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The Executive Director
Australian Law Reform Commission
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Dear Executive Director

The Refugee Advice and Casework Service welcomes the opportunity to provide this submission to the Issues Paper on Traditional Rights and Freedoms — Encroachments by Commonwealth Laws.

Established in 1987, RACS is the leading provider of free, expert legal services to asylum seekers and refugees New South Wales. Through individual casework and advice sessions, community education and public advocacy, RACS strives to ensure that individuals and families at risk of persecution or other forms of harm gain access to equal and fair representation before the law, and are granted protection by Australia in accordance with Australia's international obligations.

Our experience in advising asylum seekers on Australian refugee and migration law allows us to observe the extent to which Australia extends to non-citizens the rights and freedoms we regard as indispensable in other parts of the legal system. In this respect, a review of certain provisions in the *Migration Act 1958* (the **Migration Act**) and related legislation demonstrates significant encroachments upon the rights and freedoms of non-citizens who seek asylum in Australia. In particular, recent amendments extend the limits on government accountability and the rule of law in relation to the rights of non-citizens and institutionalise the exercise of arbitrary power in relation to individuals who seek asylum. RACS contends that these encroachments are not justified.

Our submission is not an exhaustive examination of the operation of Australian migration legislation but describes some of some provisions we consider to be relevant to the inquiry. The following is a summary of the provisions addressed in our submission:

Summary

Freedom of association

The character test in section 501 of the Migration Act allows the Minister for Immigration and Border Protection (the **Minister**) to refuse or cancel a person's visa based on a 'reasonable suspicion' of a previous or existing association with an individual or group that has been or is involved in criminal conduct. The effect of this is generally the detention of the individual. Section 501 thereby authorises the detention of a person based on a suspicion in relation to that person's lawful association with others.

Retrospective character of certain laws

The framework in section 45AA of the Migration Act allows a valid visa application to be retrospectively deemed invalid or converted into an application for a visa of a different type.

Amendments to the Migration Act currently before the Senate would introduce new provisions that would result in the refusal of existing and ongoing protection visa applications in certain circumstances, despite the applicant's current eligibility for the grant of the visa. These provisions interfere with the certainty of the framework for visa applications and have serious consequences for applicants who are refugees.

Procedural fairness

Section 501 of the Migration Act expressly provides that the rules of natural justice and the protocols for procedural fairness contained in the Migration Act do not apply to a decision of the Minister to refuse or cancel a visa, including due to a suspicion that the person does not pass the character test (discussed above in relation to freedom of association). The effect of such a decision is generally the detention of the individual, without any opportunity to respond to the information that gave rise to the suspicion.

The statutory framework that governs the Immigration Assessment Authority excludes procedural fairness obligations. The serious consequences of poor decision making in refuge status determination processes (in the form of detention and potential exposure to persecution) render the curtailment of procedural fairness requirements unjustified.

Judicial review

Section 494AA of the Migration Act restricts the access of asylum seekers to the courts by prohibiting proceedings against the Commonwealth in relation to matters including a person's status or the lawfulness of their detention. Similar bars exist for proceedings relating to the exercise of maritime powers, such as detention at sea. Legislation currently before the Parliament would restrict legal proceedings relating to the use of force against detainees in immigration detention facilities. Excluding government actions from review institutionalises the exercise of arbitrary power and may give rise to the effective authorisation of tortious conduct.

Other rights, freedoms and privileges

The Code of Behaviour for bridging visa holders places acute restrictions on the rights and freedoms of individuals by institutionalising detention as the sanction for lawful behaviour that is perceived to be disrespectful or anti-social.

1. Introduction

- 1.1. The issues paper provided by the Commission for the purpose of this inquiry (the **Issues Paper**) observes that a degree of protection of certain rights and freedoms is provided by three bodies of law: the Australian Constitution, the principal of legality and Australian jurisprudence on the relevance of international obligations to the interpretation of ambiguous provisions in Australian law.¹ The protection these sources may have traditionally offered in other spheres of Australian law has been of limited influence in relation to the legislation discussed in this submission.
- 1.2. The Australian Constitution gives the Commonwealth Parliament the power to make laws relating to immigration and aliens.² Together with international norms of state sovereignty (which give rise to the legal distinction between individuals based on nationality), this has supported a legal framework in which non-citizens in Australia are subject to mandatory detention unless they hold a visa that is in effect.³
- 1.3. A valid visa can therefore be understood as the legal right that allows a person in Australia who is not an Australian citizen to avoid being lawfully detained under Australian legislation. That right is granted by the executive according to powers and obligations contained in legislation.
- 1.4. Observations in the Issues Paper place emphasis on the high standards of scrutiny that must apply to processes that lead to criminal sanctions.⁴ One of the most serious of these is the deprivation of a person's liberty. In Australia, this outcome is also the result of an individual becoming an unlawful non-citizen (that is, a non-citizen who does not hold a visa at any given point in time). However, unlike prison sentences, which are certain in duration, Australian legislation places no limit on the duration of a non-citizen's detention.
- 1.5. While the Australian laws discussed in this submission do not relate to criminal offences, it is essential that they are understood in the context of

¹ Australian Law Reform Commission, Issues Paper: Traditional Rights and Freedoms – Encroachment by Commonwealth Laws, December 2014, 13; in relation to the relevance of International Law to principals of statutory interpretation see *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287 (Mason CJ and Deane J).

² Constitution of Australia, s 51(xix), (xxvii).

³ *Migration Amendment Act 1992* inserted into the *Migration Act* the (then) s 54Q(2)(b) requiring the detention of certain “designated persons” for up to 273 days, and s 183 preventing judicial review of a designated person's detention. In 1994 the mandatory detention regime was expanded to all non-citizens without a valid visa, and the 273 day time limit was removed. (See *Migration Reform Act 1992*, s 13. Note that s 2 of the *Migration Laws Amendment Act 1993* deferred the commencement of certain amendments contained in the *Migration Reform Act 1992* until 1 September 1994). Since that time, Australian law has mandated detention for all unlawful non-citizens and authorised their detention indefinitely, subject to basic parameters and observed by courts in relation to the purpose of ongoing detention: See eg *Plaintiff S4/2014 v Minister for Immigration and Border Protection* [2014] HCA 34; *Migration Act 1958* s 196; *Al-Kateb v Godwin & Ors* (2004) 219 CLR 562.

⁴ See eg, Issues Paper, 67.

Australia's policy of mandatory detention of non-citizens who do not hold a visa. This policy is of particular significance to individuals to whom Australia has protection obligations because the government is rarely able to remove a person from Australia in circumstances in which returning the person to their country of origin would constitute a breach of Australia's international obligations. In this situation the indefinite deprivation of a person's liberty, without trial or criminal process, is authorised by Australian law.

- 1.6. This submission considers the Australian laws that may give rise to the deprivation of an individual's liberty due to the cancellation of a visa or refusal of a visa application. It also considers the legal barriers that may lead to unfair or arbitrary decision-making in these areas, such as restrictions on procedural fairness and restrictions on access to the courts.

2. Laws that interfere with freedom of association

Question 4–1 What general principles or criteria should be applied to help determine whether a law that interferes with freedom of association is justified?

- 2.1. Freedom of association is a fundamental aspect of liberty, and a necessary component of freedom of speech. It has been identified in Australia as a corollary of the freedom of political communication implied in the Australian Constitution.⁵ To function politically and socially, individuals must be free to associate with others on their own terms in whatever ways they regard as most appropriate to their own circumstances. Restrictions on this freedom are restrictions on ability of individuals to live and exist within a community.
- 2.2. The need to balance the value of freedom of association may be balanced against the need to prevent serious criminal conduct. However, any restriction on freedom of association should face a heavy burden of justification.

Question 4–2 Commonwealth that laws unjustifiably interfere with freedom of association

- 2.3. Section 501 of the Migration Act plainly encroaches on freedom of association. It allows the Minister to refuse cancel a person's visa or refuse a person's visa application if the Minister is satisfied that the person fails the character test in section 501(6). Following amendments in 2014, the circumstances in which a person does not pass the character test in include where:
- (b) the Minister reasonably suspects:
 - (i) that the person has been or is a member of a group or organisation, or has had or has an association with a group, organisation or person; and

⁵ *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, 234 [148] (Gummow and Hayne JJ). See also: *O'Flaherty v City of Sydney Council* [2014] FCAFC 56 [28]; *Unions NSW v State of New South Wales* (2013) 88 ALJR 227; *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, 238 [158] (Gummow & Hayne JJ); *Wainohu v New South Wales* (2011) 243 CLR 181, 230 [112] (Gummow, Hayne, Crennan & Bell JJ); *Australian Capital Television v Commonwealth* (1992) 177 CLR 106, 212 (Gaudron J).

(ii) that the group, organisation or person has been or is involved in criminal conduct.⁶

- 2.4. The effect of this element of the character test if the Minister or a delegate can form a reasonable suspicion that a person had or has an association with any second person who has been involved in criminal conduct, that first person fails the character test. The result of being suspected of having or having had such an association is the refusal or cancellation of a visa, rendering the person an unlawful non-citizen and subject to mandatory detention.
- 2.5. The effect of these provisions is the establishment of wide-ranging restrictions on the people with whom a person can associate without being liable to visa refusal or cancellation. As it fails to take into account the nature of the suspected association or the nature of the suspected criminal conduct, this restriction goes far beyond any encroachment on freedom of association that may be justified in order to prevent criminal activity.
- 2.6. In addition, section 501 expressly empowers the executive to evaluate whether a person has broken any Australian laws in addition to arbitrating as to the commission of far less serious misdemeanours. This may also be seen to have the character of the executive inappropriately delegating to itself what amounts to judicial power.
- 2.7. The potential for injustice is exacerbated by the exclusion of natural justice requirements and the bar on merits review of decisions made by the Minister personally.⁷
- 2.8. Further, the standard of ‘reasonable suspicion’ in relation to the existence of the association or the criminal conduct is significantly lower than other criminal or civil thresholds.
- 2.9. These lower procedural and evidentiary standards allow a person to be detained due to their association with a second person who was suspected of criminal conduct (even if acquitted or never charged), even where the second person’s criminal conduct was minor or occurred many years ago, and even where the first person was not aware of the second person’s suspected criminal conduct. In the case of a refugee who holds or applies for a protection visa, the result of the exercise of this power will generally be indefinite detention.

3. Laws that retrospectively change legal rights and obligations

Question 7-1: General principles or criteria to evaluate whether a law that retrospectively changes legal rights and obligations is justified

- 3.1. The Issues Paper observes that there are compelling reasons to oppose laws that retrospectively change legal rights and obligations. If the law’s reach is to be ascertainable by those who are subject to it, it cannot be retrospective. If a

⁶ *Migration Act 1958*, s 501(6).

⁷ *Migration Act 1958* ss 501(5); 500(1)(b).

person understands what the law is, they can adjust their behaviour to fit within its confines. If the law is made and applied after a person acts, the law is capricious. If the law can forbid and sanction behaviour that was previously lawful and acceptable, individuals cannot have certainty in relation to what lawful behaviour is legitimate.

- 3.2. In extreme circumstances, retrospective laws may be justified in order to prevent particularly grave injustices. In general however, laws that retrospectively alter the rights or obligations of an individual in a manner adverse that individual are unjust, and should be opposed. This may be particularly evident in respect of laws that change the relationship between the individual and the state.
- 3.3. Article 4 of the ICCPR provides that some rights may be derogated from in ‘times of public emergency which threatens the life of the nation and existence of which is officially proclaimed’ subject to the prohibition on the creation of retrospective criminal offences in Article 15:

No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed.

- 3.4. The distinction in these observations and provisions between criminal offences and other laws is founded in the punitive sanctions that criminal liability can attract, such as the deprivation of liberty. In Australia, this outcome is also the result of an individual becoming an unlawful non-citizen (that is, a non-citizen who does not hold a visa at any given point in time).
- 3.5. Accordingly, legislative provisions that allow an ongoing protection visa application to be refused because of conduct or statements made in course of the application process can have the same effect as laws that retrospectively deem certain conduct to be worthy of criminal sanction.

Question 7-2: Commonwealth laws that retrospectively change legal rights and obligations without justification

Interference with ongoing visa applications – section 45AA

- 3.6. The conversion provisions in section 45AA of the Migration Act significantly destabilise the regulatory framework for visa applications by allowing a valid application for any class of visa to be retrospectively deemed invalid and converted into an application for a visa of another kind. It is questionable whether this
- 3.7. This provision undermines legislative reforms in 1992 that modernised the regulatory framework underpinning the Australian migration program by providing for codified administrative procedures for the assessment of visa applications against criteria that are transparent and certain. Such a framework is premised on the benefits that flow from administrative processes that are certain, predictable and impartial. Within this framework, the Migration Act requires the Minister to consider a valid application for a visa and either grant or refuse the visa depending on whether the relevant criteria

prescribed by the Act and regulations are satisfied.⁸ Section 45AA undermines the certainty and transparency of this framework by allowing the government the additional option of deeming the application invalid.

- 3.8. While the application of this provision is broad, it results in particular injustice when applied to applications that were made several years ago but were yet to be decided at the time of the commencement of section 45AA.
- 3.9. In the context of protection visas, a decision as to whether a visa will be granted or refused may take many months or several years. Following the repeal of the 90-day rule in section 65A in 2014 there is no statutory limitation on the period within which a protection visa application must be decided.
- 3.10. The provisions have the effect that where an applicant is an unauthorised maritime arrival within the meaning of the *Migration Act* (or other person who was not immigration cleared), the Minister must treat any undecided application as an application for a temporary protection visa.⁹ The application of this mechanism to existing applications (rather than only applications made after the commencement of the relevant provisions) allows undecided protection visa applications to be treated as if they had never been made, thereby allowing the Minister to obviate the obligation to grant the visa to an applicant who satisfies all the relevant criteria.¹⁰ This creates a legal situation in which a person who applied for a protection visa several years ago and who has always met all existing criteria for the grant of the visa can or will not be granted the visa due to the amendments, offending the expectation that the application would be determined according to the criteria that existed during the period of the application.

Application of new refusal provisions to ongoing protection visa applications, including provisions based on statements or behaviour that preceded the introduction of the provisions

- 3.11. Several recent legislative amendments to the Migration Act narrow the grounds upon which a protection visa may be granted and expand the grounds upon which a visa may be cancelled or refused.¹¹ As these provisions apply to ongoing visa applications, an application can be refused on grounds that did not exist at the time of application, nor throughout the majority of the period in which the application was being processed.
- 3.12. If enacted, provisions in the Migration Amendment (Protection and Other Measures) Bill 2014, currently before the Senate, would have retroactive effect on protection visa applicants whose applications have not been finally determined. These provisions include:

⁸ *Migration Act 1958* ss 46 and 65.

⁹ *Migration Regulations 1994*, reg 2.08F.

¹⁰ *Migration Act 1958* s 65.

¹¹ *Migration Amendment (Character and General Visa Cancellation) Act 2014*, and proposed in the Migration Amendment (Protection and Other Measures) Bill 2014.

- Proposed section 6AA of the Migration Act, which creates a higher risk threshold for significant harm (for the purposes of the complementary protection provisions in section 36 of the Migration Act). This may have the effect that applicants who have already provided all relevant evidence and who are eligible for protection under the existing complementary protection provisions and at international law are both refused a protection visa and no longer considered to be a person to whom Australia has protection obligations.
- Proposed section 91WB which would remove the fact of being a member of the same family unit as a protection visa holder from the criteria for the grant of a protection visa and lead to the refusal of the ongoing applications of current applicants who satisfy all existing requirements for the grant of the visa.
- Proposed section 91WA of the Migration Act, which changes the legal significance of evidence or statements previously provided by asylum seekers in relation to identity and identity documents such that this information may result in the mandatory refusal of applications. This provision would apply even in circumstances in which the Minister is nonetheless satisfied that the applicant is a person to whom Australia has protection obligations, and may therefore result in the indefinite detention of that person.

3.13. The retroactive application of these provisions would undermine the legal processes that have applied to ongoing but unfinalised applications. The Explanatory Memorandum to the Bill describes the provisions as intended to discourage certain behaviours in the future, such as the provision of false documents or the destruction of genuine documents.¹² These goals are not served by the retrospective application of these changes to existing visa applications. There is no compelling reason as to why elements of the Bill that would lead to the refusal of applications should have retroactive effect, but there is a high potential for manifestly unjust outcomes. RACS consequently believes that the retrospective application of these provisions to ongoing applications is not justified.

4. Procedural fairness

Question 14-1: General principles or criteria that should be applied to help determine whether a law that denies procedural fairness is justified

- 4.1. All offices of executive power should make administrative decisions that are wise, just and fair. The rules of natural justice can reasonably be regarded as safeguards against decisions that would depart from these ideals. If only one side to a dispute is heard, compelling evidence and arguments may go unheard. The result may be decisions that may not be wise, just or fair.
- 4.2. While consideration may be given to questions of urgency and the significance of the rights at stake, given the imperative for administrative decisions to be wise, just and fair, any limits on procedural fairness should be a last resort, and avoided to the greatest extent possible.

¹² Explanatory Memorandum, Migration Amendment (Protection and Other Measures) Bill 2014, 12.57.

Question 14-2: Commonwealth laws that unjustifiably deny procedural fairness

Fast track assessment process – Part 7AA of the Migration Act

- 4.3. The fast track assessment process for review of protection visa decisions in relation to asylum seekers who arrived by boat on or after 13 August 2012 introduces restrictions on the rules of natural justice in protection visa decision-making.¹³
- 4.4. Under the fast track process, the visa applications are to be assessed by the Department of Immigration and Border Protection (the **Department**). Where the Department's decision is to refuse the application, there is no avenue for merits review by the Refugee Review Tribunal (**RRT**). Instead the Independent Assessment Authority (**IAA**), a statutory body, provides a strictly limited form of merits review for only some fast track applicants. The fast track process is designed to provide a faster process than existing merits review processes (which will continue to apply to asylum seekers who do not arrive by boat) by purporting to exclude procedural fairness obligations to which a visa applicant would otherwise be entitled.¹⁴
- 4.5. The fast track process radically confines any obligation upon the IAA to observe rules of natural justice by way of an exhaustive statement of the natural justice hearing rule contained in section 473DA of the Migration Act. This excludes the obligation to invite an applicant to a hearing before a negative decision can be made, and confines the nature of IAA review to the same material that was before the primary decision-maker. As such, the IAA will generally:
- not hold hearings;
 - not allow a fast track review applicant to respond or comment on adverse information raised at the primary stage, or the reasons for the decision to refuse the application;
 - not seek new information from a fast track review applicant; and
 - not be permitted to consider new information provided by the fast track review applicant, other than in what it identifies as exceptional circumstances.¹⁵
- 4.6. The only statutory obligation upon the IAA to invite a fast track applicant to comment (either in writing or orally) exists where the IAA considers new information in exceptional circumstances and this new information could be used as a reason for refusing the application fast track applicant. In light of the gravity of what is at stake in the context of refugee status determination – not only the deprivation of a person's liberty under the Migration Act but potential for the exposure of a person to a risk of persecution – sufficient

¹³ The relevant provisions will commence on a date fixed by proclamation or the day six months after Royal Assent of the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014*.

¹⁴ *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014*, Explanatory Memorandum, 8-9.

¹⁵ *Migration Act 1958* ss 473DB, 473DC, to commence on a date to be fixed by proclamation (or the day six months after Royal Assent of the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014*).

justification for this curtailment of the rules of procedural fairness in the assessment of protection visa applications.

Power of the Minister to cancel visas without review – section 501

- 4.7. The *Migration Amendment (Character and General Visa Cancellation) Act 2014* amended the Migration Act to expand the power of the Minister to cancel the visa of a non-citizen. These amendments give power to the Minister to override decisions of the AAT and the MRT in relation to decisions not to cancel or not to refuse a visa.¹⁶ In addition, the amendments exclude natural justice requirements from the exercise of ministerial cancellation and refusal powers.¹⁷
- 4.8. Cancellation of visas should be subject to strict procedural fairness requirements because it may result in indefinite detention. RACS believes that no serious justification has been offered for the removal of procedural fairness obligations in this context. Though an extremely strong justification would be needed for denying procedural fairness, this justification has not been provided. Decision-making powers with such serious consequences must be subject to adequate procedural safeguards so that those powers are not used unfairly or arbitrarily.

5. Judicial review

Question 18-1: General principles or criteria used to help determine whether a law that restricts access to judicial review is justified

- 5.1. Judicial review is the process by which the courts ensure that the executive adheres to the rule of law. This is a fundamental means for protecting the rights and freedoms of individuals. The High Court has observed judicial review to be of fundamental importance to liberty and to secure ‘a basic element of the rule of law’.¹⁸ The effect of abrogating it entirely would be to allow government lawlessness.
- 5.2. Judicial review operates under restrictions and within limits. For example, if a person objects to some behaviour by the executive, and their objections are not accepted by the High Court of Australia, that person cannot seek further judicial review. The process of judicial review requires an endpoint and finality, in order for there to be certainty in law. Any restrictions on the ordinary processes of judicial review should require a heavy burden of proof to justify encroachment upon a principle so central to the rule of law.

Question 18-2: Unjustified Commonwealth laws that restrict access to judicial review

Bars on proceedings: section 494AA and similar provisions

¹⁶ *Migration Act 1958* s 501BA(5).

¹⁷ *Migration Act 1958* s 501(5).

¹⁸ *Church of Scientology v Woodward* (1982) 154 CLR 25, 70 (Brennan J); *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 482 [5] (Gleeson CJ).

- 5.3. The bar on court proceedings against the Commonwealth in section 494AA(1) unjustifiably encroaches upon access to judicial review. This provision prohibits:
- proceedings relating to the status of an unauthorised maritime arrival;
 - proceedings relating to the lawfulness of the detention of an unauthorised maritime arrival during the ineligibility period, being a detention based on the status of the unauthorised maritime arrival as an unlawful non-citizen.
- 5.4. Similar barriers to the judicial review of the unlawful imprisonment of an individual are contained in the *Maritime Powers Act 2013*.¹⁹
- 5.5. Amendments proposed in the Migration Amendment (Maintaining the Good Order of Immigration Detention Facilities) Bill 2015, currently before the Parliament, would prohibit proceedings against the Commonwealth or an officer relating to the use of force by an officer against a detainee in an immigration detention facility.²⁰ By providing legal immunity to officers in immigration detention centres in relation to the use of force against detainees, the legislation also intends to authorise what would otherwise be a tort.²¹
- 5.6. While these provisions do not purport to exclude proceedings in the High Court under section 75 of the Constitution, they constitute significant practical barriers to judicial review of unlawful government action. It is important that the courts be allowed to review the mistreatment of any individual, especially in relation to the possible misuse of force against them. Australians expect that a serious burden of proof needs to be met if someone is going to use physical force against them, because this is an extremely basic element of personal freedom. RACS considers that non-citizens should be no less entitled to expect that they will not be subject to the unlawful use of force, and that if unlawful force is used against them, it will be subject to legal scrutiny and accountability.

6. Other rights, freedoms and privileges

Question 19-1: General principles of common law rights, freedoms and privileges

- 6.1. High Court has observed that Australians have ‘common law freedoms of expression and assembly’²² and ‘common law rights of people to go about their lawful business undisturbed.’²³ In *Coleman v Power* [2004] HCA 39,

¹⁹ The *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* amended Schedule 1 of the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act) so that the decisions made under the new powers in the *Maritime Powers Act 2013* are not subject to judicial review. See sections 75D, 75F and 75H of the *Maritime Powers Act 2013*.

²⁰ Migration Amendment (Maintaining the Good Order of Immigration Detention Facilities) Bill 2015, proposed section 197BF.

²¹ Migration Amendment (Maintaining the Good Order of Immigration Detention Facilities) Bill 2015, Explanatory Memorandum, 15-16.

²² *South Australia v Totani* [2010] HCA 39 (11 November 2010) [30].

²³ *R V Kola No. SCCRM-02-31* [2002] SASC 203 (5 August 2002) 39.

Gleeson CJ warned against attributing to Parliament ‘an intention that any words or conduct that could wound a person's feelings should involve a criminal offence.’²⁴ These observations describe a resistance against laws that appear to interfere with the realm of discretionary behaviour that constitutes what can be understood as individual freedom.

19-1: Unjustified encroachments on common law rights, freedoms and privileges

6.2. The Code of Behaviour for Subclass 050 Bridging (General) visa holders²⁵ requires a holder of that visa to comply with series of behavioural standards far broader than what is otherwise required by law. The breach of any of these standards can give rise to the cancellation if the visa, detention and transfer to a regional processing country. These visas are ordinarily granted to asylum seekers who arrived by boat. The Code of Behaviour provides:

While you are living in the Australian community:

- you must not disobey any Australian laws including Australian road laws; you must cooperate with all lawful instructions given to you by police and other government officials;
- you must not make sexual contact with another person without that person's consent, regardless of their age; you must never make sexual contact with someone under the age of consent;
- you must not take part in, or get involved in any kind of criminal behaviour in Australia, including violence against any person, including your family or government officials; deliberately damage property; give false identity documents or lie to a government official;
- you must not harass, intimidate or bully any other person or group of people or engage in any anti-social or disruptive activities that are inconsiderate, disrespectful or threaten the peaceful enjoyment of other members of the community;
- you must not refuse to comply with any health undertaking provided by the Department of Immigration and Border Protection or direction issued by the Chief Medical Officer (Immigration) to undertake treatment for a health condition for public health purposes;
- you must co-operate with all reasonable requests from the department or its agents in regard to the resolution of your status, including requests to attend interviews or to provide or obtain identity and/or travel documents.²⁶

6.3. Because the parts of the Code of Behaviour relating to Australian laws, criminal behaviour and sexual offences replicate the cancellation powers already available to the Minister in section 501 of the Migration Act, those provisions are largely redundant.

6.4. The Code of Behaviour offers broad definitions of some of the terms relevant to other forms of behaviour:

²⁴ *Coleman v Power* [2004] HCA 39 [12].

²⁵ Introduced by the *Migration Amendment (Bridging Visas—Code of Behaviour) Regulation 2013*.

²⁶ *Code of Behaviour for Subclass 050 Bridging (General) visa holders* (2014) Department of Immigration and Border Protection, form 1443. <<http://www.immi.gov.au/allforms/pdf/1443.pdf>> at 23 January 2015

- To ‘harass’ another person means to persistently or continually disturb or irritate them.
- To ‘intimidate’ another person means to cause them fear through your words or actions, including trying to force someone to do something.
- To ‘bully’ another person means to act in an unwanted or aggressive manner towards them, especially if you are in a more powerful position. Bullying includes making threats, spreading rumours, attacking someone physically or verbally, or excluding someone from a group or place on purpose.
- ‘Anti-social’ means an action that is against the order of society. This may include damaging property, spitting or swearing in public or other actions that other people might find offensive. ‘Disruptive’ means to cause disorder or to disturb someone or something.²⁷

6.5. While the Code of Behaviour warns against engaging in ‘any anti-social or disruptive activities that are inconsiderate, disrespectful or threaten the peaceful enjoyment of other members of the community’, being inconsiderate or disrespectful is traditionally not regarded as the kind of behaviour with which lawmakers should interfere.

6.6. Further, the Code of Behaviour expressly includes within the rubric of ‘anti-social’ behaviour, that which ‘other people might find offensive’. What people *might* find offensive encompasses a very broad range of human conduct and speech, and effectively places sharp limits on the freedom of expression of asylum seekers who are required to observe the conditions.

6.7. Freedom of expression is further encroached upon by other provisions. The Code of Behaviour includes a prohibition on bullying, ‘spreading rumours’, ‘attacking someone... verbally’, or ‘excluding someone from a group or place on purpose’. These restrictions encroach upon ordinary social interactions that people naturally expect a great deal of freedom – encroachments that the broader Australian community would ordinarily not accept.

6.8. Restrictions in the Code of Behaviour apply to a great deal of behaviour that is lawful, such as ‘excluding someone’ from something. Because of the seriousness of the consequence, restrictions on this behaviour run contrary to authorities that provide that speech that ‘could wound a person’s feelings’ falls among speech that should not be criminalised.²⁸ Although the Code of Behaviour does not criminalise this behaviour, it provides powerful lawful sanctions against it including the deprivation of liberty and forcible removal from Australia, including in circumstances in which the person would otherwise be eligible for a protection visa.

6.9. RACS believes that the Code of Behaviour is an extensive and unjustified encroachment upon the general principles of common law rights, freedoms and privileges outlined above and in the Issues Paper, and there is no adequate justification for such sweeping power with such serious consequences.

4.1.

²⁷ *Code of Behaviour for Subclass 050 Bridging (General) visa holders* (2014) Department of Immigration and Border Protection, form 1443. <<http://www.immi.gov.au/allforms/pdf/1443.pdf>> at 23 January 2015.

²⁸ *Coleman v Power* [2004] HCA 39 [12].

Closing remarks

The Australian Constitution places few meaningful limitations on the lawmaking power of the Australian Parliament in relation to non-citizens. In the absence of a bill of rights, Australian legislation restricts the traditional rights and freedoms of non-citizens in ways that would not be tolerated as fair or appropriate if applied to other sections of society. In practice, the extent to which serious encroachments on rights and freedoms may be justified for non-citizens but not for citizens is currently a matter for the Parliament, highlighting the vulnerability of marginalised or stigmatised groups in adverse political conditions.

The provisions discussed above depict very significant restrictions on the rights of asylum seekers and other non-citizens under Australian law. In light of the high value that can be attributed to personal liberty, laws that lead to detention of any person should not allow scope for arbitrary decision-making. Accordingly, the legal framework for the lawful detention of non-citizens, the cancellation of visas and the refusal of protection visa applications should be strictly defined in scope, require high standards of procedural fairness and should not restrict access to the courts.

Please do not hesitate to contact us for further information in relation to any aspect of this submission.

Yours sincerely

REFUGEE ADVICE AND CASEWORK SERVICE (AUST) INC.

Per:

Scott Cosgriff
Senior Solicitor