertainty and family separation; result in an administrative burden on government and may not have the desired deterrent effect.<sup>64</sup> If TPVs are to be reintroduced, to be consistent with international obligations, the Law Council would support them as only constituting a form of 'bridging visa' while people await the determination of their claim. However, they should not be supported as the final outcome once an individual has been found to engage the protection obligations.

## Overview

65. This Schedule seeks to reintroduce TPVs and to introduce a new category of visa, the Safe Haven Enterprise Visa (SHEV).

66. The changes to the Migration Act under this Schedule include:

- Expansion of the meaning of 'protection visa' to include permanent protection visas, TPVs and any other class of permanent or temporary protection visas so prescribed by the Migration Regulations,<sup>65</sup>
- Applicability of these changes to the definition of protection visas to applications that have not been finally determined;<sup>66</sup> and
- Conversion of visas so that an application for one type of visa can be validly taken to be an application for another type of visa, including that an application for permanent protection visa made whilst an applicant was on a bridging visa can be considered an application for a TPV. The amendments explicitly state that subsection 7(2) of the *Acts Interpretation Act 1913* (Cth) – prohibiting certain retrospective measures – does not apply.<sup>67</sup>

67. The effect of these measures is that no asylum seeker who has arrived or will arrive by boat or by air without a valid visa will ever be eligible for a permanent protection visa.

68. This Schedule also makes changes to the *Migration Regulations 1994* (Cth), such that TPVs will be issued in respect of all asylum seekers who:

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<sup>64</sup> Department of Parliamentary Services, Parliament of Australia, *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014* (Bills Digest No 40, 2014-15) 14 citing 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.

<sup>65</sup> Caseload Bill, Schedule 2, Part 1, Item 1: see the new definition at s 5(1). See also new s 35A at Item 5.

<sup>66</sup> Ibid Item 19.

<sup>67</sup> Ibid Part 2, Item 20, new s 45AA. For example, section 7(2) of the *Acts Interpretation Act* relevantly provides:

*If an Act, or an instrument under an Act, repeals or amends an Act (the affected Act) or a part of an Act, then the repeal or amendment does not:*

...

*(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under the affected Act or part; or*

...

*(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment*

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- Hold, or have ever held, a Temporary Protection (Class XD) visa or a Subclass 785 (Temporary Protection) visa, including such a visa granted before 2 December 2013; or
  - Hold, or have ever held, a Temporary Safe Haven (Class UJ) visa or a Temporary (Humanitarian Concern) (Class UO) visa; or
  - Did not hold a visa that was in effect on the person's last entry into Australia; or
  - Are unauthorised maritime arrivals; or
  - Were not immigration cleared on the person's last entry into Australia.<sup>68</sup>

69. Under the proposed amendments to the Migration Regulations, TPVs will:

- Be of a duration of three years, after which time a TPV holder can be reassessed for eligibility for a further TPV, involving a fresh analysis of their claim;
- Include unrestricted work rights and access to Medicare and other benefits, subject to Social Security legislation. TPV holders will be required to meet mandatory activity testing requirements but are exempt from activity testing for the first 13 weeks;
- Prevent applicants from sponsoring family members to migrate to Australia, however, a family member can also apply for a TPV at the same time and place as the applicant, where the family member's application is combined with that of the applicant. This measure also applies to unaccompanied minors;
- Prevent departure and return to Australia, as TPVs cease automatically if the holder departs Australia;
- Prevent eligibility for Settlement Services; and
- Permit children of TPV holders to access school education through public schools and through non-government schools.

70. Further, the Explanatory Memorandum to the Bill provides that:

*A new visa to be known as Safe Haven Enterprise Visas (SHEV) will be created. Amendments to the Migration Regulations to prescribe criteria for this visa will follow in 2015.*

71. The Law Council understands that this visa will be an alternative to TPVs and will encourage 'earning and learning' in regional areas.<sup>69</sup> It will only apply to the 'legacy case load', as asylum seekers who come to Australia by boat in the future are

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<sup>68</sup> Caseload Bill, Schedule 2, Part 4, Item 29.

<sup>69</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 25 September 2014, 6 (Scott Morrison) ('Second Reading Speech'), available at: [http://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansardr/a526371b-b2dd-4037-ba7a-649c0c3fb696/0021/hansard\\_frag.pdf;fileType=application%2Fpdf](http://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansardr/a526371b-b2dd-4037-ba7a-649c0c3fb696/0021/hansard_frag.pdf;fileType=application%2Fpdf).

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subject to offshore processing.<sup>70</sup> It will not lead to permanent protection.<sup>71</sup> As the Hon Scott Morrison MP, Minister for Immigration and Border Protection, has explained:

*The visa will be valid for five years and, like the TPV, will not include family reunion or a right to re-enter Australia. SHEV holders will be targeted to designated regions and encouraged to fill regional job vacancies, where they exist, and will have access to the same support arrangement as a TPV holder.*

*SHEV holders who have worked in regional Australia without requiring access to income support for 3½ years will be able to apply and if they meet eligibility requirements be granted other onshore visas—for example, a family or skilled visa as well as temporary skilled and student visa.<sup>72</sup>*

## Issues

72. The current proposal for TPVs is inconsistent with the Law Council's Policy<sup>73</sup>.
73. The Law Council questions regulatory efforts designed to exclude certain categories of asylum seekers (i.e. unauthorised air or sea arrivals) from ever accessing permanent protection in Australia, regardless of the veracity of their protection claims.
74. In the past, TPVs were a type of visa available to people who arrive in Australia without a visa and were found to be owed protection obligations.<sup>74</sup>
75. The reintroduction of TPVs reignites questions about the administrative burden associated with them. As noted by Dr. Angus Frances, the International Law Section's Migration Law Committee's observer on the Papua New Guinea/Nauru Roundtable:

*In terms of the workability of the policy, it was something of a disaster when first implemented because the TPVs had to be renewed every three years. It is resource-consuming enough to determine someone as a refugee once. The amount of resources that would go into determining whether that person is still owed protection on the three year rolling cycle is huge.<sup>75</sup>*

76. Further, the Australian Human Rights Commission (AHRC) has stated that the use of such visas (when previously adopted from 1999 to 2008):<sup>76</sup>
- Contribute to ongoing mental health problems by creating uncertainty and insecurity;
  - Can lead to permanent separation of family members and a breach of Australia's obligations to support families to reunify.<sup>77</sup> The AHRC observed

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<sup>70</sup> Ibid.

<sup>71</sup> Ibid.

<sup>72</sup> Ibid.

<sup>73</sup> LCA Policy at [7]

<sup>74</sup> These protection obligations are set out in s 36 of the *Migration Act 1958* (Cth).

<sup>75</sup> See: Law Council of Australia, 'Asylum seekers and immigration detention' (2013) 7 *Law Council Review* 17, available at:

<http://www1.lawcouncil.asn.au/lawcouncil/images/LawCouncilReview/Issue%207%20Web.pdf>.

<sup>76</sup> Australian Human Rights Commission, *Tell Me About: Temporary Protection Visas* (2013), available at:

<https://www.humanrights.gov.au/publications/tell-me-about-temporary-protection-visas>.

<sup>77</sup> Article 23 ICCPR; Human Rights Committee, *General Comment No. 19: Protection of the family, the right to marriage and equality of the spouses* (Art. 23), UN Doc HRI/GEN/1/Rev.6, 149 (1990) [3] and [5]

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that restrictions on family reunion and overseas travel may have directly contributed to the increase in the number of family members, particularly women and children, risking their lives by making the boat journey to Australia,<sup>78</sup> and

- Constitute a discriminatory approach to refugee protection as the regime distinguishes between asylum seekers who arrived in Australia with a valid visa (permitted to apply for a permanent protection visa), and those who did not (only eligible for a TPV).

77. UNHCR has criticised Australia's policy of using TPVs and welcomed the end of TPVs in 2008. At that time, UNHCR's Regional Representative, Mr Richard Towle, said the agency had long held concerns about denying refugees access to family reunion and travel rights, stating that the use of TPVs:

*...also perpetuated uncertainty for refugees who had already suffered enormous hardship, impeding their ability to restart their lives and prolonging the separation of families.*<sup>79</sup>

78. While supporting in principle the use of temporary protection stay arrangements in limited situations,<sup>80</sup> UNHCR has said of the European Union's system of offering temporary protection in place of permanent protection for people found to be refugees:

*has a considerable impact on refugees' attitudes. Short-term residence permits are detrimental to refugees' security and stability...Regular reviews with the objective of ending refugee status can create considerable uncertainty, making it difficult for a refugee to focus on the longer term, and are thus not conducive to integration.*<sup>81</sup>

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<sup>78</sup> Australian Human Rights Commission (AHRC), *A last resort?* (April 2004) [16.2.2.], ('A last resort?'), available at: [https://www.humanrights.gov.au/sites/default/files/document/publication/alr\\_complete.pdf](https://www.humanrights.gov.au/sites/default/files/document/publication/alr_complete.pdf). See also Evidence to the Senate Standing Committee on Legal and Constitutional Affairs (Estimates), Canberra, 24 February 2009, 73 (Senator Chris Evans, Minister for Immigration and Citizenship), available at: <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p?query=Id%3A%22committees%2Festimate%2F1640%2F0001%22>. See also: Sue Hoffman, 'Temporary Protection Visas & SIEV X', 6 February 2006, available at: <http://sievx.com/articles/challenging/2006/20060206SueHoffman.html>.

<sup>79</sup> United Nations High Commissioner for Refugees, 'UN refugee agency welcomes end of TPVs' (Media Release, 14 May 2008), available at: <http://www.unhcr.org.au/pdfs/UNHCRwelcomesbudgetannouncementmay08.pdf>.

<sup>80</sup> United Nations High Commissioner for Refugees, 'Guidelines on Temporary Protection or Stay Arrangements' (February 2014), available at: <http://www.unhcr.org/cgi-bin/texis/vtx/home/opendocPDFViewer.html?docid=5304b71c9&query=%22mass%20influx%22%20+temporarily%20+protection>. UNCHR notes that Temporary Protection or Stay Arrangements are suited to the following situations:

- (i) *large-scale influxes of asylum-seekers or other similar humanitarian crises;*
- (ii) *complex or mixed cross-border population movements, including boat arrivals and rescue at sea scenarios;*
- (iii) *fluid or transitional contexts [e.g. at the beginning of a crisis where the exact cause and character of the movement may be uncertain, or at the end of a crisis, when the motivation for departure may need further assessment]; and*
- (iv) *other exceptional and temporary conditions in the country of origin necessitating international protection and which prevent return in safety and dignity*

<sup>81</sup> United Nations High Commissioner for Refugees, 'Note on the Integration of Refugees in the European Union' (May 2007), available at: <http://www.refworld.org/pdfid/463b24d52.pdf>.

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79. These issues also apply to the current Government's use of TPVs,<sup>82</sup> including the proposed amendments to the Migration Act and Migration Regulations under this Bill.
80. The Law Council considers that its Policy provides a framework that could be utilised to develop a workable approach to the determination of protection claims. For example, a fair, efficient, statutory approach to determining whether someone is a refugee, which allows the person to access independent legal advice, could reduce uncertainty and assist in the timely resolution of claims. Once a person has demonstrated his or her genuine protection needs, durable protection options could be made available without compromising other aspects of the Government's border protection policies.
81. Further, the Law Council questions giving the proposed amendments retrospective operation. As the NSW Bar observes, there is also a common law presumption against retrospectivity of legislation.<sup>83</sup> As such, people who have made a valid visa application, under the state of the law as it stood, should be entitled to enjoy the rights attaching to that application.
82. While this submission does not provide detailed remarks about the SHEV scheme as an alternative to TPVs, the Law Council agrees with concerns raised about whether it is an appropriate pathway for asylum seekers. It agrees that pathways to permanent residency in Australia should not be dependent on the capacity of a refugee to meet skilled visa requirements or the likelihood of refugees qualifying for standard onshore migration visas.<sup>84</sup>
83. In addition to these general observations, the Law Council notes that the Schedule makes a number of technical changes to the Migration Act and Migration Regulations that will result in significant effects on asylum seekers. The NSW Bar has provided a detailed overview of these changes in its submission.
84. In respect of the SHEV, the combined effect of amendments at Item 18 and Item 7 of Schedule 3 is particularly significant. Unless and until the Executive makes a Regulation prescribing criteria for a SHEV (in addition to the criteria in section 36 of the Migration Act), no valid application can be made. As there is no requirement that the Executive specify the criteria for a SHEV within a particular period of time, the Executive could in fact decline to specify the criteria altogether, such that the SHEV

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<sup>82</sup> As part of its election policy, the Government committed to reintroducing TPVs. On 23 September 2013, the Government reintroduced TPVs and on 18 October 2013, the *Migration Amendment (Temporary Protection Visas) Regulation 2013* (the 2013 Regulation) entered into force. The Senate, led by the Greens and the Labor Party – who held the balance of power in the Senate at that time, subsequently disallowed the amendment on 2 December 2013. As a result of this disallowance, the Government was unable to reintroduce a similar regulation for another six months. However, any TPVs granted between 18 October 2013 and 2 December 2013 remain in effect. The Government has since asserted that the disallowance of the 2013 Regulation is the reason that the many thousands of outstanding protection claims made by people in immigration detention or on bridging visas have not been processed.

<sup>83</sup> *Maxwell v Murphy* (1957) 96 CLR 261 at 267 per Dixon CJ

<sup>84</sup> Refugee Advice and Casework Service, 'Proposed amendments to legislation signal radical shift in Australian refugee law' (Media Release, 14 October 2014), available at: <http://www.racs.org.au/wp-content/uploads/RACS-FACT-SHEET-Asylum-Legacy-Caseload-Bill-Oct-20141.pdf>; Andrew & Renata Kaldor Centre for International Refugee Law, *Legislative Brief: Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014* (2 October 2014), available at: [http://www.kaldorcentre.unsw.edu.au/sites/kaldorcentre.unsw.edu.au/files/legislative\\_brief\\_migration\\_amendment\\_resolving\\_the\\_asylum\\_legacy\\_caseload\\_final.pdf](http://www.kaldorcentre.unsw.edu.au/sites/kaldorcentre.unsw.edu.au/files/legislative_brief_migration_amendment_resolving_the_asylum_legacy_caseload_final.pdf).

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would be nugatory. This differs from the parts of the Migration Act that prescribe criteria for other visas.<sup>85</sup>

### Recommendation

85. The Law Council suggests that the Committee recommend this Schedule not be enacted.
86. If the Committee is minded to recommend this Schedule, the Law Council suggests that the Committee also recommend:
- As TPVs are subject to inherent limitations, if they are to be reintroduced, they should only constitute a form of 'bridging visa' while people await the determination of their claim, rather than the final outcome once an individual has been found to engage the protection obligations;
  - That holders of all types of non-permanent visas are eligible to apply for permanent protection if they are still found to be owed protection after the expiration of their first term of temporary protection;
  - That holders of permanent and temporary visas are permitted to sponsor family members to migrate to Australia, including unaccompanied minors sponsoring their parents or next of kin;
  - That holders of temporary visas are permitted to depart and return to Australia in exceptional circumstances, such as the death or imminent death of a family member; and
  - Criteria are provided for a SHEV to be included in the body of the Bill as it is in relation to TPVs, preferably as an independent class of visa.

## **Schedule 4 – The Fast Track Assessment Process**

87. The Law Council supports efforts to provide a clear legal framework to the process of determining whether a protection visa applicant engages Australia's protection obligations and meets its other visa requirements. However, the Law Council does not support measures that truncate the refugee status determination process by removing safeguards that operate to ensure each claim is fairly and carefully assessed on its merits. The Law Council considers that 'fast track processing' measures in this Bill, combined with asylum seekers' general inability to access legal advice, risk *refoulement* contrary to Australia's international obligations.

### Overview

88. This Schedule amends the Migration Act to create a new, fast track system of processing for protection claims<sup>86</sup> and establishes the IAA within the RRT.<sup>87</sup>

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<sup>85</sup> Caseload Bill, Schedule 2, Part 4, from Item 32. See, for example: Subclass 785 (Temporary Protection) visa, at Schedule 2, Part 4, 35-44; Permanent Protection Visas.

<sup>86</sup> Ibid Schedule 4, Part 1, Item 21. Pursuant to new Division 1 of new Part 7AA.

<sup>87</sup> Ibid. Pursuant to new Division 8 of new Part 7AA. The IAA will also limit independent review of certain categories of protection visa applicants (In accordance with the new definitions of 'excluded fast track review applicant' and fast track applicant' at s 5(1) of the *Migration Act 1958* (Cth)); require claims to be referred to the IAA by the Minister (Pursuant to new s 473CA of new Division 2 of new Part 7AA); and limit the circumstances in which new material can be considered (Pursuant to new Division 3 of new Part 7AA).

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89. The Schedule seeks to limit the avenues of merits review available to a specific cohort of asylum seekers – fast track applicants. A new process will apply only to all unauthorised maritime arrivals who arrived on or after 13 August 2012 and whose visa status has not yet been finally determined,<sup>88</sup> replacing the existing refugee status determination process that is currently available to these applicants and their children.<sup>89</sup> The Bill will also exclude some people – excluded fast track review applicants – from this process entirely.

90. Fast track applicants will no longer be entitled to merits review at the RRT. In some cases – but not all – they will be entitled to a fast track review by a new independent body within the RRT – the IAA. The IAA will provide merits review of the initial decision with instruction to ‘pursue the objective of a mechanism of limited review that is efficient and quick’.<sup>90</sup>

91. The IAA:

- Will make a decision on the papers, and will not offer a review applicant an interview or the opportunity to comment on an application, except where ‘exceptional circumstances’ exist;<sup>91</sup>
- Is prohibited from considering new information or evidence except for where ‘exceptional circumstances’ exist;<sup>92</sup> and
- Is under no obligation to provide an applicant with any documents relied upon in the initial decision by the delegate.<sup>93</sup>

92. The IAA can either affirm a decision to refuse the fast track applicant’s protection visa application, or can refer to the matter to the Minister for his or her consideration with directions or recommendations; however the Minister is under no obligation to grant a protection visa.<sup>94</sup>

93. The proposed amendments also seek to establish a subset of applicants – excluded fast track review applicants – who will not have access to either the RRT or the IAA.<sup>95</sup> A fast track applicant can become ‘excluded’ from the merits review process for various reasons, including if he or she:

- Has previously had a claim for protection refused in Australia, any other country or by the UNHCR;<sup>96</sup>

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<sup>88</sup> Ibid Item 1 – definition of ‘fast track applicant’ at sub-s (a)(i)-(iii).

<sup>89</sup> This will also apply to children of fast track applicants who are born in Australia. As with TPVs and SHEVs, this process will not apply to asylum seekers arriving by boat in the future, as under the current policy, these people will be sent offshore for processing and resettlement. See: Explanatory Memorandum, 114 [761]: ‘The purpose of the combined effect of the note at the definition of **fast track applicant** and new subsection 5(1AC) is to ensure that children born on or after 13 August 2012 to unauthorised maritime arrivals who entered Australia before 13 August 2012 will have their immigration status processed consistently with that of their parents. It is intended that only those children born on or after 13 August 2012 to unauthorised maritime arrivals who entered Australia on or after 13 August 2012 be processed under the Fast Track Assessment process’ (emphasis in original).

<sup>90</sup> Caseload Bill, Schedule 4, Part 1, Item 21, new s 473BA.

<sup>91</sup> Ibid, new s 473DB.

<sup>92</sup> Ibid, new s 473CC.

<sup>93</sup> Ibid, new s 473DE.

<sup>94</sup> Ibid, new s 473CC(2).

<sup>95</sup> For the definition of an ‘excluded fast track review applicant’ see: Caseload Bill, Schedule 4, Part 1.

<sup>96</sup> Caseload Bill, Schedule 4, Part 1, Item 1, definition of an ‘excluded fast track applicant’ at (a)(iv)

- Makes claims for protection which the Minister considers to be ‘manifestly unfounded’;<sup>97</sup>
- Is considered to have provided ‘bogus documents’ to the Department without a reasonable explanation;<sup>98</sup> or
- Is considered to have effective protection available to him or her in a country other than Australia.<sup>99</sup>

94. The Minister is also able to determine other classes of people to fit within the definitions ‘excluded fast track review applicant’ and ‘fast track applicant’.<sup>100</sup>

95. The Law Council also notes the interaction of this particular Schedule with Schedule 1 of the Protection Bill, which introduces section 5AAA into the Migration Act, seeking to place upon a non-citizen in relation to protection claims.<sup>101</sup>

96. The Government considers that its fast track process will ‘efficiently and effectively respond to unmeritorious claims for asylum’ and is ‘specifically aimed at addressing the backlog of [illegal maritime arrivals]’.<sup>102</sup> It notes that:

*These measures will support a robust and timely process, better prioritise and assess claims and afford a differentiated approach depending on the characteristics of the claims.*<sup>103</sup>

#### The Law Council’s Policy - non-refoulement

97. The Law Council’s principal concern with this Schedule is that the fast track review process will preclude certain asylum seekers from accessing a thorough refugee status determination process.

98. Comparisons with international review mechanisms heighten concerns about the breadth of the proposed Australian scheme. For example, the Andrew & Renata Kaldor Centre for International Refugee Law (Kaldor Centre) noted in relation to the United Kingdom’s Detained Fast Track (DFT) system<sup>104</sup>, that it applies to cases that can be decided quickly and contains safeguards to ensure certain people – such as unaccompanied children – are not placed in that system.

99. The Law Council considers that the increased power of the Minister within the operation of the fast track system to exclude certain applicants based on his or her opinion lacks necessary safeguards to protect against the risk of *refoulement*, including:

- a. The Minister’s exercise of discretion to determine whether a claim is manifestly unfounded; or

<sup>97</sup> Ibid at (a)(v).

<sup>98</sup> Ibid at (a)(vi).

<sup>99</sup> Ibid (a)(i).

<sup>100</sup> Ibid Item 2, new sub-s (1AA).

<sup>101</sup> It also notes the interaction of this particular Schedule with proposed changes to the operation of MRT-RRT at Schedule 4 of the Protection Bill.

<sup>102</sup> Second Reading Speech, 6.

<sup>103</sup> Ibid 7.

<sup>104</sup> Andrew & Renata Kaldor Centre for International Refugee Law, *Factsheet: ‘Enhanced screening’ and ‘fast track’ policies* (7 November 2013) (‘Kaldor Centre summary’), available at:

[http://www.kaldorcentre.unsw.edu.au/sites/kaldorcentre.unsw.edu.au/files/enhanced\\_screening\\_07.12.2013.pdf](http://www.kaldorcentre.unsw.edu.au/sites/kaldorcentre.unsw.edu.au/files/enhanced_screening_07.12.2013.pdf).

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- b. Whether or not an applicant has a reasonable explanation for providing a bogus document.<sup>105</sup>

100. In this context, the NSW Bar has emphasised that the existing scheme in the Migration Act would allow decisions to be made very quickly, if they are to be favourable to an applicant. It considers that, given the traditional high proportion of unauthorised maritime arrivals who have been found to be owed protection; these existing procedures should be adequate to deal with the existing caseload.

#### The Law Council's Policy - review of Executive action

101. The Law Council's Policy is that access to a robust and independent system of merits review should be provided for all administrative decisions concerning protection status. It considers that merits review is a vital element of the legal process which assists correct decisions to be made.

102. As the Parliamentary Joint Committee on Human Rights has previously observed in relation to the proposed changes to the MRT-RRT under the Protection Bill, Ministerial discretion is not sufficient to protect against the risk of *non-refoulement* or satisfy the 'independent, effective and impartial' review standards under the ICCPR and the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.<sup>106</sup>

103. Further, the Law Council's Policy provides that protection determination processes should include procedural fairness guarantees, such as the right to present and challenge evidence, and be accompanied by the provision of independent legal advice.

104. The Law Council highlights issues in two key areas:

- a. The proposed IAA review process; and
- b. The denial of merits review to a person found to be an 'excluded fast track review applicant'.

#### *The IAA process*

105. The Bill provides that the IAA will be 'required to pursue the objective of providing a mechanism of limited review that is efficient and quick', which is in stark contrast to the RRT's current objectives, which include that it must be '*fair*' and '*just*'.<sup>107</sup> To achieve an efficient and quick process, the IAA process risks not offering an application procedure that provides procedural fairness.<sup>108</sup>

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<sup>105</sup> As defined at s 97 of the *Migration Act 1958* (Cth).

<sup>106</sup> Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Ninth Report of the 44th Parliament; Bills introduced 23 - 26 June 2014; Legislative Instruments received 7 - 20 June 2014*, 15 July 2014, 45-46.

<sup>107</sup> *Migration Act 1958* (Cth) s 420(1).

<sup>108</sup> In this context, the NSW Bar has observed that new section 473DA (at Schedule 4, Part 1, Item 21) – that provides for an exhaustive statement of the natural justice hearing rule – greatly diminishes the requirements of procedural fairness and the applicant's chances of correcting factual errors or wrong assumptions in the primary decision, particularly where these errors are based on a misreading of country material. The proposed amendments therefore ensure that any natural justice defects are not cured by the review, requiring judicial review in the High Court of the primary decision. Proposed s 473DA consequently permits actual and apprehended bias on the part of the decision maker, including in the making of template decisions which rubber stamp the primary decision. The NSW Bar has further observed that certain measures in new Subdivision C ensure that the reduced content of procedural fairness is preserved, however, the limits on

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106. The Law Council notes that statistics published by the Department<sup>109</sup> and the MRT-RRT<sup>110</sup> on the turnover rate of negative primary decisions reinforce the need for a proper merits review. It observes that asylum seekers arriving by boat are more likely to have genuine claims for protection than those arriving by plane<sup>111</sup>. This illustrates that a thorough and independent merits review process is necessary to protect against the risk of *refoulement*.

107. Whilst the IAA sits in the RRT, its ability to provide effective review is uncertain, given that:

- a. Negative fast track decisions will only be referred to the IAA by the Minister;
- b. The IAA will only be able to conduct a review on the papers. Applicants will not generally have the ability to provide new information, or attend an interview; and
- c. The IAA does not reflect the inquisitorial merits review process that characterises other statutorily independent merits review bodies.

108. When a review of a primary decision is conducted, the Law Council considers that new information about the Applicant's claims for protection should be considered by a merits review authority.<sup>112</sup>

109. In the Law Council's view, there are a number of ways information can become available only after the primary decision has been made, for example:

- The situation in the Applicant's home country worsens from the time that the primary decision was made; and
- Events occur which specifically reinforce the applicant's claims. In some cases, if an asylum seeker who is being specifically targeted flees his or her home country, persecuting authorities will often target family members or friends of the applicant after the applicant has departed. If this occurs, it should be considered by the merits review authority as strong evidence of the applicant's objective fear of persecution.

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procedural fairness are such that the overall effect, is that any limited protections for procedural fairness are unsatisfactory. For example, new s 473EA requires reviewers to make a 'written statement of decision'. While the contents of this statement must include the reasons for the decision, unlike the similar provision at s 473CB for the primary decision maker, new s 473EA does not require the reviewer to set out any findings of fact or to refer to the evidence on which the findings were based. As a result, the review may not 'cure' any jurisdictional error in the primary decision, for which only the High Court has jurisdiction to conduct judicial review.

<sup>109</sup> Department of Immigration and Border Protection, *Asylum Trends: Australia 2012-13 Annual Publication* (2013), available at: <https://www.immi.gov.au/media/publications/statistics/immigration-update/asylum-trends-aus-2012-13.pdf>. Of the top six countries of citizenship for asylum seekers of seeking protection in Australia, the amount of decisions that are overturned at the merits review stage has been over 50% for the last four years. In 2012-2013 the Independent Merits Review (IMR) body overturned 66.4% of decision made at the first instance, for 2011 -2012 the 85.3% primary decision were overturned, and between 2010 – 2011, 87% were overturned – at 29.

<sup>110</sup> Migration Review Tribunal-Refugee Review Tribunal, *Annual Report 2012-13* (2013) ('MRT-RRT Annual Report'), available at: <http://www.mrt-rrt.gov.au/AnnualReports/MRTRRTAR201213.pdf>. The set aside rate for unauthorised maritime arrival case load for 2012 – 2013 was 65% and '[m]ost RRT remittals were on the basis that the applicant was a refugee' – at 21.

<sup>111</sup> Refugee Council of Australia *Statistics on asylum seekers arriving in Australia* (February 2014), available at: <http://www.refugeecouncil.org.au/r/stat-as.php>.

<sup>112</sup> This includes new information or evidence that has developed since the initial application was refused, as well as information that existed at the time of primary application but was not disclosed at this time.

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110. Further, there are numerous reasons that applicants may not have disclosed all relevant information with their initial application, including:

- The applicant was unaware that the information was relevant to their claims;
- The applicant did not have access to a document at the time of primary application;
- The applicant was not aware that information or documents existed at time of primary application, but subsequently learns of their existence during the merits review stage; and
- The applicant may be unwilling or unable to disclose personal information that is critical to a claim owing to the trauma experienced, or without first establishing a relationship of trust with the decision maker.<sup>113</sup>

*Excluded fast track review applicants*

111. The Law Council particularly questions the proposal to deny any form of refugee status determination – however truncated by the fast track process – to a person considered to be an ‘excluded fast track review applicant’, noting that the group is potentially extremely broad.

112. On a practical level, the Law Council considers that excluding access to primary decision making and merits review may lead to applicants to seek the limited form of judicial review that is available to them in the High Court.<sup>114</sup>

113. The Law Council therefore suggests that the definition of ‘excluded fast track review applicant’ is removed from the Bill. It further suggests that all asylum seekers are given the same access to primary and merits review as other visa applicants, regardless of the mode of arrival to Australia.

114. More specifically, the Law Council makes the following comments in relation to excluded fast track review applicants who:

- a. Have had their protection refused or withdrawn in Australia or overseas<sup>115</sup> – a previous refusal does not necessarily mean that an applicant is not a genuine refugee. For example, the circumstances in his or her home country may have changed significantly since their initial application. In addition, other countries’ processes and standards for processing refugee applications differ, and the applicant may nevertheless meet the prescribed Australian standards;

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<sup>113</sup> See for example, Amina Memon, ‘Credibility of Asylum Claims: Consistency and Accuracy of Autobiographical Memory Reports Following Trauma’ (2012) 26:5 *Applied Cognitive Psychology* 677. Memon’s research in which ‘Brewin (2011) review studies that questioned rape survivors soon after a clearly specified event noting significant gaps in their memory initially but an improvement in recall 3 months on (Mechanic, Resick, & Griffin, 1998). Memon states that ‘[i]t is clear that like all types of memory, memory for traumatic events changes over time and further that this appears to be associated with the severity of PTSD syndromes’.

<sup>114</sup> The only Court with jurisdiction to review judicially the screening out process would be the High Court, the screening out being a primary migration decision: see ss 476 and 477 of the *Migration Act 1958* (Cth). Because the Federal Circuit does not have jurisdiction in relation to primary decisions, the High Court could not remit proceedings to it: s 476B.

<sup>115</sup> Caseload Bill, Schedule 4, Part 1, Item 2, sub-ss 5(1)(a)(ii) to (iv).

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- b. Make a ‘manifestly unfounded claim for protection’. Guidance is not provided on what types of claims would fit this category;
  - c. Without ‘reasonable explanation’ provide bogus documents – there are legitimate reasons why false documents may be provided in a protection visa application. As noted in the MRT-RRT’s Credibility Guidelines, ‘the use of false documents does not necessarily mean that an applicant’s claims are untrue’<sup>116</sup>.

115. It is noted that there is no guidance about what may be deemed a ‘reasonable explanation’.<sup>117</sup> Although a ‘reasonable explanation’ is an important safeguard, this provision is dependent on the views of the Minister, which are not subject to any form of review.

#### The Law Council’s Policy - legal advice and assistance

116. As discussed, the Law Council’s Policy stipulates that legal assistance should be provided to all people seeking protection in Australia.

117. Neither the Bill nor the Explanatory Memorandum set out whether any form of legal advice and assistance will be provided to asylum seekers who will be excluded from the fast track process, or part of the fast track process. Without the provision of legal advice and assistance, the Law Council is of the view that the fast track process may not achieve its stated objective of ‘efficiently and effectively respond to unmeritorious claims for asylum’<sup>118</sup>.

118. In this context, the Law Council notes that the United Kingdom High Court has found the DFT system unlawful on the basis that there is an ‘unacceptable risk of unfairness’ in that the system does not provide for ‘early instruction of lawyers to advise and prepare the claim, and to seek referrals for those who may need them, with sufficient time before the substantive interview.’<sup>119</sup> The Court also identified other shortcomings in the system.<sup>120</sup>

#### Interaction with the Migration Amendment (Protection and Other Measures) Bill 2014

119. The Law Council is concerned that the issues discussed in relation to Schedule 4 may be further compounded by the proposed changes to the Migration Act in the Protection Bill, currently before the Senate.

120. For example, proposed new section 5AAA of the Protection Bill will introduce a burden of proof requirement more suited to an adversarial process that seeks to test claims relating to past or existing factual events that are within the applicants knowledge or that can be readily demonstrated by reference to documentary or other evidence.<sup>121</sup> The combined changes in these Bills to the Migration Act will serve to increase the burden on applicants who are likely to have little or no understanding of Australia’s complex legal system.

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<sup>116</sup> MRT-RRT Credibility Guidelines, [9.4].

<sup>117</sup> Protection Bill submission, 14-19.

<sup>118</sup> Second Reading Speech, 6.

<sup>119</sup> *Detention Action v Secretary of State for the Home Department* [2014] EWHC 2245, [220]-[221] (Justice Ouseley).

<sup>120</sup> Such as: flaws in the screening process and lack of safeguards for ‘vulnerable’ categories of asylum seekers in the DFT.

<sup>121</sup> See discussion of this provision at: Protection Bill submission, 9-13.

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121. The risk with these changes – the ‘fast track’ process, the withdrawal of IAAAS funding and the increased burden on applicants to demonstrate claims – is that applicants for protection status will fail to clearly articulate their protection claims during the ‘fast track’ process. Accordingly, applicants with genuine protection claims may be at risk of return to their place of origin.

### Recommendations

122. The Law Council suggests that the Committee recommend this Schedule not be enacted, as all asylum seekers should be given the same access to merits review, regardless of the mode of arrival to Australia.

123. If the Committee wishes to recommend this Schedule, the Law Council suggests that:

- Free independent legal advice for fast tracked applicants should be provided;
- The proposed amendments under Subdivision C be amended to ensure that the IAA has a duty to consider all new information and evidence provided by the Applicant, including any new claims for protection, new information provided orally or in writing, and any further primary or secondary evidence;
- The written reasons provided pursuant to new sub-section 474EA(1) are sufficiently detailed; and that a minimum quota of publishable decisions be determined by Parliament to ensure that the Public has access to a range of varied decisions;
- The new sub-section 473FA(1) be amended to include the word ‘fair’;
- The amendments should extend the jurisdiction of the Federal Circuit Court to include judicial review of screening out decisions which are affected by jurisdictional error;
- The Committee recommend the reinstatement for IAAAS funding for all applicants subject to the ‘fast track’ process, including the IAA, process; and
- The definition of ‘excluded fast track review applicant’ is removed from the Bill, or in the alternate:
  - Sub-sections 5(1)(a)(ii) to (iv), as well as (v) and (vi) be removed from the definition;
  - Greater guidance is provided around the meaning of ‘reasonable explanation’,<sup>122</sup> ‘manifestly unfounded claim’ and ‘bogus documents’. Any such guidance – for example, in the Explanatory Memorandum – must not detract from the fact that applications must be assessed on an individual basis, according to the applicant’s particular claims.
  - The Minister be required provide an explanation to the applicant of why their documents are considered bogus, or their claims are considered manifestly unfounded, and be provided with an opportunity to respond;

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<sup>122</sup> A broad interpretation should be provided for the meaning of a ‘reasonable explanation’. This would ensure that applicants with genuine refugee claims are not unfairly disadvantaged.

- The obligation to put adverse information to the applicant at sub-sections 57(1)(a) and (3)(b) is broadened beyond the provision of personal information to material that was relied upon by the decision maker, such as country information;
- Excluded fast track review applicants have access to the RRT, or at the very least, access to an independent merits review system such as the existing Independent Protection Assessment system,<sup>123</sup> insofar as this is in accordance with Australia's international obligations; and
- The benefit of informing fast track applicants of what review pathways are open to them pursuant to new subsections 66(2)(e) and (f) extend to excluded fast track review applicants concerning information about judicial review in addition to information that the decision is not merits reviewable.

## Schedule 5 – Australia's international law obligations

### Overview

124. This Schedule clarifies the Government's intention of when Australia's *non-refoulement* obligations should arise, and the meaning of certain words and terms including 'refugee' and 'well-founded fear of persecution'. The Explanatory Memorandum makes it clear that these changes are made in response to a series of High Court and Federal Court decisions.<sup>124</sup>
125. An officer's duty to remove a person from Australia arises under section 198 of the Migration Act. Proposed section 197C provides that an officer *must* remove an unlawful non-citizen pursuant to section 198 irrespective of Australia's *non-refoulement* obligations.
126. The Explanatory Memorandum states that proposed section 197C seeks 'to ensure that the Parliament is able to control how Australia's *non-refoulement* obligations will be implemented domestically.'<sup>125</sup> It also states that there 'are a number of personal non-compellable powers available for the Minister to use, before the exercise of the removal power, to allow a visa application or grant a visa where this is in the public interest'.<sup>126</sup>
127. The proposed amendments in Part 2 seek to remove most references to the Refugee Convention from the Migration Act, replacing them with a 'new, independent and self-contained statutory framework which articulates Australia's interpretation of its protection obligations under the Refugee Convention'.<sup>127</sup>
128. Proposed changes include:

<sup>123</sup> Department of Immigration and Border Protection, 'Fact Sheet 9 - Litigation Involving Migration and Citizenship Decisions' (27 August 2014), available at: <https://www.immi.gov.au/media/fact-sheets/09litigation.htm> - 'Departmental decisions for refugee determination in offshore protection obligation assessments are reviewable by the Independent Protection Assessment (IPA). This assessment process replaced the similar Independent Merits Review (IMR) system in March 2011.'

<sup>124</sup> Explanatory Memorandum. In respect of Australia's *non-refoulement* obligations, see 165-6 at [1134]-[1136]. In respect of the 'internal relocation' principle, see 171-2 at [1182]-[1188]. In respect of the meaning of 'well-founded fear of persecution' see 174 at [1194]. In respect of the meaning of 'membership of a particular social group' see 177-9 at [1216]-[1217] and [1223].

<sup>125</sup> Ibid [1138].

<sup>126</sup> Ibid 9.

<sup>127</sup> Ibid 10.

- Section 5H, that defines the term ‘refugee’ by reference to Article 1A(2) of the Refugee Convention and the exclusion clause at Article 1F;
- Section 5J, which seeks to define a key requirement of refugee status – ‘well-founded fear of persecution’ – that appears undefined in the Refugee Convention:<sup>128</sup>
  - Section 5J(1) provides that a person only has a well-founded fear if that person has a ‘real chance’ of persecution in all areas of the receiving country (the ‘internal relocation’ principle). This removes the High Court’s test for ‘reasonableness’ in internal relocation cases,<sup>129</sup> so that the principle will no longer encompass consideration of whether the relocation is ‘reasonable’ in light of an applicant’s individual circumstances.<sup>130</sup> In addition, the real persecution must relate to ‘all areas of the receiving country’, which is broader than existing law,<sup>131</sup>
  - Section 5J(2), that codifies the interpretation of effective protection measures provided by the State. Under this provision, a well-founded fear of prosecution will not be established if an appropriate criminal law, a reasonably effective police force and an impartial judicial system provided by the relevant State exists or if adequate and effective protection measures are provided by a source other than the relevant State;<sup>132</sup> and
  - Section 5J(3), that creates a new ‘reasonable steps’ test for assessing whether a person could take reasonable steps to modify his or her behaviour so as to avoid a real chance of persecution (other than through a modification which would conceal or conflict with a fundamental characteristic of the person’s identity or conscience);<sup>133</sup>
- Section 5L, that restricts the definition of membership of a particular social group (as grounds for determining a well-founded fear of persecution) by requiring that the defining characteristic of the particular social group must be either innate or immutable or so fundamental to the member’s identity or conscience, that the member should not be forced to renounce it.<sup>134</sup> This change is ‘intended to reduce the incentive and capacity for applicants to advance extensive lists of possible particular social groups’.<sup>135</sup> The Explanatory Memorandum notes that the current approach of the High Court with respect to the meaning of a particular social group, combined with

<sup>128</sup> Ibid [1198]: This amendment is not intended to change the meaning of s 91R, but makes it explicit that this requirement should be considered in the context of a well-founded fear of persecution at new s 5J.

<sup>129</sup> As set out in *SZATV v Minister for Immigration and Citizenship* [2007] HCA 40. While the Court considered that this ‘internal relocation’ principle was within the scope of the Refugee Convention, it placed emphasis on the reasonableness test.

<sup>130</sup> Explanatory Memorandum [1183].

<sup>131</sup> Ibid [1181]-[1183]: this codifies the existing internal relocation principle, but unlike the existing principle, makes no reference to reasonableness.

<sup>132</sup> Ibid [1188]-[1189]: This proposed amendment seeks to codify *Minister for Immigration and Multicultural Affairs v S152/2003* (2004) 222 CLR 1 and *Siaw v Minister for Immigration and Multicultural Affairs* [2001] FCA 953.

<sup>133</sup> Ibid [1194]: This overturns the High Court’s decision in *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* [2003] HCA 71, where it was held that an assessment under the Refugee Convention does not extend to what a person could or should do if they were returned to their country of origin, but what they would do.

<sup>134</sup> In this way, the proposed section overturns the broader test of the High Court in *Applicant S v Minister for Immigration and Multicultural Affairs* [2004] HCA 25.

<sup>135</sup> Explanatory Memorandum, 11.

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'minimal legislative guidance' on this term, has resulted in a broad interpretation of the term,<sup>136</sup>

- Section 5M, which defines a 'particularly serious crime' for the purposes of codifying the exception to *refoulement* at Article 33(2) of the Refugee Convention. This change removes existing references to the Refugee Convention;<sup>137</sup> and
- Section 36(1C), that codifies the exception to the principle of *non-refoulement* at Article 33(2) of the Refugee Convention.

#### The Law Council's Policy - *non-refoulement*

129. As noted above, the Law Council's Policy recognises Australia's chief international obligation of *non-refoulement*. The Law Council does not consider that proposed section 197C accords this the principle. There is no legislative requirement on the Minister to consider this obligation when exercising these powers.<sup>138</sup>

130. The Law Council acknowledges that the Minister may turn his or her mind to this principle in exercising certain discretionary powers,<sup>139</sup> and that these mechanisms may 'enable *non-refoulement* obligations to be addressed before a person becomes ready for removal'<sup>140</sup>.

131. The NSW Bar considers that the effect of Schedule 4 of the Bill will be to degrade the visa application process in relation to those who arrived by boat on or after 12 August 2012. It is particularly concerned that:

- a. Excluded fast track review applicants are particularly vulnerable to be *refouled* to danger without recourse to any merits review; and
- b. Fast track applicants who have received negative decisions, which are subsequently negatively reviewed by the IAA, must be removed from Australia without further consideration of Australia's *non-refoulement* obligations. It is worth re-emphasising that this process will occur without legal advice, and that the review decision will be made on the papers and without the ability of the applicant to appear.

132. The Law Council therefore considers that although it may appear that there are safeguards in place to protect against *refoulement* through the reliance on Ministerial discretion; these safeguards may not be satisfactory.<sup>141</sup>

133. Further, the Law Council considers that the overriding issue with seeking to define the constituent elements of refugee status at proposed sections 5H, 5J, 5L, 5K and 5M and 36(1)(c), is that applicants who may have a protection claim under the Refugee Convention will be prevented from seeking protection from Australia.

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<sup>136</sup> Ibid [1216]-[1217], *Applicant S v Minister for Immigration and Multicultural Affairs* [2004] HCA 25.

<sup>137</sup> Ibid [1228]: This amendment is not intended to change the meaning of s 91U.

<sup>138</sup> For example, s 417 of the *Migration Act 1958* (Cth) is not subject to the requirements of procedural fairness: *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636.

<sup>139</sup> For example, pursuant to ss 46A(2), 195A or 417 of the *Migration Act 1958* (Cth).

<sup>140</sup> Explanatory Memorandum [1142]-[1146].

<sup>141</sup> The Law Council has consistently advocated against the reliance on the Minister's non-compellable, non-reviewable powers – for example, see: Protection Obligations submission.

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## The Law Council's Policy - adherence to other international obligations

134. The Law Council's Policy stipulates that Australia is obliged under international law to recognise the right to seek asylum and to ensure that laws and policies concerning asylum seekers adhere to the principles contained in the Refugee Convention.
135. The Law Council notes that to gain refugee status pursuant to the Refugee Convention in a State which is party to the Convention, an applicant must demonstrate that the applicant is outside his or her country of nationality or where the individual has no nationality, their country of former habitual residence; have a well-founded fear of persecution owing to the individual's race, religion, nationality, membership of a particular social group or political opinion; and owing to that well-founded fear, is unable or unwilling to return.<sup>142</sup> The Refugee Convention does not define these elements further.
136. The Law Council questions the proposed removal of references to the Refugee Convention in the Schedule, and its narrower reinterpretation of Australia's international obligations. The Kaldor Centre noted that this approach misunderstands the system of international law in general and creates risks that Australia will violate its obligations under the Refugee Convention.<sup>143</sup>
137. The NSW Bar considers that those items that either omit or replace direct references to the Refugee Convention,<sup>144</sup> are intended to effect a structural change to the Migration Act from the interpretation by the High Court of the Act as containing, when read as a whole, 'an elaborate and interconnected set of statutory provisions directed to the purpose of responding to the international obligation which Australia has undertaken in the Refugees Convention'.<sup>145</sup> From this interpretation the Court found the removal power under section 198 was to be read in light of, and subject to, the obligations in the Refugee Convention<sup>146</sup> Consequently, the removal power at section 198 will be concerned only with the practical consideration of the removal.<sup>147</sup>

### *Well-founded fear of persecution*

138. Determining whether an applicant has a well-founded fear of persecution must include 'an evaluation of the applicant's statements rather than a judgement on the situation prevailing in his country of origin.'<sup>148</sup> As noted by UNHCR, determination of whether a person has a 'well-founded fear' involves a consideration of both subjective and objective elements.<sup>149</sup> The subjective element concerns a person's fear and their state of mind. The objective element requires that a state of mind must be supported by an objective situation.

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<sup>142</sup> Article 1A(2) Refugee Convention.

<sup>143</sup> Kaldor Centre summary, 5.

<sup>144</sup> Caseload Bill, Schedule 5, Part 2, Items: 10 (amending sub-s 36(2)(a)); 11 (amending sub-s 48A(1)); 13 (amending sub-s 228B(2)); 14 (amending sub-para 336F(3)(a)(ii), 4(a)(ii) and 5(c)(i)); 15 (amending sub-para 36F5(c)(ii)); 16 (amending sub-para 502(1)(a)(iii)) and 17 (repealing and replacing sub-s 503(1)(c)).

<sup>145</sup> *Plaintiff M61/2010E v Commonwealth of Australia* [2010] HCA 41 at [27].

<sup>146</sup> *Plaintiff M70/2011 v Minister for Immigration and Citizenship* [2011] HCA 32.

<sup>147</sup> *NATB v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 292, [53]: 'Even if it is virtually certain that he or she will be killed, tortured or persecuted in that country, whether on a Refugees Convention ground or not'.

<sup>148</sup> United Nations High Commissioner for Refugees, for example: United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status* (Office of the United Nations High Commissioner for Refugees, 2<sup>nd</sup> ed, 1992), [37] ('UNHCR Handbook').

<sup>149</sup> *Ibid* [37]-[38].

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139. This well-founded fear must be one of 'persecution'. Proposed section 5J restricts the definition of 'well-founded fear of persecution'. Proposed section 5J limits the meaning of this requirement for refugee status by reducing the significance of the subjective element of 'well-founded fear' and defining persecution. For example, the Government's intention<sup>150</sup> to remove an assessment of reasonableness in determining the appropriateness of internal relocation (at section 5J(1)(c)), does not give effect to Australia's obligations. As UNHCR has noted, the inability of a person to avail him or her self of State protection 'must be determined according to the circumstances of the case.'<sup>151</sup> Where a person is unwilling to avail him or her self of State protection, this must be on the basis of that person's fear of persecution.<sup>152</sup> Although it is noted that '[t]he fear of being persecuted need not always extend to the whole territory of the refugee's country of nationality',<sup>153</sup> removing consideration of 'reasonableness' from the determination of internal location precludes the consideration of the subjective element of a 'well-founded fear of persecution'.

140. On the basis of this reasoning, the Law Council also considers that proposed sub-sections 5J(2) and (3) limit what must primarily be a consideration of both subjective and objective factors. These do not allow for consideration of the subjective element of a 'well-founded fear', and place restrictions on this element of refugee status. As UNHCR has stated:

*The competent authorities that are called upon to determine refugee status are not required to pass judgement on conditions in the applicant's country of origin. The applicant's statements cannot, however, be considered in the abstract, and must be viewed in the context of the relevant background situation. A knowledge of conditions in the applicant's country of origin--while not a primary objective--is an important element in assessing the applicant's credibility. In general, the applicant's fear should be considered well-founded if he can establish, to a reasonable degree, that his continued stay in his country of origin has become intolerable to him for the reasons stated in the definition, or would for the same reasons be intolerable if he returned there.*<sup>154</sup>

#### *Reasonable steps to modify behaviour*

141. Proposed section 5J(3) states that a person does not have a well-founded fear of persecution if he or she could take reasonable steps to modify his or her behaviour and avoid a real chance of persecution in the receiving country.

142. The NSW Bar notes that:

- a. This is against the principle in *Appellant S395/2002 v MIMA*<sup>155</sup> that a Tribunal will err if it assesses a claim on the basis that an applicant is expected to take reasonable steps to avoid persecution if returned to his or her country of

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<sup>150</sup> Explanatory Memorandum [1183]: 'The Government considers that in interpreting the "reasonableness" element into the internal relocation principle, Australian case law has broadened the scope of the principle to take into account the practical realities of relocation'.

<sup>151</sup> UNHCR Handbook [99]. See also: *Januzi v Secretary of State for Home Department* [2006] 2 AC 426 at 440 per Lord Bingham and *United States Code of Federal Regulations* [208.13].

<sup>152</sup> UNHCR Handbook [100].

<sup>153</sup> *Ibid* [91].

<sup>154</sup> *Ibid* [42].

<sup>155</sup> [2003] HCA 71

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origin.<sup>156</sup> The Court found that the Tribunal's task was to assess what the applicant will do, not what he or she could or should do; and

- b. The claim in the Explanatory Memorandum that this new sub-section is not inconsistent with the section 395 principles is not supported by the decision of the Full Court in *Minister for Immigration and Border Protection v SZSCA*<sup>157</sup>, the Minister's appeal from which is yet to be decided by the High Court. The proposed section would allow for a Tribunal to impose modifications of behaviour by which a person may avoid an incorrect imputation of any one of the Refugee Convention's reasons, even where such modifications may cause significant hardship to the person and effectively amount to acquiescence in persecution.

#### *Membership of a particular social group*

143. Proposed section 5L requires that to meet the definition of a particular social group (other than family), the relevant characteristic must be innate or immutable, or so fundamental to a person's identity that he or she should not be required to renounce it. The NSW Bar observes that although the stated intention of this section may be to clarify and limit the definition of membership of a particular social group, it will almost certainly encourage litigation for further judicial clarification of these statutory terms. This provision reduces Australia's protection obligations under the Refugee Convention to members of these social groups who might be targeted for reasons other than those personal characteristics in new subsection 5L(1)(b), for example for logistical reasons, or as part of a campaign to destabilise or create fear in a society.

#### Recommendation

144. The Law Council suggests that the Committee recommend this Schedule not be enacted.

## **Schedule 6 – Unauthorised maritime arrivals and transitory persons: newborn children**

### Overview

145. The rationale behind the proposed changes to the Migration Act under Schedule 6 is to:

*reinforce the government's view that the children of [illegal maritime arrivals] who are born in Australia are included within the existing definition of 'unauthorised maritime arrival', known as UMA, in the Migration Act.*<sup>158</sup>

146. Such children will be subject to offshore processing and unable to apply for a visa while they remain in Australia, unless the Minister intervenes.<sup>159</sup> The definition of a 'UMA' will also extend to children born in regional processing countries.<sup>160</sup>

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<sup>156</sup> Ibid, at [40] and [50] per McHugh and Kirby JJ and at [80] and [82] per Gummow and Hayne JJ.

<sup>157</sup> [2013] FCAFC 155.

<sup>158</sup> Second Reading Speech, 8. Caseload Bill, Schedule 6, Part 1, Items 1-3, new sub-s 5AA(1A) and (1AA). Associated amendments are also made to ss 198, 198AD and 198AH of the *Migration Act 1958* (Cth), that concern removal, including to a regional processing country.

<sup>159</sup> Ibid, new sub-s 5AA(1A).

<sup>160</sup> Ibid.

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147. The Schedule<sup>161</sup> makes clear the Government's intention that the above changes apply retrospectively in certain circumstances – i.e. in relation to an 'applicable matter'<sup>162</sup> – such that it applies to babies already born to unauthorised maritime arrivals or transitory persons. Item 12 stipulates that the changes do not apply if an application for a visa has been finally determined.
148. The Schedule<sup>163</sup> further provides that, should the Migration Act be applied retrospectively pursuant to certain provisions,<sup>164</sup> a child would be barred from applying for a visa unless an application for a visa was made before the commencement date of the Schedule, or the Minister has lifted the bar for the parent of the child.<sup>165</sup>
149. The Schedule<sup>166</sup> sets out that certain matters are to have prospective application, namely, that children of unauthorised maritime arrivals – including transitory persons – born in the migration zone or a regional processing country will become unauthorised maritime arrivals if they are born on or after the commencement day of the Schedule.

#### The Law Council's Policy - the rights of the child

150. As one of the Law Council's Constituent Bodies, the Law Institute of Victoria (LIV) observes, the amendments proposed in Schedule 6 would have the effect of preventing children born in Australia with a parent designated as an unauthorised maritime arrival from applying for protection visas.
151. The proposed changes in Schedule 6 are contrary to the Law Council's Policy. Paragraphs [4], [7](g) and [10](h) of the Policy refer to Australia's international obligations, including those under the *Convention on the Rights of the Child* (CROC), such as the requirement that, in any decision making affecting the rights of a child, the best interests of the child must be a primary consideration.
152. The United Nations Committee on the Rights of the Child has stated that assessment and determination of the best interests should be undertaken in each individual case, in the light of the specific circumstances of each child, group of children, or children in general.<sup>167</sup> The elements to be taken into account when assessing and determining the child's best interests include: the child's views and identity; preservation of the family environment and maintaining relations; care, protection and safety of the child; vulnerability; and the child's rights to health and education.<sup>168</sup> Further, States may not exercise discretion as to whether children's best interests are to be assessed and ascribed the proper weight as a primary consideration.<sup>169</sup> As the Committee on the Rights of the Child has noted:

*Viewing the best interests of the child as "primary" requires a consciousness about the place that children's interests must occupy in all actions and a willingness to give priority to those interests in all circumstances, but*

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<sup>161</sup> Ibid Part 2, Items 11.

<sup>162</sup> Ibid. Set out at (a)-(f).

<sup>163</sup> Ibid Items 13-4.

<sup>164</sup> Ibid. Pursuant Item 11, sub-s 46A(1) and 46B(1) apply to a child.

<sup>165</sup> Ibid. Pursuant Item 11, sub-s 46A(2) and 46B(2) apply to a child.

<sup>166</sup> Ibid. Pursuant to Item 15.

<sup>167</sup> Committee on the Rights of the Child, *General Comment 14: (2013) on the right of the child to have his or her best interests taken as a primary consideration* (art. 3, para. 1) (29 May 2013) CRC/C/GC/14, [48].

<sup>168</sup> Ibid [52]-[79].

<sup>169</sup> Ibid [36]-[37].

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*especially when an action has an undeniable impact on the children concerned.*<sup>170</sup>

153. The NSW Bar notes that the CROC imposes a package of obligations upon Australia, and reliance on one Article – such as those relating to family unity – cannot justify non-compliance with another.<sup>171</sup> It also notes the recommendations in the AHRC's report *A last resort?*<sup>172</sup> and the concluding observations by the Committee on the Rights of the Child,<sup>173</sup> that Australia's immigration policy must be made to comply with its international obligations.

154. Although the Law Council's Policy emphasises the importance of family unification,<sup>174</sup> the proposed amendments that seek to maintain the family unit also effectively render children stateless until the point at which they can claim the nationality of their parents, whether they are born in Australia or under Australia's jurisdiction in its regional processing centres.<sup>175</sup> The Law Council notes Article 7 of the CROC relates to the right to acquire a nationality.<sup>176</sup>

155. Australia is also party to the 1954 *Convention relating to the Status of Stateless Persons* and the 1961 *Convention on the Reduction of Statelessness*. As the NSW Bar notes, the Bill could do more than is presently proposed to ensure the right of a child to a nationality and to avoid the circumstance of statelessness and its attendant adverse consequences.

156. Despite Australia's obligations under these instruments, the Bill's Statement of Compatibility with Human Rights, annexed to the Explanatory Memorandum, provides:

*A stateless child's status as a UMA does not alter that child's eligibility for citizenship under the citizenship laws of Australia or any presently designated regional processing country.*<sup>177</sup>

157. The following requirements are relevant concerning eligibility for Australian citizenship:

- For children under 15 years – the child must be living with a responsible parent who is an Australian citizen or a responsible parent who is not an Australian citizen and you would otherwise suffer significant hardship or disadvantage;<sup>178</sup> or
- For unaccompanied humanitarian minors – wards of the Minister require the consent of the Minister's delegate or unaccompanied humanitarian minors

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<sup>170</sup> Ibid [40].

<sup>171</sup> See arts 7, 9, 10 and 22.

<sup>172</sup> *A last resort?* Recommendation 5.

<sup>173</sup> Committee on the Rights of the Child, *Consideration of reports submitted by States parties under article 44 of the Convention*, 40<sup>th</sup> sess, CRC/C/15/Add.268 (20 October 2005) [62], available at:

<http://www.refworld.org/pdfid/45377eac0.pdf>.

<sup>174</sup> LCA Policy, [7(f)].

<sup>175</sup> This is a question of the extraterritorial application of Australia's obligations under human rights instruments to which it is party. For example, see: Article 2(1) of the CROC, and Article 2(1) of the ICCPR.

<sup>176</sup> See also Article 24(3) of the ICCPR that provides: 'Every child has the right to acquire a nationality'.

<sup>177</sup> At 31.

<sup>178</sup> Department of Immigration and Border Protection, 'Children aged 15 years and under or unaccompanied minors' (13 February 2014), available at:

[http://www.citizenship.gov.au/applying/how\\_to\\_apply/15\\_and\\_under/](http://www.citizenship.gov.au/applying/how_to_apply/15_and_under/).

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who are not wards of the Minister require the consent of their responsible carer,<sup>179</sup> or

- For refugee or humanitarian entrants – the child must be a permanent resident, satisfy the residence requirements and be of good character. If children apply for citizenship once they have turned 18 years, they are further required to have lived in Australia for 4 years on a permanent residency.<sup>180</sup>

158. These requirements suggest that it is extremely unlikely that children affected by the proposed measures in Schedule 6 will be eligible for Australian citizenship.<sup>181</sup>

159. Under the proposed amendments, it is difficult to see how a child of UMA persons will be able to adopt the citizenship of their parents. The Law Council also notes that, since the reintroduction of regional processing under the former Government in late 2011,<sup>182</sup> no refugees have been granted citizenship in either Nauru or Papua New Guinea (PNG). Further, the memoranda of understanding governing the resettlement of refugees in Nauru, PNG and, most recently, Cambodia,<sup>183</sup> do not contain any provisions regarding eligibility for citizenship, at any stage of that person's residency.

160. The LIV notes that the legislation seeks to change the definition of UMA to include a child of an UMA (new section 5AA(1A) of the Migration Act) if:

- The person is born in the migration zone;
- A parent is, at the time of the birth, a UMA; and
- The person is not an Australian citizen at the time of birth.

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<sup>179</sup> Ibid.

<sup>180</sup> Department of Immigration and Border Protection, 'Refugee and Humanitarian Entrants' (13 February 2014), available at: [http://www.citizenship.gov.au/applying/how\\_to\\_apply/refugee/](http://www.citizenship.gov.au/applying/how_to_apply/refugee/)

<sup>181</sup> Section 21(8) of the *Citizenship Act 2007* (Cth) does create an eligibility for citizenship in the case of a person born in Australia but who is stateless. The provisions in schedule 6 are likely to make it more difficult for a child of unauthorised maritime arrivals born in Australia to exercise their rights to turn that eligibility into actual rights of citizenship. Ferouz, the Rohingya baby discussed below in this submission, falls into this category.

<sup>182</sup> See: Janet Phillips, 'A comparison of Coalition and Labor government asylum policies in Australia since 2001' (Research paper, Parliamentary Library, Parliament of Australia, 28 February 2014) 4-5. The current arrangements for the transfer, processing and resettlement of asylum seekers from Australia to PNG are governed by the 6 August 2013 memorandum of understanding (MOU) between the Governments of PNG and Australia: *Memorandum of Understanding between the Government of the Independent State of Papua New Guinea and the Government of Australia, relating to the transfer to, and assessment and settlement in, Papua New Guinea of certain persons, and related issues*, 6 August 2013 – see: <http://www.dfat.gov.au/geo/png/joint-mou-20130806.html>. This MOU supports the 19 July 2013 *Regional Resettlement Arrangement between Australia and Papua New Guinea on Further Bilateral Cooperation to Combat People Smuggling* (RRA). The RRA was made under the (now superseded) 8 September 2012 *Memorandum of Understanding between the Government of the Independent State of Papua New Guinea and the Government of Australia, relating to the Transfer to and Assessment of Persons in Papua New Guinea, and Related Issues*. On 29 August 2012 the Australian Government signed a MOU with the Government of Nauru: *Memorandum of Understanding between the Republic of Nauru and the Commonwealth of Australia, relating to the Transfer to and Assessment of Persons in Nauru, and Related Issues*, signed by the Participants on 29 August 2012. This was superseded by the *Memorandum of Understanding between the Republic of Nauru and the Commonwealth of Australia, relating to the transfer to and assessment of persons in Nauru, and related issues*, signed by the Participants on 3 August 2013 – see: <https://www.dfat.gov.au/issues/people-smuggling-mou.html>.

<sup>183</sup> *Memorandum of Understanding between the Government of the Kingdom of Cambodia and the Government of Australia Relating to the Settlement of Refugees in Cambodia*, signed by the Participants on 26 September 2014 – see: <http://www.minister.immi.gov.au/scottmorrison/files/cambodia-australia-mou-operational-guidelines.pdf>.

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161. The LIV considers that this means that babies born in Australian hospitals and issued with Australian birth certificates will not be eligible to apply for protection in Australia in accordance with section 46A of the Migration Act, and 'must' be taken to a regional processing centre 'as soon as is reasonably practicable' in accordance with section 198AD of the Act.<sup>184</sup>

#### *Ferouz*

162. The LIV provides the example of Baby Ferouz, who was born to parents who arrived in Australia by boat. Ferouz's parents are stateless (Rohingyas from Myanmar) and were sent to Nauru, contrary to medical advice after a doctor examined his mother on Christmas Island and alerted the Department to her high risk pregnancy. Ferouz's mother was flown to the Australian mainland shortly after arriving in Nauru, and Ferouz was born in Brisbane. As such, he has an Australian birth certificate and has spent every day of his life in Australia. Ferouz will not be entitled to apply for a permanent protection visa and is liable with his parents to be transferred back to Nauru at any time. The LIV estimates that there are at least a hundred families in this situation.

163. As Ferouz's parents have previously been detained in Nauru, he will also not be eligible for a TPV under the terms of the agreement between the Government and the Palmer United Party, in the event the Bill passes in its current form.

164. In respect of the amendment to section 5(1) – the definition of 'transitory persons' – the LIV notes that this means that a child born in Australia to parents who have previously been transferred to a regional processing centre before being returned to Australia for a specific purpose (i.e. childbirth) must also return to that same regional processing centre, in accordance with sections 198AD / 198AH of the Migration Act.

165. Because Ferouz's mother has spent time on Nauru and was flown to Australia for a (temporary) medical reason, she is considered to be a 'transitory person'. If these reforms are passed, Ferouz will also be classified as a transitory person and the whole family will be sent back to Nauru. They will not be entitled to apply for a TPV under other reforms contained in this Bill. The LIV estimates that there are at least sixteen families in this situation.

166. By way of contrast, there are a number of families who were never sent to Nauru and are not considered transitory persons. For example, law firm Maurice Blackburn secured undertakings from the Department that 100 Australian born babies and their immediate family members will not be removed from Australia until the Ferouz case is resolved. These families would have otherwise been sent to a regional processing centre some time ago. They have remained in Australian detention centre facilities, including on Christmas Island. These family members are not transitory persons and will be entitled to apply for a TPV under other provisions of this Bill. They will avoid being sent to Nauru.

167. The LIV considers that there is no clear policy purpose in treating these two family groups differently.

168. On 15 October 2014, the Federal Circuit Court handed down judgment in Plaintiff *B9/2014 v Minister for Immigration*.<sup>185</sup> The Court found that there was no

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<sup>184</sup> Note that the legislation states 'a parent', so only one of the parents needs to be an UMA for the child to also be a UMA. Note 2 under this section states that a parent may be a UMA even if the parent holds a visa.

<sup>185</sup> [2014] FCCA 2348

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jurisdictional error, and that on Ferouz's birth he entered Australia and became an 'unlawful non-citizen' under the Migration Act, on the basis that neither of his parents held a valid visa.<sup>186</sup> It was found that he did not enter on an aircraft, but he did enter after 1 June, 2013 at 'any other place'. The Court found that Ferouz was an 'unauthorised maritime arrival', and that his application for a protection visa was invalid.<sup>187</sup> This decision is currently under appeal.

169. The LIV notes that the Minister has indicated publicly that, in an agreement struck with the Palmer United Party, certain UMAs who arrived post 13 August 2012 will be entitled to apply for a temporary visa. It considers that it is unclear exactly how this will work, however it is presumed that the Minister will exercise his discretion to lift the bar against applying for a protection visa<sup>188</sup> for this certain group of asylum seekers, and allow them to apply for a certain category of temporary visa. The LIV notes that the Minister has made it clear that he will not allow transitory persons, currently in Australia, to apply for protection in Australia. In effect, this means that any Australian born baby born to parents who arrived in Australia after 12 August 2013 will be entitled to apply for temporary protection in Australia, unless one or both of their parents have previously been detained in a regional processing country, regardless of the fact they are currently in Australia and were born in Australia.

170. The LIV considers that this is an arbitrary distinction to make, with significant implications. If the Bill passes in its current form, and the Court upholds the *Plaintiff B9/2014* decision, a number of babies who have been born in Australia and detained here for close to one year (under undertakings preventing their removal until their status is determined in the matter of *Plaintiff B9/2014*) will be transferred to a regional processing country simply because their parents were previously detained offshore, in some cases for a very short period.

#### The Law Council's Policy - retrospectivity

171. The Law Council's Policy notes that principles defining the rule of law require that laws and policies affecting asylum seekers should not have retrospective operation.

172. As the LIV observes, the amendments proposed in Schedule 6 are intended to operate retrospectively. This means that any visa applications from children born to UMAs prior to the commencement of the Act will be invalid.

173. This has significant implications for a number of Australian born babies who have lodged applications for Protection Visas, and are waiting on the appeal of the Federal Circuit Court's judgment in the matter of *Plaintiff B9/2014*. This case will determine whether Australian born babies born to UMAs are also UMAs under section 5AA of the Migration Act as it is currently drafted.

174. In accordance with the Bill's retrospective operation, even if the Applicant in this matter has judgment awarded in his favour, and then successfully applies for a protection visa, his claim for protection will be nullified and he will be liable for transfer to a regional processing country once the Bill passes.<sup>189</sup>

175. For example, as Ferouz's matter is currently on appeal, even if Ferouz was successful on appeal and subsequently successfully applied for a protection Visa,

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<sup>186</sup> An appeal has been lodged against this decision.

<sup>187</sup> Pursuant to s 46A(1) of the *Migration Act 1958* (Cth).

<sup>188</sup> *Ibid.*

<sup>189</sup> Unless his application for a Protection Visa has been 'finally determined' per Caseload Bill, Schedule 6, Part 2, Item 12.

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these reforms would mean he would have his protection visa removed, and would be transferred to Nauru.

176. These proposed amendments will therefore have an important impact on those children waiting on the appeal to the Federal Court in the matter of the *Plaintiff B9/2014*, as, even if the final decision of the Court is that these children are able to claim protection visas, this Bill will exclude them from that possibility.

177. The Law Council therefore suggests that the Committee recommend that Schedule 6 be omitted from this Bill and that the Government should wait to see the final outcome of the Federal Court decision in the above matter before introducing any further legislation addressing this issue.

### Recommendation

178. The Law Council suggests that the Committee does not recommend the enactment of this Schedule, at least until the outcome of the appeal to the Federal Court in the matter of the *Plaintiff B9/2014*.

179. If the Committee is minded to recommend the enactment of this Schedule, the Law Council suggests that the Committee:

- Consider the ways in which procedural fairness can be guaranteed to these children. For example, the Explanatory Memorandum should be amended to make it explicit that, pursuant to proposed sub-section 198(1C) at Item 7 of Part 1, if a child is mandatorily removed (who also is effectively temporarily in Australia), then removal of the mother or child should only occur if neither mother nor child 'needs to be in Australia'. Although these needs may be linked, both the mother and child should have those potential needs recognised; and
- Recommend against the retrospectivity of the Schedule.

## **Conclusion**

180. The Law Council supports efforts to enact a clear, fair and efficient system for assessing protection claims and issuing protection visas and considers that certainty of the legal framework for the determination protection claims is urgently needed, especially for the 'legacy caseload'. It also underscores the importance of access to independent legal or migration advice for asylum seekers, under Australia's jurisdiction. If the Committee recommends no other changes, the Law Council urges it to consider recommending that free, independent legal or migration advice be reinstated for asylum seekers, including those who fall under the auspices of this Bill.

181. The significance of the changes proposed in this Bill should not be understated. Along with the other Bills before Parliament, this Bill constitutes the single biggest change to Australia's asylum seeker policy ever made, and as such demands careful public and parliamentary scrutiny of its many detailed and complex provisions.

182. The Law Council suggests the Bill not be passed. If the Committee is minded to support the Bill, the Law Council has attempted to provide constructive recommendations for improvements.

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## **Acknowledgement**

The Law Council of Australia wishes to acknowledge the assistance of the following Constituent Bodies and Committees in the preparation of this submission:

Law Institute of Victoria

New South Wales Bar Association

International Law Section's Migration Law Committee

National Human Rights Committee

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## **Attachment A: Profile of the Law Council of Australia**

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The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Large Law Firm Group, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- The Large Law Firm Group (LLFG)
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of approximately 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2014 Executive are:

- Mr Michael Colbran QC, President
- Mr Duncan McConnel President-Elect
- Ms Leanne Topfer, Treasurer
- Ms Fiona McLeod SC, Executive Member
- Mr Justin Dowd, Executive Member
- Dr Christopher Kendall, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.