



Refugee Council  
of Australia

UNITED NATIONS HUMAN RIGHTS COUNCIL

## **SUBMISSION TO THE UNIVERSAL PERIODIC REVIEW OF AUSTRALIA**

### **1. Protections against *refoulement***

#### *Expansion of maritime powers to detain and transfer*

- 1.1. As a result of changes introduced through the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014*, the Minister for Immigration has the power to detain people at sea (both within Australian waters and on the high seas) and to transfer them to any country or a vessel of another country – even if Australia does not have that country’s consent to do so. These powers can be exercised without consideration of Australia’s non-*refoulement* obligations, the law of the sea or any other international obligations. The exercise of these powers is not subject to the judicial review or the rules of natural justice and certain determinations are not subject to publication under the *Legislative Instruments Act 2003*, meaning that they will not be made public or face scrutiny by Parliament.

#### *Non-refoulement obligations no longer considered during mandatory removals*

- 1.2. Under Section 198 of the *Migration Act*, which sets out the circumstances in which non-citizens who do not have valid visas are subject to mandatory removal from Australia, people can now be deported irrespective of whether Australia has non-*refoulement* obligations towards them. As such, even if an assessment has been conducted which indicates that a person would face a real risk of persecution or other forms of serious harm if deported, they must be removed from Australia if they fall into one of the categories set out in Section 198.

#### *Proposed changes to threshold for complementary protection*

- 1.3. Asylum seekers are able to access protection in Australia on complementary grounds if there is a real risk that they will face torture or other forms of cruel, inhuman or degrading treatment if returned to their home country. The *Migration Amendment (Protection and Other Measures) Bill 2014* currently before Parliament seeks to significantly raise the threshold for the grant of protection on complementary grounds. If the legislation is passed, asylum seekers will be required to demonstrate that it is “more likely than not” they will be harmed upon return (that is, there is a greater than 50% chance of them being harmed) in order to access complementary protection. RCOA believes that this change to the threshold would significantly increase the risk of *refoulement* for people seeking protection on complementary grounds.<sup>1</sup>

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<sup>1</sup> For further information, see RCOA’s submission to the Parliamentary review of the Bill at <http://www.refugeecouncil.org.au/r/sub/1408-Migration-Amendment.pdf>

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## 2. Processing of protection claims

### *Excision policy*

2.1. Under Australian law, a person who arrives by boat without authorisation is barred from applying for any sort of visa, including a Protection Visa, except at the discretion of the Minister for Immigration. Known as excision, this policy previously applied only to specific outlying territories of Australia (such as Christmas Island) but has recently been extended to the whole of Australia. As a result, asylum seekers who arrive anywhere in Australia by boat cannot apply for a visa except at the discretion of the Minister. RCOA believes that the excision policy unfairly discriminates against asylum seekers on the basis of their mode of arrival and impedes access to effective protection.

### *Redefinition of international obligations*

2.2. In addition to the introduction of a less robust fast-track assessment process for asylum seekers arriving by boat (as described in the joint NGO submission), Australia has also recently introduced a new statutory framework for assessing protection claims. Most references to the Refugee Convention have been removed from the *Migration Act* and replaced with the Government's own interpretation of Australia's international obligations towards refugees. While some of the reinterpretations are broadly consistent with Australia's obligations under the Refugee Convention, several are out of step with the Convention and international guidelines on the assessment of refugee claims. For example:

- Asylum seekers will only be eligible for protection in Australia if their *fear of persecution extends to the entire territory of their country of origin*. If there is an area of their country to which they can safely and legally relocate (even if doing so would result in significant hardship), they will not be entitled to refugee status in Australia.
- Asylum seekers will not be entitled to refugee status in Australia if the *government or another party or organisation (including an international organisation) that controls the country or a substantial part of the country can provide them with "effective protection"*. There is concern that this requirement does not allow for a realistic consideration of a person's protection needs in all circumstances (for example, the level of protection afforded by non-government groups is unlikely to be equivalent to that afforded by a government).
- A person will not be entitled to refugee status in Australia if they could take reasonable steps to *modify their behaviour so as to avoid persecution*. While there are a number of important exceptions to this requirement (for example, asylum seekers would not be required to conceal an innate or immutable characteristic), the circumstances under which a person *would* be expected to modify their behaviour remain unclear. This could result in the denial of refugee status to people who are at significant risk of harm or face undue restrictions on their freedom which, if based on other grounds, would entitle them to refugee status.
- The category of "*social group*" – one of the five grounds on which a person can claim refugee status – has been redefined. While the new definition is broadly consistent with the United Nations High Commissioner for Refugees' guidelines on the applicability of the "social group" category<sup>2</sup>, there is concern it could potentially exclude some groups at risk of persecution (such as people who are persecuted on the basis of their profession).

2.3. RCOA believes that the new requirements described above set unreasonably high thresholds for the grant of refugee status and will thus increase the risk of asylum seekers being erroneously denied protection and returned to situations where they could face persecution or other forms of serious harm.<sup>3</sup>

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<sup>2</sup> United Nations High Commissioner for Refugees, *Guidelines on International Protection: Membership of a particular social group*, <http://www.unhcr.org/3d58de2da.html>

<sup>3</sup> For further information, see RCOA's briefing paper on the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014*, <http://www.refugeecouncil.org.au/wp-content/uploads/2015/02/1502-Legacy-Caseload.pdf>

- 2.4. The *Migration Amendment (Protection and Other Measures) Bill 2014* currently before Parliament seeks to make several additional changes to Australia's processes for assessing asylum claims which would similarly increase the risk of erroneous decision-making and consequent return to danger.<sup>4</sup>

#### ***Withdrawal of funded legal advice***

- 2.5. The Australian Government has recently changed the eligibility criteria for access to the Immigration Advice and Application Assistance Scheme (IAAAS), a government-funded program which provides access to free advice and application assistance to disadvantaged asylum seekers. Asylum seekers who arrived in Australia with valid visas and are facing disadvantage can now access the IAAAS at the first stage of decision-making only, not at the independent review stage. Asylum seekers who arrived in Australia without valid visas are no longer eligible for the IAAAS. Without access to free, professional advice, it is likely that many asylum seekers will struggle to successfully navigate the visa application process and articulate their claims, again increasing the risk of asylum seekers being erroneously returned to danger.

#### ***Prolonged delays in processing of claims***

- 2.6. Processing of the claims of asylum seekers who arrived by boat was effectively suspended under the previous Government between August 2012 and July 2013, resulting in a large backlog of claims. Since the change of Government in September 2013, processing of these claims has again been suspended. There are now many thousands of asylum seekers living in the community who have been waiting for well over a year (in some cases, more than two years) for their claims to be processed. These prolonged delays and the associated uncertainty have had significant negative impacts on the health (particularly mental health) and wellbeing of asylum seekers.

### **3. Asylum seekers living in the Australian community**

#### ***Failure to ensure adequate standard of living***

- 3.1. RCOA welcomes the Australian Government's commitment to expanding the use of community-based alternatives to immigration detention, particularly for children and families. We are concerned, however, that these alternatives do not currently ensure an adequate standard of living for asylum seekers.
- 3.2. The majority of asylum seekers released from immigration detention have been granted short-term Bridging Visas which allow them to live freely in the community pending resolution of their claims. They have access to Australia's universal healthcare scheme and receive a basic living allowance. Some Bridging Visa holders who are vulnerable or have complex needs are eligible for more intensive support but most receive limited assistance beyond income support and health care. Many asylum seekers on Bridging Visas face destitution and marginalisation, struggling to afford basic necessities such as adequate food, housing and medication and having few opportunities to engage with the broader community due to their limited incomes and lack of English skills.
- 3.3. The destitution faced by asylum seekers on Bridging Visas has been exacerbated by the denial of work rights to asylum seekers who arrived by boat. RCOA therefore warmly welcomes the Government's recent commitment to granting work rights to asylum seekers, which we believe will assist in alleviating this destitution. However, given that asylum seekers often face challenges in securing stable employment, we believe that the granting of work rights alone will not be sufficient to ensure an adequate standard of living to asylum seekers.

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<sup>4</sup> For further information, see RCOA's submission to the Parliamentary review of the Bill at <http://www.refugeecouncil.org.au/r/sub/1408-Migration-Amendment.pdf>

## Code of behaviour

- 3.4. Asylum seekers who arrived by boat and are eligible for release from immigration detention are required to sign a code of behaviour<sup>5</sup> before they are released into the community. RCOA believes that this policy unfairly discriminates against asylum seekers based on their mode of arrival and serves to demonise asylum seekers who arrived by boat. The code of behaviour does not apply to asylum seekers who arrived with valid visas, any other category of migrants or overseas visitors to Australia. It applies only to asylum seekers who arrived by boat, despite the fact that they are significantly less likely to be charged with crimes than members of the public.<sup>6</sup> The code of behaviour policy has generated significant fear and anxiety amongst asylum seekers, in some cases resulting in disengagement from support services and activities and reluctance to raise concerns with NGOs and advocates, thus further contributing to the marginalisation of this group of asylum seekers.

## 4. Guardianship of unaccompanied children

- 4.1. Under Australia's *Immigration (Guardianship of Children Act) 1946*, the Minister for Immigration is the legal guardian of all unaccompanied children arriving in Australia, including those who are seeking asylum. As such, the Minister is simultaneously responsible for safeguarding the best interests of these children and making decisions about whether they will be detained, sent to an offshore processing centre or granted a visa.
- 4.2. RCOA believes that this conflict of interest prevents the Minister from fulfilling their guardianship responsibilities effectively. Past experience has demonstrated that, where there is a conflict between the Minister's role as guardian and their role in enforcing the Government's asylum seeker policies, the later role generally takes precedence. For example, the Government transfers unaccompanied children to offshore processing centres without considering whether this would be in the child's best interests, on the basis that "the best interests of such children are outweighed by other primary considerations, including the need to preserve the integrity of Australia's migration system and the need to discourage children taking, or being taken on, dangerous illegal boat journeys to Australia."<sup>7</sup> This failure to consider the best interests of the child has resulted in unaccompanied children being transferred to Nauru despite the fact that they were certain to face prolonged indefinite detention under harsh conditions in a country which lacks a child protection system.

## 5. Reintroduction of temporary protection

- 5.1. Asylum seekers who arrive in Australia without valid visas are no longer eligible for permanent residency in Australia. If they are found to be refugees, they will instead be granted a Temporary Protection Visa (TPV) which will be valid for up to three years, after which time they must reapply for protection and have their claims reassessed. TPV holders are permitted to work and access government-funded employment support services, have access to Australia's universal healthcare scheme and are eligible for some forms of income support. However, they do not have access to settlement services (including free English language tuition under the Adult Migrant English Program), are ineligible to sponsor family members for resettlement in Australia and can only travel overseas with right of return in limited circumstances with written approval from the Minister for Immigration.
- 5.2. TPVs were previously in place in Australia between 1999 and 2007. During this time, the combined effects of family separation, lack of access to adequate support services and prolonged uncertainty and insecurity stemming from temporary status had serious negative impacts on the health, wellbeing and settlement outcomes of TPV holders. A 2006 study by

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<sup>5</sup> A copy of the code can be downloaded at <http://www.immi.gov.au/forms/Documents/1443.pdf>

<sup>6</sup> Hall, B. (2013). "Liberals under hammer over asylum seeker crime claims." *Sydney Morning Herald*, 1 March, <http://www.smh.com.au/federal-politics/political-news/liberals-under-hammer-over-asylum-seeker-crime-claims-20130228-2f96l.html>

<sup>7</sup> See the Australian Human Rights Commission (2014). *The Forgotten Children: National Inquiry into Children in Immigration Detention*, p. 192, [https://www.humanrights.gov.au/sites/default/files/document/publication/forgotten\\_children\\_2014.pdf](https://www.humanrights.gov.au/sites/default/files/document/publication/forgotten_children_2014.pdf)

mental health experts, for example, found that refugees on TPVs experienced higher levels of anxiety, depression and post-traumatic stress disorder than refugees on permanent Protection visas, even though both groups of refugees had experienced similar levels of past trauma and persecution in their home countries.<sup>8</sup>

- 5.3. It is expected that similar negative impacts will be seen amongst TPV holders under the new visa regime or may indeed be more severe. Under the previous TPV regime, TPV holders who were found to be in ongoing need of protection after the first visa expired were able to apply for permanent residency. This is not the case under the new TPV regime, under which TPV holders are not eligible to apply for permanent visas. TPVs holders can apply for a Safe Haven Enterprise Visa, another temporary humanitarian visa which does offer a pathway to permanent residency; however, the number of refugees likely to be eligible for permanent residency through this pathway is expected to be very small.<sup>9</sup> Furthermore, many of the refugees who will eventually be granted TPVs have already experienced prolonged uncertainty due to delays in the processing of claims (see Section 2 of this submission) and thus may already be experiencing significant mental health issues, their recovery from which is likely to be hampered by further years of uncertainty on a TPV.

## **6. Restrictions on family reunion**

- 6.1. As a result of a range of policy measures introduced since 2012, refugees who arrived in Australia by boat have virtually no opportunities for family reunion. They are not eligible to sponsor family members for resettlement under Australia's Refugee and Humanitarian Program and are considered the "lowest processing priority" under the family stream of Australia's general migration program, meaning that their applications have very little chance of success (although the changes to processing priorities will not apply to people who have become Australian citizens). In addition, TPV holders are not permitted to sponsor family members under any program and will not have the opportunity to apply for permanent residency (as a pathway to citizenship) except at the discretion of the Minister for Immigration. As a result, many refugees in Australia face the prospect of indefinite separation from their family members.
- 6.2. RCOA believes that restrictions on family reunion unfairly discriminate against refugees on the basis of their mode of arrival in Australia, fail to adequately protect the family unit and undermine the health and wellbeing of refugees and their families. Feedback gathered through RCOA's networks and community consultations over a number of years has repeatedly highlighted the often devastating impacts of prolonged family separation, including mental health issues, difficulties in settling successfully in Australia, financial hardship (due to the imperative to financially support family members overseas) and family breakdown. Family separation can also have serious consequences for family members living overseas (many of whom are women and children), who may remain trapped in precarious or dangerous circumstances. RCOA has heard of several cases where family members of refugees in Australia have been killed overseas following delays in family reunion.

## **7. Recommendations**

RCOA recommends that:

- a) The *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* be repealed.<sup>10</sup>
- b) Provisions of the *Migration Act 1958* relating to excision be repealed.

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<sup>8</sup> Momartin, S., Steel, Z., Coello, M., Aroche, J., Silove, D.M. & Brooks, R. (October 2006). 'A comparison of the mental health of refugees with temporary versus permanent protection visas', *Medical Journal of Australia*, vol. 185, no. 7, pp. 357-361,

<https://www.mja.com.au/journal/2006/185/7/comparison-mental-health-refugees-temporary-versus-permanent-protection-visas>

<sup>9</sup> For further information, see RCOA's briefing paper on the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014*, <http://www.refugeecouncil.org.au/wp-content/uploads/2015/02/1502-Legacy-Caseload.pdf>

<sup>10</sup> This legislation includes provisions relating to the expansion of maritime powers to detain and transfer, consideration of non-*refoulement* obligations during mandatory removals and Temporary Protection Visas.

- c) Access to the Immigration Advice and Application Assistance Scheme be reinstated for all asylum seekers in need, regardless of their mode of arrival.
- d) The processing of asylum claims be immediately recommenced.
- e) Support services for asylum seekers living in the community be reviewed to ensure that they provide for an adequate standard of living.
- f) The code of behaviour for asylum seekers living in the community be abolished.
- g) The *Immigration (Guardianship of Children Act) 1946* be amended to remove the Minister for Immigration as guardian of unaccompanied children and appoint an independent guardian who can effectively safeguard the best interest of the child.
- h) All restrictions on access to family reunion opportunities for refugees who arrived by boat be abolished.