Refugee Council of Australia

AUSTRALIAN LAW REFORM COMMISSION

RESPONSE TO THE TRADITIONAL RIGHTS AND FREEDOMS INQUIRY

The Refugee Council of Australia (RCOA) is the national umbrella body for refugees, asylum seekers and the organisations and individuals who work with them, representing 200 organisations and more than 900 individual members. RCOA promotes the adoption of humane, lawful and constructive policies by governments and communities in Australia and internationally towards refugees, asylum seekers and humanitarian entrants. RCOA consults regularly with its members, community leaders and people from refugee backgrounds and this submission is informed by their views.

RCOA welcomes the opportunity to provide feedback on the Australian Law Reform Commission (ALRC) Review of Commonwealth Laws for Consistency with Traditional Rights, Freedoms and Privileges. For many years, RCOA has expressed serious concern about laws and policies which infringe upon the rights and freedoms of people seeking protection in Australia. This submission provides an overview of some of the most troubling of these laws and policies, with a specific focus on those which unreasonably restrict freedom of movement, retrospectively change legal rights, change the burden of proof and deny procedural fairness.

1. Freedom of movement: Indefinite mandatory detention

1.1. Australia's policy of indefinite mandatory immigration detention, as enshrined in the *Migration Act 1958*, has for over two decades resulted in unreasonable and arbitrary restrictions on freedom of movement. Under this policy, "unlawful non-citizens" (people who are not citizens of Australia and do not hold a valid visa) must be detained until they are granted a visa or leave the country. Detention is mandatory regardless of circumstances (including for children) and can lawfully continue even if a person presents no identifiable risk to the community. There are no time limits on detention under Australian law (meaning that an "unlawful non-citizen" can theoretically be detained for the course of their natural life), no onus on the Australian Government to demonstrate why the continued detention of a particular individual is necessary and very few grounds on which people detained can challenge the lawfulness of their detention.

1.2. In addition, current mechanisms for monitoring and review of detention have proved inadequate to present unreasonable restrictions on freedom of movement. At present, the only formal, independent review mechanism available to people who have been detained for extended periods is oversight by the Commonwealth Ombudsman. For years, the Ombudsman has prepared detailed reports taking into account the mental and physical health and wellbeing of individuals detained. Many such reports have recommended the individual be released from immigration detention; however, there is nothing to compel the Minister for Immigration to act on these recommendations and in practice they have been often ignored. In addition, the Ombudsman has no authority to interview and report on a person's detention until they have been detained for a period of more than six months.

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1.3. The combination of a deficient legal framework and inadequate oversight has resulted in many thousands of people (primarily asylum seekers who arrived in Australia without visas) remaining in unnecessary detention for prolonged periods, with serious consequences for their health and wellbeing. As of 31 January 2015, 1,382 people have been detained in closed immigration detention facilities for more than one year, including 228 people who had been in detention for over two years. The average length of detention was 442 days.[1]

1.4. In assessing complaints against Australia relating to arbitrary detention (see examples below), the United Nations Human Rights Committee has noted that the justification for detention must be advanced on grounds specific to the individual concerned and that this justification should be subject to periodic review.[2] The Committee also recently released a General Comment on arbitrary detention, which affirms that "the notion of 'arbitrariness' is not to be equated with 'against the law' but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity, and proportionality".[3]

A v Australia[4]
This case concerned a Cambodian asylum seeker who had been detained for over four years. The Committee found that detention in this case was arbitrary because Australia had failed to provide adequate review of the necessity of detention: "Every decision to keep a person in detention should be open to review periodically so that the grounds justifying the detention can be assessed. In any event, detention should not continue beyond the period for which the State can provide appropriate justification… Without such factors detention may be considered arbitrary."

C v Australia[5]
This case concerned an Iranian national who had been detained for two years. The Committee found that detention was arbitrary in this case because ongoing detention lacked justification. In defining the meaning of arbitrary, the Committee noted that: "Whatever the reasons for the original detention, continuance of immigration detention for over two years without individual justification and without any chance of substantive judicial review was, in the Committee's view, arbitrary." The Committee found that the Australian Government had failed to regularly reassess the necessity for continual detention and consider "less invasive means of achieving the same ends… for example, the imposition of reporting obligations, sureties or other conditions".

1.5. RCOA believes that Australia's policy of indefinite mandatory detention fails these tests: detention is lawful (and, indeed, required) even if there is no individual justification for detaining a particular individual; there is no effective system of periodic review of decisions to detain; and people can remain in detention indefinitely even if they pose no identifiable risks to the community. We believe that the automatic detention of asylum seekers who arrive without visas and continued detention beyond the time needed to conduct health, security and identity checks represent inappropriate, unreasonable, unnecessary and disproportionate restrictions on freedom of movement and thus constitute arbitrary detention.

Recommendation 1
RCOA recommend that the Migration Act 1958 *be amended so as to:*

a) Abolish mandatory immigration detention in favour of a discretionary system under which detention is applied as a last resort and only when strictly necessary;
b) Restrict immigration detention to a maximum of 30 days without judicial review and six months overall;

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[1] See the Immigration Department's detention statistics for 31 January 2015 at http://www.immi.gov.au/About/Documents/detention/immigration-detention-statistics-jan2015.pdf
[2] M. T. Stubbs, 'Arbitrary Detention in Australia: Detention of Unlawful Non-Citizens under the Migration Act 1958 (Cth)' (2006) 25 *Australian Year Book of International Law* 273, 294.
[3] Human Rights Committee, General *comment No. 35 Article 9: Liberty and security of person*, http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fGC%2f35&Lang=en
[4] http://www1.umn.edu/humanrts/undocs/html/vws560.html
[5] http://www.refworld.org/docid/3f588ef00.html

c) *Establish a system of judicial review of immigration detention longer than 30 days, with subsequent reviews carried out at regular intervals if continued detention is deemed appropriate;*
d) *Codify clear criteria for lawful detention and minimum standards of treatment for people subject to immigration detention, in line with UNHCR's Detention Guidelines;*[6] *and*
e) *Prohibit the detention of children in closed immigration detention facilities, with community-based support arrangements to be used in place of closed detention.*

2. Freedom of movement: Offshore processing

2.1. RCOA is particularly troubled by the situation of asylum seekers forcibly transferred to offshore detention centres in Nauru and Papua New Guinea's Manus Island. The United Nations High Commissioner for Refugees has asserted that these asylum seekers are subjected to arbitrary indefinite detention for prolonged periods under harsh conditions. While these detention centres operate under the laws of Nauru and Papua New Guinea, they are funded by and receive significant operational support from the Australian Government. Furthermore, the Australian Government transfers asylum seekers to these centres in full knowledge that they are likely to be detained for prolonged periods.

2.2. While we welcome the planned transition to an "open" detention model in Nauru, we are concerned that asylum seekers will still face significant and unwarranted restrictions on their freedom of movement. Furthermore, we understand that no such plans are in progress for the asylum seekers detained on Manus Island, who continue to be detained arbitrarily for long periods of time. RCOA believes it is unacceptable for Australia to maintain its policy of offshore processing in the absence of adequate safeguards against arbitrary indefinite detention and other forms of mistreatment. As such, we recommend that this policy be abolished.

Recommendation 2
RCOA recommends that:
a) *All provisions of the* Migration Act 1958 *relating to offshore processing of asylum claims be repealed;*
b) *The offshore detention centres in Nauru and Manus Island be closed; and*
c) *All asylum seekers currently subject to offshore processing be returned to Australia for processing of their claims.*

3. Freedom of movement: Detention at sea

3.1. Under Part 3 of the *Maritime Powers Act 2013*, a maritime officer may exercise powers over foreign vessels to administer or ensure compliance with the *Migration Act 1958* or another "monitoring law".[7] These powers include the ability to detain a person and take them (or cause them to be taken) to a place within or outside the migration zone, including a place outside Australia.[8] The recently-passed *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* significantly expanded the powers of the Minister for Immigration 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.

3.2. 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. The *Maritime Powers Act 2013* thus effectively permits indefinite detention at sea, without any effective mechanism for oversight.

3.3. The case of the 157 asylum seekers who were detained at sea for almost a month in June 2014 clearly highlights the risk of arbitrary indefinite detention resulting from the provisions of

[6] http://www.unhcr.org/505b10ee9.html
[7] *Maritime Powers Act 2013* (Cth) ss 8, 41(1)(e).
[8] *Maritime Powers Act 2013* (Cth) s 72(4).

the *Maritime Powers Act 2013*. The High Court found in January 2015 that the detention of these asylum seekers was lawful under the *Act*[9], despite the fact that no individualised determinations had been made as to whether detention was reasonable, necessary and proportionate in the circumstances. In RCOA's view, the provisions of the *Maritime Powers Act* permit inappropriate and arbitrary restrictions on freedom of movement. We are particularly troubled that the *Act* allows such restrictions to be imposed at sea outside Australia's territorial waters, as people detained under these circumstances can effectively be held incommunicado and are unlikely to have ready access to independent support and advice.

Recommendation 3
RCOA recommends that the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014 *be repealed.*

Recommendation 4
RCOA recommends that provisions of the Maritime Powers Act 2013 *which allow for detention of people outside of Australian territorial waters be repealed.*

4. Freedom of movement and procedural fairness: Indefinite detention on security or character grounds

4.1. RCOA remains greatly concerned about the plight of people who have been found to be refugees but remain in indefinite detention on security or character grounds. There are at least 32 people who have been found to be owed refugee protection but remain in indefinite immigration detention because they have received adverse security assessments. They are not informed of the reasons for these adverse assessments or invited to respond to the evidence against them, nor can they seek review of these assessments through the Administrative Appeals Tribunal. We believe that this process, through denying refugees the right to know and respond to the case against them, fails to uphold basic principles of natural justice and procedural fairness.

4.2. Refugees in this situation face indefinite detention with no prospect of release, many now having been detained for several years. Under the *Migration Amendment Act 2013*, they are ineligible to be granted a permanent Protection Visa due to having received an adverse security assessment. The only alternative to indefinite detention that the Australian Government has been prepared to consider for these refugees is resettlement in a third country. However, all attempts by both the Australian Government and the individuals concerned to seek third country resettlement have been unsuccessful. In addition, there are a significant number of refugees who have been denied a visa on character grounds and as a result also face the prospect of indefinite detention with little hope of release.

4.3. Successive governments have failed to conduct individualised assessments to determine whether ongoing detention is necessary to mitigate risks to the community or to consider whether less restrictive alternatives (such as control orders or community detention) could be appropriate for the individuals affected. As such, RCOA considers the indefinite detention of refugees on security and character grounds to be arbitrary, a view shared by the UN Human Rights Committee.

FKAG et al v Australia[10] *and MMM et al v Australia*[11]
These cases concerned refugees who had been held in indefinite detention due to receiving adverse security assessments. The UN Human Rights Committee found that the refugees had been subjected to inhuman and degrading treatment, arbitrary detention, denial of habeas corpus and (for five of the refugees) denial of the right to be informed of the reasons for arrest. It recommended that all of the refugees be released from detention and be provided with rehabilitation services and compensation and that that Australia review its migration legislation to strengthen protections against inhuman and

[9] *CPCF v Minister for Immigration and Border Protection* [2015] HCA 1
[10] http://www.ccprcentre.org/doc/2013/08/2094_2011-FKAG-et-al-v-Australia_en.pdf
[11] http://www.ccprcentre.org/doc/2013/08/2136_2012-MMM-et-al-v-Australia_en.pdf

degrading treatment and arbitrary detention. Most of the refugees involved in these cases remain in immigration detention.

Recommendation 5
RCOA recommends that legislation be introduced to allow the Administrative Appeals Tribunal to review adverse security assessments relating to Protection Visa applicants.

Recommendation 6
RCOA recommends that the Migration Amendment Act 2013 *be repealed.*

Recommendation 7
RCOA recommends that clear guidelines be developed for resolving in the status of people who have been found to be in need of protection but who have received an adverse security or character assessment, including exploration of less restrictive alternatives to detention.

5. Retrospective changes to legal rights

5.1. The *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* reintroduced temporary protection as the only available option to asylum seekers who arrive in Australia without valid visas and are subsequently found to be refugees. The *Act* retrospectively provides that an application for a permanent Protection Visa can be validly taken to be an application for a Temporary Protection Visa, explicitly stating that subsection 7(2) of the *Acts Interpretation Act 1913* (prohibiting certain retrospective measures) does not apply.

5.2. As a result, thousands of asylum seekers who arrived in Australia without valid visas and whose protections claims have not yet been finally determined are now no longer eligible for permanent Protection Visas. If they are found to be refugees, they will have far fewer rights than was previously the case; for example, they will not be permitted to sponsor family members for resettlement in Australia, have limited access to support services and can only travel overseas with right of return if there are "compassionate or compelling circumstances" necessitating travel and only with written approval from Minister for Immigration.

5.3. RCOA believes that the retrospective reintroduction of temporary protection is unjustified. The Australian Government maintains that Temporary Protection Visas act as a deterrent to unauthorised arrival. If the Government believes this to be the case[12], it makes little sense to apply these changes to people who could not possibly have known that they would be eligible for temporary protection only should they arrive without a visa and thus could not possibly have been deterred from seeking to arrive in an authorised manner. While we oppose the reintroduction of Temporary Protection Visas in general, we believe it is particularly unjust to withdraw access to permanent protection to people who arrived in Australia years ago under a different government and a very different legal regime.

5.4. The Migr*ation Amendment (Protection and Other Measures) Bill 2014*, currently before Parliament, also seeks to introduce a number of changes to legal rights which will apply retrospectively. For example, the Bill would require the Refugee Review Tribunal to draw an unfavourable inference about the credibility of a person's protection claim if that person provides new evidence relating to their claim at the review stage without a "reasonable explanation". The stated aim of such amendments is to encourage asylum seekers to provide all claims and supporting evidence as soon as possible in the status determination process.

[12] In fact, available evidence suggests that Temporary Protection Visas (TPVs) do not act as a deterrent. In the two years after TPVs were first introduced in October 1999, 10,217 asylum seekers arrived in Australia by boat, a five-fold increase on the number (1,953 arrivals) who arrived in the two years prior. There is also evidence to suggest that TPVs created an incentive for some asylum seekers to travel to Australia by boat. As TPV holders were not eligible for family reunion, some of their family members living in difficult or dangerous circumstances overseas (the majority of whom were women and children) were driven to undertake the same dangerous journey to Australia in a bid to reunite with their loves ones. After TPVs were introduced, the proportion of women and children amongst asylum seekers arriving by boat increased from around 25 per cent to around 40 per cent. See http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BN/2012-2013/BoatArrivals

5.5. Again, RCOA believes that the retrospective application of the proposed changes is unjustified. RCOA understands that this Bill is intended to apply to all asylum seekers whose protection claims have not yet been finally determined, regardless of when they arrived in Australia. If the purpose of these amendments is to encourage asylum seekers to put forward all claims and evidence as soon as possible, it is senseless to apply them to people who lodged their initial protection claim several years ago. We believe it is in unjust to penalise asylum seekers for failing to comply with rules or procedures which did not exist at the time they lodged their protection claim.

6. Changes to burden of proof

6.1. The *Migration Amendment (Protection and Other Measures) Bill 2014* also seeks to shift the burden of proof onto asylum seekers to specify the particulars of their protection claims and provide sufficient evidence to support these claims. Currently, the refugee status determination process is understood to be inquisitorial rather than judicial in nature. In this context, there is no legal burden of proof on either party.[13]

6.2. RCOA believes that an inquisitorial process is most appropriate for the assessment of protection claims. Such a process ensures that decision-makers can gain a broader understanding of the circumstances from which an asylum seeker may be fleeing and investigate further information as needed. An inquisitorial process is also more conducive to the building of trust between asylum seekers and decision-makers (essential if asylum seekers are to feel confident in sharing what are often highly traumatic experiences) and to providing appropriate support to survivors of torture and trauma, who may face difficulties in presenting their claims articulately. We are concerned that shifting the burden of proof as proposed in the Bill would create a more adversarial system which assumes against the granting of refugee status unless proved otherwise.

6.3. In addition, the Bill stipulates that the Minister for Immigration – and all those people acting on their behalf – are not obliged to provide legal or migration advice and assistance or other forms of support to people lodging protection claims. As such, asylum seekers could be expected to navigate the complex status determination processes without being given information about the law that applies to their claims and without receiving any assistance to prepare their claims, including assistance with translating and interpreting. Should the burden of proof be shifted as proposed, even people with compelling protection claims are likely to face significant challenges in accessing the protection to which they are entitled.

Recommendation 8
RCOA recommends that:

a) *The* Migration Amendment (Protection and Other Measures) Bill 2014 *not be passed;*
b) *If the* Migration Amendment (Protection and Other Measures) Bill 2014 *is passed, its provisions apply from the date it enters into force rather than retrospectively.*

7. Procedural fairness: Ministerial discretion relating to visas and citizenship

7.1. RCOA has long opposed the provisions of the *Migration Act 1958* which restrict the right of asylum seekers who arrive by boat to validly apply for visas except at the Minister's discretion. This restriction effectively operates to exclude people from a fair and efficient status determination process, as asylum seekers who arrive by boat have means of accessing protection in Australia unless the Minister decides it would be in the "public interest" to allow them to do so. We believe that this restriction unfairly discriminates against asylum seekers based on their mode of arrival, impedes access to effective protection and hampers the efficiency of the decision-making process by requiring personal Ministerial intervention in each case.

[13] *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004* (2006) 231 CLR 1.

7.2. The recently-passed *Migration Amendment (Character and General Visa Cancellation) Act 2014* provides the Minister with a far higher (and, in RCOA's view, inappropriate) level of discretion to refuse or cancel visas and overturn decisions of tribunals. For example, the *Act* permits visa cancellation in circumstances where an individual has, or is believed to have, some kind of association with a group, organisation or person who has been or may have been involved in criminal conduct – regardless of whether the individual had been involved in such conduct themselves or was aware that their associate had been so involved.

7.3. Additionally, the *Act* permits visa cancellation in circumstances where the Minister "reasonably suspects" an individual has been involved in criminal activity or has an association with someone who has been involved in criminal activity. In effect, these amendments would allow visas to be cancelled on the basis of suspicion alone, regardless of whether the person has been charged with an offence or convicted or even whether any evidence exists to suggest that they have been involved in criminal conduct or have an association with someone who has. As such, the *Act* potentially allows the Minister to cancel visas in circumstances where it is not fair or reasonable to do so.

7.4. Similar concerns arise in relation to the *Australian Citizenship and Other Legislation Amendment Bill 2014* currently before Parliament, which we believe would grant the Minister too high a degree of discretion in revoking citizenship on the basis of fraud or misrepresentation. If the Bill is passed, the only requirement which must be satisfied in order for the Minister to validly revoke citizenship on the basis of fraud or misrepresentation is that the Minister be satisfied that such fraud or misrepresentation has occurred. There is no requirement that a person be found guilty of fraud or even that evidence of fraud must exist. Essentially, the amendments would permit revocation of citizenship on the basis of the Minister's personal opinion alone. RCOA is concerned that the introduction of such broad discretionary powers would be incompatible with standards of procedural fairness.

Recommendation 9
RCOA recommends that provisions of the Migration Act 1958 *which restrict the right of asylum seekers who arrive by boat to validly apply for visas except at the Minister's discretion be repealed.*

8. Procedural fairness: Access to independent merits review

8.1. Under the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014,* asylum seekers who arrived in Australia by boat between 13 August 2012 and 1 January 2014 and have not been transferred offshore will now have their cases assessed through a "fast-track" process. Asylum seekers whose claims are rejected by the Department of Immigration will no longer be able to appeal to the Refugee Review Tribunal. Instead, their claims may be referred to a new body called the Immigration Assessment Authority (IAA).

8.2. The proposed structure and functions of the IAA do not, in RCOA's view, provide an adequate framework for ensuring accuracy and procedural fairness in decision-making. Unlike the Refugee Review Tribunal, asylum seekers cannot apply to the IAA in their own right: cases must be referred to the IAA by the Minister. In most circumstances, the IAA will make assessments based solely on the information provided to it by the Secretary of the Department of Immigration at the time that a case is referred. The applicant will not be permitted to participate in the process and cannot provide new information to support their claims other than in exceptional circumstances and within certain restrictions. In some circumstances, asylum seekers subject to fast-track processing will not be eligible for any form of merits review.

8.3. Access to an independent and credible system of merits review is, in RCOA's view, a basic standard of procedural fairness. Through denying asylum seekers the opportunity to put forward or respond to information relevant to their claims and, in some cases, blocking access to review altogether, the fast-track process will create a much higher risk of inaccuracy in

decision-making. This in turn increases the danger of asylum seekers being erroneously returned to situations where they could face persecution or other forms of serious harm.

8.4. In addition, the *Migration Amendment (Character and General Visa Cancellation)* introduced new powers permits the Minister to set aside and substitute decisions of review tribunals relating to visa cancellations. The criteria for the exercise of these personal powers are again very broad, relying on the Minister's personal assessment of an individual case and an undefined "national interest" test rather than objective evidence. The *Act* also expanded the Minister's personal powers to cancel visas, the exercise of which is not merits reviewable. *Australian Citizenship and Other Legislation Amendment Bill 2014* would similarly grant the Minister discretionary powers to overturn the findings of the Administrative Appeals Tribunal and prevent merits review of decisions made personally by the Minister in the public interest. We believe both pieces of legislation grant the Minister an inappropriate level of discretion in decisions relating to visas and citizenship and thereby significantly undermine the rule of law and the purpose of independent merits review.

Recommendation 10
RCOA recommends that the Migration Amendment (Character and General Visa Cancellation) Act 2014 *be repealed.*

Recommendation 11
RCOA recommends that Australian Citizenship and Other Legislation Amendment Bill 2014 *not be passed.*