THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: HumanRightsREvk:911279

5 November 2015

Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

By email: legcon.sen@aph.gov.au

Dear Committee Secretary,

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

I am writing on behalf of the Human Rights Committee of the Law Society of NSW ("Committee") which is responsible for considering and monitoring Australia's obligations under international law in respect of human rights; considering reform proposals and draft legislation with respect to issues of human rights; and advising the Law Society accordingly.

The Committee has serious concerns about the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 ("the Bill"). In the Committee's view, the Bill interferes with the rule of law both from the perspective of settled domestic principles, as well as in respect of settled international law principles. The Committee submits that the Government has not demonstrated that this proposed departure from fundamental human rights and rule of law principles is rationally connected, and proportionate, to the achievement of the stated policy objectives.[1] The Committee's concerns are underpinned by the strong likelihood that the passage of the Bill will result in unjust outcomes, with potentially very serious consequences, for affected individuals. The Committee notes that the Bill may also adversely affect Australia's standing as an international citizen. For these reasons and the reasons set out below, the Committee strongly opposes this Bill.

The Committee sets out below its particular concerns in relation to the proposed Temporary Protection Visas and Safe Haven Enterprise Visas; the fast track process and the proposed Immigration Assessment Authority; the removal power; and the removal of references to the Convention Relating to the Status of Refugees ("Refugee Convention").

[1] In this respect, the Committee refers to the concerns of the Parliamentary Joint Committee on Human Rights stated in the *Fourteenth Report of the 44th Parliament*, October 2014, available online: http://www.aph.gov.au/~/media/Committees/Senate/committee/humanrights_ctte/reports/2014/14_44/14th%20report%20FINAL.pdf (accessed 5 November 2014)

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## 1. Temporary Protection Visa and Safe Haven Enterprise Visa

Schedules 2 and 3 of the Bill seek to address the Government's policy of not granting permanent visas to refugees who have arrived by boat or in an irregular manner by re-introducing the Temporary Protection Visa ("TPV") and introducing a new Safe Haven Enterprise Visa ("SHEV").

The SHEV is said to be a visa that will be valid for five years and requires its holder to reside in a designated regional area and, like the TPV, will not allow for family reunion or the right to travel and re-enter. Should the holder of a SHEV work or study in a regional area for three and a half years without accessing income support they would then, in theory, be permitted to apply for another visa. There is otherwise little guidance on how the SHEV will work or the consequence for a visa holder who cannot meet the requirements because there may not, for example, be work available in a regional area. The proposed amendments will apply retrospectively to invalidate existing applications for permanent visas and deem them to be a valid application for a temporary visa.

TPVs were originally introduced on 20 October 1999 before being abolished in 2007. A report released in March 2006 by the Legal and Constitutional Reference Committee following an inquiry into the administration and operation of the *Migration Act 1958* (Cth) ("Act") identified that there was little "real evidence of its deterrent value" and that there was "no doubt that its operation has had a considerable cost in terms of human suffering".

The Committee is concerned about the denial of family reunion to holders of temporary protection visas and notes that international human rights instruments, including the Universal Declaration of Human Rights (Article 16); the International Covenant on Civil and Political Rights (Article 17 and 23); the International Covenant on Economic, Social and Cultural Rights (Article 10); and the Covenant on the Rights of the Child (Article 9 and 10), recognise that the family is the fundamental group unit of society and is entitled to protection by States.

The Committee considers that imposing restrictions on family reunion will have a detrimental impact on refugees. An Australian study into the impact of TPVs on the mental health of refugees revealed that:

> Separation from the family, worry about the family's safety, being unable to return home in an emergency, and anxiety about repatriation were endorsed by over 90%of TPV holders... TPV holders exceeded PPV holders on all measures of psychiatric disturbance and mental disability. Consistent with the body of refugee literature, regression analysis showed that trauma was a predictor for all mental health indices. Nevertheless, TPV status made a substantial additional contribution, being by far the greatest predictor of PTSD symptoms accounting for 68% of the variance.[2]

Further to this the United Nations High Commissioner for Refugees has identified that the family unit has a better chance than an individual of successfully integrating in a new country and that the refugee family plays an important role in ensuring the protection and well-being of its individual members[3]. The denial of family reunion is particularly detrimental for unaccompanied minors and will impede on the development of their personal and social

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[2] Shakeh Momartin, Zachary Steel, Marianio Coello, Jorge Aroche, Derrick M Silove and Robert Brooks, "A comparison of the mental health of refugees with temporary versus permanent protection visas" (2006) 185 Medical Journal of Australia

[3] UNHCR, 'Protecting the family: Challenges in implementing policy in the resettlement context' (20-21 June 2011), Background note for the agenda item: Family reunification in the context of resettlement and integration at the Annual Tripartite Consultations on Resettlement, available online: http://www.unhcr.org/3b30baa04.pdf (accessed 29 October 2014)

skills[4] and is at clear odds with the Convention on the Rights of the Child that requires "applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by State Parties in a positive, humane and expeditious manner" (Article 10).

It is the Committee's view that the evidence does not support the contention that the reintroduction of TPVs will have the stated deterrent effect on asylum seekers who intend to travel to Australia by boat and may breach Australia's international obligations by interfering with the right of the individual/child to be reunited with their family. In circumstances where the Government has advised that irregular maritime arrivals have stopped the Committee considers that the re-introduction of the temporary protection visa is not reasonable, necessary or proportionate.

## 2. Fast track process and the Immigration Assessment Authority

Schedule 4 of the Bill establishes a new protection assessment process for a category of people who are defined to be a "fast track applicant." The category includes asylum seekers who arrived in Australia by boat after 13 August 2012 and can also be any person or a class of persons that the Minister may identify. The Bill proposes that an "excluded fast track review applicant" who presents a baseless or unmeritorious claim will not have access to this primary protection assessment process or merits review. The denial of the primary protection assessment process and merits review will also extend to:

- Those who previously entered Australia and made a claim for protection that was refused or withdrawn; and
- Those who have made an unsuccessful claim for protection in a country other than Australia; and
- Those who have had a claim for protection refused by the UNHCR; and
- Those who provide a bogus document in support of their application.

Those not excluded will not have access to a de novo hearing before the Refugee Review Tribunal but instead will be referred to the newly established Immigration Assessment Authority ("IAA").

Under proposed changes the IAA will be required to provide a limited form of review that is "efficient and quick" without accepting or requesting new information and without conducting an interview. Unlike the Refugee Review Tribunal[5] and the Migration Review Tribunal[6] the IAA is not required to pursue an objective of providing a mechanism of review that is "fair" and "just". The IAA will not be permitted to consider new information unless it is satisfied that there are "exceptional circumstances" which justify considering the new information and that the applicant has demonstrated that the new information was not and could not have been provided to the Minister before the decision was made.

The Committee is concerned that many aspects of the new process are inadequate. Firstly, it is the Committee's view that a merits reviewer must have the ability to consider new information or evidence to determine its relevance and reliability. The Explanatory Memorandum envisages that credible and relevant information/evidence that was previously available but not submitted would be disregarded. In the Committee's view, requiring the IAA to ignore relevant and reliable evidence because there are no "exceptional circumstances" as to why the evidence was not previously advanced greatly undermines the task of the reviewer in coming to a correct or preferable decision and will lead to the IAA making

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[4] Note 3
[5] Compare with s 420 of the *Migration Act 1958* (Cth)
[6] Compare with s 353 of the *Migration Act 1958* (Cth)

decisions that breach Australia's non-refoulement obligations. It also fails to appreciate that an asylum seeker may only discover the relevance of information when they have seen their decision record.

Secondly, while it may be accepted that there is no universal right to an oral hearing[7], in circumstances where many asylum claims are determined on demeanour, credibility and adverse information, the Committee considers that any review should be in the form of a de novo hearing with an assumption in favour of providing applicants an opportunity to give evidence and present arguments relating to the issues arising in relation to the decision under review.

Thirdly, the Committee considers all unsuccessful applicants – including those excluded from the primary protection assessment process altogether – should have access to a full de novo hearing. The concern here is that many asylum seekers, particularly in the absence of IAAAS legal assistance, may not be able to adequately articulate or advance their claims for protection and would thus be denied IAA review on the basis that their claims are baseless or unmeritorious. The Committee opposes the fast track process and the establishment of the IAA.

### 3. The removal power

Schedule 5 of the Bill introduces a new ss 197C(1) which provides that for the purposes of the removal power under the Act, it is irrelevant whether Australia has non-refoulement obligations in respect of an unlawful non-citizen. Proposed ss 197(2) provides that an officer's duty to remove as soon as reasonably practicable an unlawful non-citizen under s 198 of the Act arises irrespective of whether there has been an assessment, according to law, of Australia's non-refoulement obligations in respect of the non-citizen.

The amendments are said to be in response to a number of decisions that have held that a person can only be removed where there has been a lawful assessment of Australia non-refoulement obligations.[8] The Explanatory Memorandum makes reference to the Full Federal Court decision *of M38/2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 131 ("*M38/2002*") as authority for the preferred position that the duty to remove was not to be constrained by consideration of non-refoulement obligations as it was presumed that that consideration had taken place.

The Bill's statement of compatibility with human rights states:

> ...on the face of the legislation as proposed to be amended, these provisions are capable of authorising actions which may not be consistent with Australia's non-refoulement obligations, [however] the Government intends to continue to comply with these obligations and Australia remains bound by them as a matter of international law. They will not, however, be capable as a matter of domestic law of forming the basis of an invalidation of the exercise of the affected powers. It is the Government's position that the interpretation and application of such obligations is, in this context, a matter for the executive government.[9]

Relevantly, *M38/2002* concerned an Iranian national who had been found to not have a well-founded fear of persecution in Iran. Despite this, he sought injunctive relief arguing that his return would fall foul of Australia's non-refoulement obligations. Their Honours Goldberg, Weinberg and Kenny JJ explained that the obligation against non-refoulement only applied to asylum seekers who are determined to be refugees under Article 1 of the Refugee

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[7] See *WZARH v Minister for Immigration and Border Protection* [2014] FCAFC 137 at [9]-[14] per Flick and Gleeson JJ.
[8] Reference is made to *Minister for Immigration and Citizenship v SZQRB* [2013] FCAFC 33
[9] See Explanatory Memorandum, Attachment A at page 28.

Convention.[10] It was in that context that their Honours rejected the proposition that the duty to remove him under s 198(6) was required to be read subject to the non-refoulment obligation. Their Honours stated at [71]:

> ...for by the time an officer is called upon to discharge the duty imposed by s 198(6) of the Act, any claim by a detainee for refugee status has been refused, or is taken to have been refused, in accordance with the processes established under the Act.

The operation of removal power and its interaction with non-refoulement is best set out in *Plaintiff M70 v Minister for Immigration and Citizenship* [2011] HCA 32, where Gummow, Hayne, Crennan and Bell JJ at [91] explained that:

> ... the ambit and operation of a statutory power to remove an unlawful non-citizen from Australia must be understood in the context of relevant principles of international law concerning the movement of persons from state to state.

French CJ further observed at [54]:

> ... If the person is found to be a refugee, then removal under s 198(2) will necessarily have to accord with Australia's non-refoulement obligation.

It follows, in the Committee's view, that s 198 does not authorise an officer to remove a person found to be refugee to any country where he or she has a well-founded fear of persecution for a Convention ground[11]. It does, however, permit removal to a country where non-refoulement obligations are not engaged. It is for this reason that a lawful assessment of a person's claims is required before removal to the country of claimed persecution can proceed.

The Committee notes, for example, that an unauthorised maritime arrival, in immigration detention, is prevented by s 46A of the Act from making a valid application for a protection visa. The proposed amendments would require his/her removal as soon as reasonably practicable despite them:

1. Never having had the opportunity to make an application; or
2. Not having been interviewed about their claims; or
3. Not having had adverse information put to them for comment; or
4. Having a decision made on their claims that misunderstands their claims or applies a wrong legal test.

The Committee considers it to be an entirely appropriate response to Australia's international obligations for the Act to prevent the removal of a person seeking protection until a lawful assessment has been made of their claims for protection. This ensures that those seeking protection are not removed in breach of Australia's non-refoulement obligations. The Committee is concerned that the proposed amendments will permit, and indeed, require removal of a person who has not had their claims lawfully and completely assessed.

## 4. Removing references to the Refugee Convention

Schedule 5 of the Bill removes most references to the Refugee Convention from the Act and codifies Australia's own definition of a refugee.

The Convention defines a refugee in Article 1(2) as a person who:

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[10] At [38]
[11] See *MZYYO v Minister for Immigration and Citizenship* [2013] FCA 49 at [65]

> ...owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of that country...

Proposed s 5J(1) provides a person has a well-founded fear of persecution if, inter alia, "the real chance of persecution relates to all areas of a receiving country". While it may be observed that there is no reference in the Convention definition to the principle of internal relocation it is generally accepted that the grant of asylum may be denied to applicants for whom it may be considered reasonable, in the sense of practicable, to relocate to a region where, objectively, there no appreciable risk of the occurrence of the feared persecution.[12]

Proposed s 5J(1) presents a significant departure from the understood definition of a refugee under the Convention in that it removes the internal relocation principle and imposes on asylum seekers an almost impossible task of having to demonstrate a well-founded fear of persecution in all areas of a receiving county. Under the new definition it would be irrelevant if an asylum seeker cannot relocate to another part of the country because of civil war, serious discrimination falling short of serious harm, outbreak of disease, or other practical reasons such as language or inability to find employment.

The Committee opposes the amendment and notes that Article 42 of the Convention does not permit States to make reservations about the Convention definition of a refugee in Article 1.

The Committee would welcome the opportunity to appear before the Senate Committee to expand on its written submission. Questions can be directed to Vicky Kuek, policy lawyer for the Committee, at victoria.kuek@lawsociety.com.au or (02) 9926 0354.

Yours sincerely,

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**Chief Executive Officer**

[12] See for example *SZATV v Minister for Immigration and Citizenship* (2007) 233 CLR 18