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### **SUBMISSION TO THE INQUIRY INTO TRADITIONAL RIGHTS AND FREEDOMS – ENCROACHMENT BY COMMONWEALTH LAWS**

We welcome the opportunity to make this submission on the inquiry into Traditional Rights and Freedoms – Encroachment by Commonwealth Laws. We thank the Commission for allowing us an extension on this submission.

The Migration Law Program, within the Legal Workshop of the ANU College of Law specialises in developing and providing education Programs that focus on Migration Law and Policy. The Migration Law Program has also been engaged in developing research into the practical operation of migration law and administration in Australia, and has previously provided submissions and presented evidence to a number of Parliamentary Committee inquiries, conferences and seminars.

This submission draws upon a number submissions made by the Migration Law Program to senate Inquiries in 2013 in relation to migration legislation.<sup>1</sup> We are indebted to Andrew Bartlett, Linda Kirk, Kerry Murphy, Christine Giles, Sudrishti Reich and Matthew Zagor for their input into those submissions. We hope that this submission is helpful to the Commission in its deliberations. The Migration Law Program would be happy to further elaborate on any aspect of the submission in consultation.

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<sup>1</sup> See ANU College of Law submissions to the [Migration Amendment \(Character and General Visa Cancellation\) Bill 2013 \(Cth\)](#), [Migration and Maritime Amendment \(Resolving the Legacy Caseload\) Bill 2013](#) and the [Migration Amendment \(Protection and Other Measures\) Bill 2013 \(Cth\)](#).

## OVERARCHING COMMENTS

The terms of reference for the Inquiry are wide in scope. We have read and we support the submissions made by the Castan Centre for Human Rights and the Human Rights Law Centre. In particular, we support their conclusions that the Inquiry ought to properly consider Australia's international human rights obligations in assessing whether domestic laws unnecessarily encroach on, or unjustifiably interfere with traditional rights and freedoms.

Australia's international human rights obligations are especially important in the migration/refugee law space. In a dualist system – such as Australia's – international obligations are not part of domestic legislation unless they are specifically incorporated. However, this does not mean that there is no relationship between the two systems. Nor does it mean that domestic legislation should be used to abrogate binding international obligations. As a party to the *UN Convention Relating to the Status of Refugee*<sup>2</sup> and other international human rights instruments,<sup>3</sup> Australia remains bound by its international obligations.

An assessment of whether laws unreasonably encroach on tradition rights and freedoms should be made with regard to Australia's international human rights obligations. To the extent that domestic legislation limits rights and freedoms under international law, the Government bears the onus of proving that such limitations are proportionate and necessary to achieve a legitimate objective. This is a well-understood principle of international human rights law and it provides a sound basis on which to balance competing interests.

Our submission focuses on provisions of the *Migration Act 1958* (Cth) and that, in our view, unjustifiably encroach on the rights and freedoms identified in IP 46. In particular, the submission focuses on a recent amendments resulting from the *Maritime and Migration Amendment (Resolving the Legacy Caseload) Act 2014* (Cth), the *Migration Amendment*

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<sup>2</sup> *Convention Relating to the Status of Refugees*, 28 July 1951, UNTS 189 (entered into Force 22 April 1954).

<sup>3</sup> These include *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976); *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Opened for Signature 10 December 1984, 1465 UNTS 85 ; (entered into Force 26 June 1987); *Convention on the Rights of the Child*, opened for signature 20 December 1989, 1577 UNTS 3 (entered into force 2 September 1990).

*(Character and General Cancellation) Act 2014 (Cth)*. It also touches upon a number of other migration and citizenship related Bills that, if enacted, will affect rights and freedoms identified in IP 46.

Our submission will address Chapters 4 (Freedom of Association), 5 (Freedom of Movement), 7 (Retrospective Laws), 14 (Procedural Fairness).

## CHAPTER 4 – 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?

**Question 4–2** Which Commonwealth laws unjustifiably interfere with freedom of association, and why are these laws unjustified?

### PRINCIPLES AND CRITERIA

Freedom of peaceful assembly and association serve as ‘a vehicle for the exercise of many other civil, cultural, economic, political and social rights’<sup>4</sup> necessary for a functioning democracy. The right to freedom of association is enshrined in Arts 21 and 22 of the ICCPR, which makes clear that no restrictions may be placed on these rights other than *those necessary in a democratic society* in the interest of national safety, public order or public health.<sup>5</sup>

The general principle that should be applied is whether laws that impact on freedom of association are necessary in a democratic society. By implication, this requires an assessment of whether they are proportionate and reasonable for the protection of the national interests.

### VISA CANCELLATION ON CHARACTER GROUNDS: ASSOCIATION AND MEMBERSHIP OF AN ORGANISATION

The *Migration Amendment (Character and General Visa) Cancellation Act 2014* (Cth) makes significant amendments to the visa cancellation framework under the *Migration Act 1958* (Cth). Of particular concern are the amendments relating to the ‘character test’ under s 501. Section 501 gives wide powers to the Minister, or his delegate, to refuse or cancel a visa on

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<sup>4</sup> Human Rights Council, *Resolution 15/21 The Freedom of Peaceful Assembly and Association*, 6 October 2010.

<sup>5</sup> *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) arts 21 NS 22.

the basis that a person does not meet the 'character test'. Various circumstances where a person is taken not to meet the character test are found in s 501(6).

One basis for character cancellation is on the basis of association with individuals or a group involved in criminal conduct. Previously, s 501(6)(b) provided that a person does not meet the character test if they are a person who 'has or has had an association with someone else, or with a group or organisation, whom the Minister reasonably suspects has been or is involved in criminal conduct'.

In the infamous case of *Minister for Immigration and Citizenship v Haneef*, the Full Federal Court held that 'association' for the purposes of s 501(6) must extend beyond innocent or mere association.<sup>6</sup> Importantly, the court drew upon both the principles that Acts should be 'construed, where constructional choices are open, so as not to encroach upon common law rights and freedoms'<sup>7</sup> and the principle of legality that 'fundamental rights cannot be overridden by general and ambiguous words'.<sup>8</sup> In this sense, it is important to bear in mind the Court's finding that temporary and permanent visas have rights attached to them. They include, depending on the conditions of the visa, the right to live freely, to work, and associate with others.<sup>9</sup>

The new s 501(6)(b) significantly broadens the character test to include both association and mere membership of a group that is, or has, been involved in criminal conduct. A person's visa can now be cancelled on the basis that:

*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*

(ii) *that the group, organisation or person **has been or is***

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<sup>6</sup> *Minister for Immigration and Citizenship v Haneef* 160 CLR 414, [130] (Black CJ, French and Weinberg JJ).

<sup>7</sup> *Ibid* [107] referring to *Potter v Minahan* (1908) 7 CLR 277.

<sup>8</sup> *Ibid* [111] referring to *R v Secretary of State for the Home Department; Ex parte Simms* [2000] 2 AC 115.

<sup>9</sup> *Ibid* [110]: 'Dr Haneef was, of course, not a permanent resident, but his visa gave him valuable rights. They included the right, for the term of his visa, to live here, to be at liberty here, to be with his wife here, and to work here'.

*involved in criminal conduct.*

The Explanatory Memorandum makes it clear that membership of, or association with, a group or organisation that has or is involved in criminal conduct is, by itself, grounds for character cancellation:

*The intention of this amendment is to lower the threshold of evidence required to show that a person who is a member of a criminal group or organisation, such as a criminal motorcycle gang, terrorist organisation or other group involved in war crimes, people smuggling or people trafficking, does not pass the character test. The intention is that membership of the group or organisation alone is sufficient to cause a person to not pass the character test. Further, a **reasonable suspicion of such membership or association is sufficient to not pass the character test**. There is no requirement that there be a demonstration of special knowledge of, or participation in, the suspected criminal conduct by the visa applicant or visa holder.<sup>10</sup>*

This provision is neither a reasonable or proportionate curtailment of the right to freedom of association. The provision is now so broad that it would cover a range of circumstances where there is no appreciable risk to Australian society. For example, the provision would cover instances where a person was, but is no longer, a member of a group or organisation that is involved in criminal activities. Similarly, it would cover members of an organisation that committed criminal conduct many years ago, but is no longer involved in any criminal activity.

Similarly, the broadening of 'reasonable suspicion' beyond considering whether the group or person has been involved in criminal activity heightens the risk of unnecessary curtailment on a person's freedom of association. The provision does not require the decision-maker to make a finding of fact that a person *is* a member or group or *has* had an association with a group or person, it merely requires that there is a 'reasonable suspicion' of such. Ministerial Direction No 65 provides that a reasonable suspicion is 'less than a certainty or a belief, but more than a speculation or idle wondering'.<sup>11</sup> In our view, this

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<sup>10</sup> Explanatory Memorandum *Migration Amendment (Character and General Visa Cancellation) Act 2014* (Cth) [41].

<sup>11</sup> Minister for Immigration and Border Protection, 'Ministerial Direction No 65 - Visa Refusal and Cancellation under S 501 and Revocation of Mandatory Cancellation under S 501CA' 25.

provides no real useful guidance to decision-makers in the exercising their discretion to cancel a visa, other than to reinforce the wide reach of the provision.

At the very least, we would urge the Commission to consider the necessity of providing in the legislation a definition of 'association' and 'membership' consistent with the Full Federal Court's finding in *Haneef*. That is, something beyond mere membership and innocent association is required to judge a person's character. For example, legislation could make it clear that association or membership requires that the person was sympathetic with or supportive of the criminal conduct.

While Ministerial Direction No 65 requires decision makers to have to consideration to the 'nature of the association, the degree and sufficiency of the association and the duration of the association' and makes it clear that 'mere knowledge of criminality of the associate, is not, in itself, sufficient to establish association', we query whether this provides sufficient protection.

It is worth noting that while Ministerial Direction No 65 is binding on delegated decision-makers, it is not binding on the Minister when he or she exercises their personal powers.<sup>12</sup> In this respect, failure of the legislation to provide a definition of 'association' or 'membership' gives the Minister considerable powers to cancel a visa. This is compounded by the fact that decisions to cancel a visa under s 501 made personally by the Minister are not subject to natural justice requirements,<sup>13</sup> and decisions by the Minister to set aside a decision to revoke mandatory cancellation of a visa by the AAT or MRT are not subject to judicial review or natural justice requirements.<sup>14</sup> (discussed below)

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<sup>12</sup> *Damanik v Minister for Immigration and Multicultural Affairs* [2000] FCA 771 (2000) [10] (French J).

<sup>13</sup> *Migration Act 1958* (Cth) s 501(3).

<sup>14</sup> *Ibid* s 501BA.



## CHAPTER 5 - FREEDOM OF MOVEMENT

**Question 5–1**      What general principles or criteria should be applied to help determine whether a law that interferes with freedom of movement is justified?

**Question 5–2**      Which Commonwealth laws unjustifiably interfere with freedom of movement, and why are these laws unjustified?

### PRINCIPLES AND CRITERIA

As the IP notes, freedom of movement concerns the freedom of citizens to move freely both within their own country and to leave their own country. Freedom of movement is enshrined in Articles 12 and 13 of the ICCPR and a range of other international human rights instruments.

In the domestic context, we note that the *Migration Act* does allow the government to regulate the entry and stay of non-citizens, with lesser rights to freedom of movement than citizens. For example, there are regional skilled migration visas that require a person to work and remain in a particular region as a condition of their visa.<sup>15</sup> Those who are in Australia lawfully, without restrictions, should be entitled to the same rights as citizens. We also note that under the ICCPR, restrictions on freedom of movement should only be restricted on national security, public interest, public order, public health or other to protect the rights and freedoms of others.<sup>16</sup> Restrictions should not only serve these permissible purposes, but must also necessary and proportionate and be the least intrusive means of achieving the result.

### INDEFINITE DETENTION ON SECURITY CHARACTER GROUNDS

We share the concerns outlined in the Refugee Council of Australia outlined in their submission in relation to those asylum seekers who have been found be refugees but remain in indefinite detention due to adverse security assessments undertaken by ASIO.

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<sup>15</sup> See for example, *Migration Act 1958* (Cth) sch 5, Condition 8539 which stipulates that, while the visa holder is in Australia they cannot live, study or work outside of regional or low growth metropolitan areas.

<sup>16</sup> *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 12(3).

These individuals have not been informed of the reasons for their adverse security assessments, nor given an opportunity to respond to the allegations, or to seek merits review. As a result of the legislation and failure of the government to undertake individual assessments to consider alternatives to detention, such detention is arbitrary and unlawful under Article 9 of the ICCPR. According to the Human Rights Committee:

*In the absence of any substantiation of the need to individually detain each author, it may be inferred that such detention pursues other objectives: a generalized risk of absconding which is not personal to each author; a broader aim of punishing or deterring unlawful arrivals; or the mere bureaucratic convenience of having such persons permanently available. None of these objectives provides a legitimate justification for detention.<sup>17</sup>*

As a result of the High Court's decision in *Plaintiff s 4/2014 v Minister for Immigration and Citizenship*, detention under the *Migration Act* can only occur for three lawful purposes: removal from Australia; receiving, investigating and determining an application for a visa permitting the alien to enter and remain in Australia; or determining whether to permit a valid application for a visa.<sup>18</sup> The High Court also held that 'the duration of any detention, and thus its lawfulness, must be capable to being determined at any time and from time to time'. That is, the government must always be able to point to a lawful purpose for the detention. Given that these individuals have been found to be refugees and cannot be removed from Australia in breach of *non-refoulement* obligations, the onus is on the government to point to a lawful purpose for their ongoing detention. In our view, the current indefinite detention of these refugees fails this test.

We agree with the Refugee Council of Australia that changes arising from the Migration Amendment Act 2013 (Cth) should be repealed, and failing that, less restrictive measures to detention (such as control orders or community detention) be considered.

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<sup>17</sup> Human Rights Committee, *F.K.A.G et Al v Australia*, Communication No. 2094/2011, 26 July 2013 [3.4].

<sup>18</sup> *Plaintiff S4/2014 v Minister for Immigration and Border Protection* (2014) 312 ALR 537, [26] (French CJ, Hayne, Crennan, Keifel, Keane JJ).

## CHAPTER 7 – LAWS OF RETROSPECTIVE APPLICATION

**Question 7–1** What general principles or criteria should be applied to help determine whether a law that retrospectively changes legal rights and obligations is justified?

**Question 7–2** Which Commonwealth laws retrospectively change legal rights and obligations without justification? Why are these laws unjustified?

### PRINCIPLES AND CRITERIA

We do not support laws of retrospective application in relation to asylum seekers. In particular, we do not support laws that have the effect of depriving a person of lawful rights and entitlements that accrued to them at the time of application. A person who owed protection obligations by Australia should not have their rights and entitlements diminished purely as a deterrence measure.

### RETROSPECTIVE CHANGES TO PROTECTION VISA APPLICATIONS

*Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014 (Cth)* amended the *Migration Act* to provide that a protection visa includes permanent protection visas, temporary protection visas, and other permanent or temporary protection visas that can be prescribed for by the Regulations. The amendments contain 'conversion' provisions found in s45AA that allow a valid visa application for a class of visa to be retrospectively deemed invalid, and converted to visa application for another class. In relation to Temporary Protection Visas, the conversion provision apply to applications that have been made have not been finally determined. It has the effect that valid application for a permanent protection visa is converted into an application for a temporary visa.

This is a significant change to Australia's visa framework, and is potentially inconsistent with other provisions in the Act. Under s 65, the Minister for Immigration and Citizenship *must* after considering a valid visa application make a decision whether to grant or refuse the

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visa. This provision is important in giving applicants certainty that their visa applications will be considered against the visa criteria for which they have applied. The conversion provisions add not only a layer of complexity, but would also introduce uncertainty into the system. We also note that while other conversion provisions exist in the system – such as one that converts a prospective marriage visa into a partner visa application because a marriage has taken place between the time of application and decision – these do not operate to retrospectively affect existing rights and entitlements.<sup>19</sup>

The amendments explicitly state that subsection 7(2) of the *Acts Interpretation Act 1913* (Cth) which prohibits certain retrospective measures does not apply. The conversion provision is an attempt to give effect to the government's policy that no unauthorized maritime arrival will be granted a permanent protection visa.

This policy position is an inadequate justification for retrospectively removing the accrued rights of those who applied for a permanent protection visa. The retrospective nature of the provision will mean that those found to be genuine refugees on rolling temporary protection visas, which in our view, may give rise to a breaches of fundamental rights, including the right to freedom of movement.

#### TEMPORARY PROTECTION VISAS AFFECT RIGHTS AND FREEDOMS

There is nothing in the *Refugee Convention* that mandates protection offered by a State must be of a permanent nature. However, temporary protection is widely recognised as an *exceptional measure* to be applied only where it is impracticable to conduct individual refugee status determinations, or where protection is granted a class of persons broader than Refugee Convention, for example, those fleeing generalized violence or other emergencies.<sup>20</sup>

While it is envisaged that temporary protection may be suitable in range of circumstances, it is the practice of most states to offer permanent protection to a person who is recognised as a refugee. By contrast, the proposed TPV is intended to ensure that the person to whom Australia owes protection obligations can never granted a permanent protection visa, due to their mode of arrival. In our view, this constitutes a breach of the right to non-

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<sup>19</sup> *Migration Regulations 1994* (Cth) reg 2.08E.

<sup>20</sup> Executive Committee of the High Commissioner's Programme, 'Note on International Protection, UN Doc. A/AC.96/830' [47].

discrimination under the ICCPR.<sup>21</sup> It also constitutes a breach of Article 31 of the *Refugee Convention*, since it could be argued that TPVs holders are being penalised for their mode of arrival by way of being offered a visa with diminished social entitlements.

We also argue that temporary protection visas are inconsistent with the purpose of the *Refugee Convention* to provide protection that is worthy of the name for refugees. In this respect, the Convention envisages that, once found to be a refugee, the cessation of refugee status should only occur where, for example, the conditions in the country of origin have changed such that the reasons for the person becoming a refugee have ceased.<sup>22</sup> What the Convention does not envisage is a 'potential loss of status triggered by the expiration of domestic visa arrangements'.<sup>23</sup>

In addition, we note that Article 34 of the *Refugee Convention* requires states to 'as far as possible facilitate the assimilation and naturalization of refugees'.<sup>24</sup> We fail to see how rolling temporary protection visas can be consistent with this obligation. Rather, they place refugees in a state of permanent limbo with no pathway or ability to achieve a permanent and durable solution.<sup>25</sup>

There exists ample evidence that uncertainty of TPV regime and the limited rights afforded to visa holders have a deleterious effect on the mental wellbeing of refugees.<sup>26</sup> For example, a British Journal of Psychiatry study found that:

- Certainty of residency to persons recognised as refugees seems to be essential for recovery from trauma-related psychiatric symptoms.
- Families and social groups that are not kept together or reunited maybe at greater risk of prolonged mental disorder.<sup>27</sup>

The most concerning aspect of the TPV is the ban on travel and family reunification. TPV holders will not be able to sponsor their families to Australia, and cannot leave Australia to visit their families and then return to Australia. Both the temporary protection visa and the

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<sup>21</sup> *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 26.

<sup>22</sup> *Convention Relating to the Status of Refugees*, 28 July 1951, UNTS 189 (entered into Force 22 April 1954) art 1C.

<sup>23</sup> UNHCR, 'UNHCR Concerned about Confirmation of TPV System by High Court'.

<sup>24</sup> *Convention Relating to the Status of Refugees*, 28 July 1951, UNTS 189 (entered into Force 22 April 1954) art 34.

<sup>25</sup> C.f. James Hathway, *The Rights of Refugees under International Law* (Cambridge University Press, 2005), 989.

<sup>26</sup> Zachary Steel et al, 'Impact of Immigration Detention and Temporary Protection on the Mental Health of Refugees' [2006] *British Journal of Psychiatry* 58; Zachary Steel and Derrick Silove, 'The Mental Health Implications of Detaining Asylum Seekers' (2001) 175 *Medical Journal of Australia* 569.

<sup>27</sup> *Ibid.*

temporary safe haven visa are liable for cancellation if the visa holder leaves Australia.<sup>28</sup> The explanatory memorandum recognizes that the policy may result in people being 'separated from their families for some years', but that the measures are proportionate and reasonable to 'maintain the integrity of the migration system and the national interest'.<sup>29</sup>

We disagree. The ban on family reunification may give rise to a breach of Articles 17(1) and 23 of the International Covenant on Civil and Political Rights (ICCPR).<sup>30</sup> These provide that family is a fundamental unit of society that should be protected, and that no one should be subjected to arbitrary or unlawful interference with his family. We also point to Articles 10(1) of the Convention on the Rights of the Child (CRoC), which requires states to facilitate family reunification in a 'positive, humane and expeditious manner'. This is consistent with the primary obligation to ensure the best interest of the child is primary consideration in Article 3(1) of the CRoC.

Aside from family reunion, the ban on would also unnecessary curtailment on a person's freedom of movement. We note that previous iterations of the TPVs and other temporary protection visas, such as the Kosovar (Safe Haven Temporary) Subclass 448 visa had no restrictions on freedom of movement. The policy intention appears to send the message to those on TPVs that if they want to be with their families, they must return home and not return to Australia.

In our view, it is disingenuous to say that a person can voluntarily choose to return home if they wish to be with their family. Given that a person who engages Australia's protection obligations has a well-founded fear of persecution in their home country, we say that the only place where refugees may enjoy family unity is within the country of refuge. Similarly, it is also disingenuous to say that because people choose to travel to Australia without their family, Australia has not caused the separation and therefore, is not interfering with the family within the meaning of Article 17 of the ICCPR. This ignores the stark realities of forced migration, where people may be forced to leave their countries quickly to avoid persecution and may be separated from their families for reasons beyond their control.

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<sup>28</sup> Migration Act s 82(8).

<sup>29</sup> Statement of Compatibility with Human Rights Migration and Maritime Powers Legislation Amendment (Resolving The Asylum Legacy Caseload) Bill 2014 (Cth) 12.

<sup>30</sup> *International Covenant on Economic, Social and Cultural Rights*, Opened for Signature 16 December 1966, 993 UNTS 3 (entered into Force 3 January 1976).

## CHAPTER 9 - BURDEN OF PROOF

**Question 9–1** What general principles or criteria should be applied to help determine whether a law that reverses or shifts the burden of proof is justified?

**Question 9–2** Which Commonwealth laws unjustifiably reverse or shift the burden of proof, and why are these laws unjustified?

### PRINCIPLES AND CRITERIA

Burden of proof principles will apply differently in different contexts. As the Issues Paper notes, in criminal trials the prosecution bears the burden of proof. In refugee status determinations, a person must prove that they have a ‘well-founded’ fear of persecution. That is, there is ‘a standard of proof’ to which the applicant must satisfy the decision-maker that he or she is genuine refugee. This should be differentiated from the question of who bears the ‘burden of proof’ (i.e. establishing the facts). As we argue below, in order to ensure that the principle of *non-refoulement* is not breached, the burden of proof cannot lie solely with the person seeking protection. Rather, it must be a shared duty between the state and asylum seeker.

In this context, it should be noted that *non-refoulement* is the principal obligation owed by state parties to the Refugees Convention. To the extent that there any reversal or shift in burden of proof on an asylum seeker, the obligation is on the Government to ensure that such changes would not result in a breach of *non-refoulement*.

### REVERSING THE BURDEN OF PROOF IN REFUGEE STATUS DETERMINATION

The Migration Amendment (Protection and Other Measures) Bill 2014 (Cth), is currently before the Senate. It seeks to insert s 5AAA into the *Migration Act 1958* (Cth) (the Act) to provide that it is the responsibility of the non-citizen ‘to specify all particulars of his or her claim to be such a person [ie a person in respect of whom Australia has protection obligations] and to provide sufficient evidence to establish the claim’.<sup>31</sup> In addition, s

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<sup>31</sup> Migration Amendment (Protection and Other Measures) Bill 2014 (Cth) sch 1 item 1.

5AAA(4) expressly states that Minister does not have the responsibility or obligation to specify any particulars of the non-citizen's claim, or assist an applicant in establishing their protection visa claim.<sup>32</sup>

This is a significant amendment that, if passed, would effectively shift the onus for establishing a claim solely with the person seeking protection, where none previously existed.<sup>33</sup> While at first glance the proposed amendment may appear reasonable, deeper consideration reveals that imposing such an onus is not justified.

The UN *Convention Relating to the Status of Refugees* does not prescribe minimum requirements or procedures for refugee status determination.<sup>34</sup> However, there is a well-understood principle that a shared duty of fact-finding exists between the decision-maker and the applicant. The UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (UNHCR Handbook) provides that:

While the burden of proof in principle rests on the applicant, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner. Indeed, in some cases, it may be for the examiner to use all the means at his disposal to produce the necessary evidence in support of the application.<sup>35</sup>

The principle of a shared duty between the applicant and the decision-maker flows from purely 'pragmatic reasons', recognizing the power imbalance between the asylum seeker and the state.<sup>36</sup> That is, while the applicant is best placed to provide testimonial and other evidence, government officials often have greater access to resources that allow access to critical information not available to the applicant. More fundamentally, the duty on states to engage in fact-finding flows from the obligation to provide protection, as encompassing

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<sup>32</sup> Ibid.

<sup>33</sup> The *Migration Act 1958* (Cth) does not explicitly provide that an applicant has the onus of proof in relation to an application for a protection visa, or a visa of any other kind. The general position is that an applicant puts information before a decision-maker, who must have regard to all relevant information in assessing the criteria for the grant of the visa.

<sup>34</sup> *Convention Relating to the Status of Refugees*, 28 July 1951, UNTS 189 (entered into Force 22 April 1954).

<sup>35</sup> UNHCR, 'Handbook on Procedures and Criteria for Determining Refugee Status' (Geneva, re-edited 1992 1979) [196].

<sup>36</sup> James Hathaway and Michelle Foster, *The Law of Refugee Status* (Cambridge University Press, 2nd ed) 119.



doing whatever is ‘within their ability to ensure the recognition of genuine refugees’.<sup>37</sup> In short, states cannot simply ‘adopt a passive posture, responding only to what is adduced by the applicant’.<sup>38</sup>

This principle of a shared duty of fact-finding has also been endorsed by the Australian courts, in the context of giving proper consideration to an applicant’s claim. In *W396/01*, the Full court of the Federal Court opined that:

The scope of Tribunal’s review task is not limited by the case articulated by an applicant. The Tribunal should look at all the evidence and material that it has not rejected and give consideration to a case which it might reasonably raise, notwithstanding that such a case might not have been contended for by the applicant’.<sup>39</sup>

Placing the burden of proof solely on the applicant essentially imports elements of an adversarial process into an inquisitorial process.<sup>40</sup> The existence of an onus will have profound implications for certain groups – such as unaccompanied minors or victims of domestic violence – who need assistance in asserting their claims. The vulnerable position of such asylum seekers is exacerbated by the Australian Government’s move to remove access to free legal/immigration assistance to those who have arrived in Australia as an irregular maritime arrival.<sup>41</sup>

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<sup>37</sup> Ibid.

<sup>38</sup> Ibid 120.

<sup>39</sup> *W396/01 v Minister for Immigration & Multicultural Affairs* [2002] FCAFC 103 (2002) [35] per Black CJ, Wilcox and Moore JJ.

<sup>40</sup> See eg, The Andrew and Renata Kaldor Centre for International Refugee Law, *Submission to Senate Legal and Constitutional Affairs Committee Inquiry into the Migration Amendment (Protection and Other Measures Bill) 2014* (Cth), Submission No 6; Law

Council of Australia, *Submission to Senate Legal and Constitutional Affairs Committee Inquiry into the Migration Amendment (Protection and Other Measures Bill) 2014* (Cth), Submission No 9, 9–10; Ms Linda Kirk, *Submission to Senate Legal and Constitutional Affairs Committee Inquiry into the Migration Amendment (Protection and Other Measures Bill) 2014* (Cth), Submission 12, 4.

<sup>41</sup> This is discussed further below.

Given the inquisitorial nature of refugee status determination – to ascertain from the facts whether a person has a well-founded fear of persecution – an incomplete exploration of the facts risks an incorrect refugee assessment, and potential return of a person to a place where they will be persecuted - in breach of Australia’s *non-refoulement* obligations.<sup>42</sup>

If these amendments are passed, we urge the Commission to consider them in its deliberations at the Discussion Paper stage.

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<sup>42</sup> See *Convention Relating to the Status of Refugees*, 28 July 1951, UNTS 189 (entered into Force 22 April 1954) art 33. The principle of non-refoulement – not to send a person back to frontiers where they may be persecuted - is the bedrock of international refugee law: Sir Elihu Lauterpacht and Daniel Bethlehem, ‘The Scope and Content of the Principle of Non-Refoulement: Opinion’ , *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection* (Cambridge University Press, 2003).

## CHAPTER 14 – PROCEDURAL FAIRNESS

**Question 14–1** What general principles or criteria should be applied to help determine whether a law that denies procedural fairness is justified?

**Question 14–2** Which Commonwealth laws unjustifiably deny procedural fairness, and why are these laws unjustified?

### PRINCIPLES AND CRITERIA

Merits review bodies are an important part of Australia migration system. Migration law is a subset of administrative law, the purpose of which is to safeguard the rights and interests of persons in their dealings with government and agencies. In our view, decisions that have a significant impact on a person's rights and interests should be subject to merits review. A feature of merits review is that the decisions are conducted *de novo*. Review should be independent, impartial, and decisions should be made having regard to all information available.

Access to merits review with in-built procedural fairness obligations form an important part of the Australia's migration system. The *Migration Act* sets out 'exhaustive' criteria for the natural justice and hearing rules in relation to the Migration and Refugee Review Tribunals.<sup>43</sup> These obligations include the requirement to invite an applicant to a hearing,<sup>44</sup> to give applicant particulars of adverse information that would be reason for affirming the decision under review and provide the applicant with an opportunity to respond.<sup>45</sup> These obligations underpin the role of both the MRT and RRT to ensure that it conducts review in a manner that is 'fair, just, economical and quick'.<sup>46</sup>

Given the entrenchment of procedural fairness in merits review of migration and refugee assessments, any encroachment on these rights must be carefully considered. In particular,

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<sup>43</sup> *Migration Act 1958* (Cth) s 357A (MRT), s 422 (RRT).

<sup>44</sup> *Ibid* ss 360(MRT), 425 (RRT).

<sup>45</sup> *Ibid* ss 359A, 359AA (MRT); 424A, 424AA (RRT).

<sup>46</sup> *Ibid* s 353(1) (MRT), 420 (RRT).

the erosion of procedural fairness obligations should not be justified on the basis of efficiency or expediency in decision-making.

#### FAST TRACK ASSESSMENT PROCEDURES UNDER PART 7AA MIGRATION ACT

Schedule 4 of the *Migration and Maritime Amendment (Resolving the Legacy Caseload) Act 2014* (Cth) makes amendments to the Migration Act to provide for 'fast track' assessments,<sup>47</sup> for unauthorized maritime arrivals who form part of the 'legacy caseload' and for whom the Minister has lifted the bar from being able to make a valid visa application.<sup>48</sup>

Applicants who form part of the 'asylum legacy caseload', are termed 'fast track applicants'<sup>49</sup> and will be subject to the fast track assessment process established by the new Part 7AA. The primary decision ('fast track decision') for 'fast track applicants' will be made by the Department of Immigration and Border Protection (DIBP), using 'existing provisions of the Migration Act [and] will be supported by a code of procedure with shorter time frames which will be prescribed in the Migration Regulations.'<sup>50</sup>

Merits review of negative DIBP decisions ('fast track reviewable decisions')<sup>51</sup> will not be reviewed by the Refugee Review Tribunal (RRT). Instead, review will be conducted by a newly created Immigration Assessment Authority (IAA) to be established within the existing Refugee Review Tribunal (RRT).<sup>52</sup>

Certain applicants, termed 'excluded fast track review applicants',<sup>53</sup> will not have access to merits review by the IAA.<sup>54</sup> These applicants will include those who can access protection

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<sup>47</sup> While these amendments have been passed, they have not taken effect as no proclamation date has been made. If no such date is forthcoming, the changes will take place 6 months after the date of Royal Assent.

<sup>48</sup> The Legacy caseload comprises of around 30,000 asylum seekers living in the community on a bridging visa or held in onshore detention facilities. They entered Australia on or after 13 August 2012 for whom the Minister has lifted the bar preventing the UMA from making a valid visa application under subsection 46A(1) and who has subsequently made a valid application for a protection visa in Australia.

<sup>49</sup> Migration and Maritime Powers Legislation Amendment (Resolving The Asylum Legacy Caseload) Act 2014 (Cth), proposed s 473BA.

<sup>50</sup> Explanatory Memorandum, *ibid* 8.

<sup>51</sup> See proposed s 473BB.

<sup>52</sup> See proposed s 473JA.

<sup>53</sup> Migration and Maritime Powers Legislation Amendment (Resolving The Asylum Legacy Caseload) Bill 2014 (Cth) s 5(1) sch 4 pt 1 Item 2.

<sup>54</sup> Explanatory Memorandum, *ibid* 107.

elsewhere or who make a manifestly unfounded claim for protection or who without reasonable explanation use a bogus document to support their application.<sup>55</sup> These ‘excluded fast track review applicants’ will have access only to an internal Departmental review of the primary decision.

Under the amendments, the Minister will have the power to expand the class of persons that will be excluded from accessing merits review (excluded fast track applicants) and will also be able to expand the class of persons that will be subject to the fast track process. Both will be by way of a non-disallowable legislative instrument.<sup>56</sup>

The amendments are discriminatory, punitive and contrary to Australia’s international obligations as they identify and subject to inferior assessment processes a group of asylum seekers based on their mode of arrival and date of entry into Australia.<sup>57</sup> The failure of the amendments to provide an independent, effective and impartial review of claims to protection by ‘fast track applicants’ is incompatible with Australia’s obligations under the ICCPR and CAT.<sup>58</sup>

The fast track review system is unnecessary. It provides for an inferior system of merits review undertaken by a non-independent decision-making body (the IAA) for ‘fast track applicants’ and remove entirely access to merits review for a group of ‘excluded fast track review applicants’. The diminution and/or removal of merits review processes proposed by the amendments increases the risk of inaccurate decision-making in relation to the protection claims of ‘asylum legacy caseload’ applicants, and thereby increases the potential for the *refoulement* of refugees to a place of persecution.

The amendments are unnecessary as there is an existing and established merits review tribunal (the RRT) – with entrenched procedural fairness obligations – that can conduct

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<sup>55</sup> Ibid s 5(1) sch 4 pt 1 Item 2.

<sup>56</sup> Ibid ss 5(1AA) and (1AB) sch 4 pt 1 Item 2.

<sup>57</sup> Contrary to Articles 2, 14 and 26 of the International Covenant on Civil and Political Rights (ICCPR), and Articles 2 and 31 of the Refugee Convention. The Statement of Compatibility with Human Rights states that whereas the proposed measures “may be said to engage Articles 2(1) and 26 [of the ICCPR] by facilitating different review rights for certain fast track applicants, they are both reasonable and proportionate to achieving their aim ... of limiting access to de novo merits review as provided by the Refugee Review Tribunal to those asylum seekers who seek Australia’s protection through lawful channels.”: 23.

<sup>58</sup> Contrary to Article 3(1) Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), Articles 6(1) and 7 ICCPR, Article 31 Refugee Convention and Article 14 ICCPR.

reviews of negative primary DIBP decisions for applicants who are part of the ‘asylum legacy caseload’.

#### ACCESS TO INDEPENDENT MERITS REVIEW

Under the amendments, ‘excluded fast track review applicants’ will not have access to any form of external merits review of the primary decision.<sup>59</sup> As noted by the PJCHR, ‘the provision of ‘independent, effective and impartial’ merits review of *non-refoulement* decisions is integral to complying with the *non-refoulement* obligations under the ICCPR and CAT.”<sup>60</sup> We strongly endorse the view of the PJCHR that “an internal departmental review system, by its nature, lacks the requisite degree of independence required under international human rights law to provide a sufficient safeguard.”<sup>61</sup>

Accordingly, the amendments which seek to exclude decisions made in relation to ‘excluded fast track review applicants’ in the absence of independent scrutiny creates a high risk that inaccurate primary decisions will not be identified, and that wrongful *refoulement* of refugees will thereby occur.

Division 8 provides for the establishment of the Immigration Assessment Authority (IAA) within the existing Refugee Review Tribunal (RRT).<sup>62</sup> The IAA consists of the Principal Member of the RRT, Senior Reviewers and other Reviewers who exercise the powers and functions of the IAA.<sup>63</sup> The Principal Member is responsible for the overall operation and administration of the IAA and may issue directions and determine policies for this purpose.<sup>64</sup> The Senior Reviewer manages the IAA subject to the directions of and policies determined by the Principal Member.<sup>65</sup> The Senior Reviewer is appointed by the Principal Member, who must consult the Minister before making the appointment.<sup>66</sup> The Reviewers

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<sup>59</sup> Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving The Asylum Legacy Caseload) Bill 2014 (Cth) 8.

<sup>60</sup> Parliamentary Joint Committee on Human Rights, ‘Fourteenth Report of the 44th Parliament’ (October 2014) 88.

<sup>61</sup> PJCHR Report, p.88 at para 1.411. The PJCHR concluded that the proposed exclusion of merits review for excluded fast track review applicants is incompatible with Australia’s non-refoulement obligations, p.88 at para 1.412.

<sup>62</sup> Proposed section 473JA(1).

<sup>63</sup> Proposed section 473JA(2),(3).

<sup>64</sup> Proposed section 473JB(1).

<sup>65</sup> Proposed section 473JB(2).

<sup>66</sup> Proposed section 473JC. Note that proposed section 473BA provides that Reviewers are appointed by the Minister.

and Senior Reviewer are engaged under the *Public Service Act 1999*.<sup>67</sup> The Reviewers are appointed by the Minister.<sup>68</sup>

The establishment of the IAA within the existing structure of the RRT and overseen by the Principal Member of the RRT will mark a significant change to the existing operation of the RRT. Unlike appointments to the MRT-RRT that are made by the Governor-General for a fixed term, appointments to the IAA will be public servants employed or seconded to undertake the work of the IAA. Unlike Members of the MRT-RRT, IAA Reviewers will *not* be independent statutory officers.<sup>69</sup>

In effect, there is now a new non-independent division (IAA) within the existing MRT-RRT. The Senior Reviewer and Reviewers of the IAA will be non-statutory officers (public servants) undertaking a merits review function similar to, albeit considerably more limited than that exercised by the independent statutory officers (Members) of the MRT-RRT.

Under this hybrid structure, with RRT Members and IAA Reviewers undertaking similar merits review functions, but only the former being independent statutory appointments and thereby not subject to influence by the Minister or DIBP in making decisions for individual applicants, creates a situation whereby decisions made for 'fast track applicants' will not be those of an independent and impartial tribunal. There is a considerable risk that the decisions of the non-independent IAA will be little more than a rubber stamp of the primary DIBP decision, a risk that is heightened by the inferior processes and reduced procedural fairness obligations of the IAA (discussed below) as compared to those of the RRT.

There is no reason why the review of primary 'fast track' decisions of applicants who form part of the 'asylum legacy caseload' cannot and should not be undertaken by the RRT. There are currently 135 MRT-RRT Members<sup>70</sup> located throughout Australia who could be constituted these 'fast track' review cases by the Principal Member and prioritised ahead of

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<sup>67</sup> Proposed section 473JE(1). The Senior Reviewer must be an SES employee: section 473JC(1).

<sup>68</sup> Proposed section 473BA.

<sup>69</sup> The Statement of Compatibility with Human Rights states that "[t]he establishment of the IAA as a separate office within the RRT, will allow it to make findings independent of the Department and therefore the primary assessment process.": Statement of Compatibility with Human Rights, Attachment A to Migration and Maritime Powers Legislation Amendment (Resolving The Asylum Legacy Caseload) Bill 2014 (Cth) 27.

<sup>70</sup> Senate Legal and Constitutional Affairs Committee, Estimates, *Hansard*, 20 October 2014, p16.

other on-shore protection cases.<sup>71</sup> This would ensure that reviews of ‘fast track’ decisions are finalised efficiently and expeditiously in accordance with Government policy, and without sacrificing the procedural fairness safeguards guaranteed by the RRT’s statutory processes and procedures.

#### PROCEDURAL FAIRNESS OBLIGATIONS

Whereas the *Migration Act* provides for a right to merits review by the RRT following a negative primary protection decision by DIBP,<sup>72</sup> a ‘fast track’ applicant<sup>73</sup> who receives a negative primary decision cannot make an application for review directly to the IAA. The proposed amendments provide that the Minister must “as soon as reasonably practicable after the decision is made” refer a ‘fast track reviewable decision’ to the IAA.<sup>74</sup> Once referred to the IAA a fast track reviewable decision must be reviewed by the IAA, which has the power to affirm the decision or remit it for reconsideration to the primary decision-maker.<sup>75</sup>

The denial to ‘fast track’ applicants of what is effectively the right to apply for review to the RRT of a negative primary protection decision is a significant departure from the existing statutory scheme. Whereas this obviates the need for an applicant to complete application forms and pay an application fee, it removes from the applicant’s control the decision as to whether their case is to be reviewed. Furthermore, there is no provision to require a fast track applicant to be notified that the primary decision has been referred by the Minister to the IAA.

While the RRT is required under section 420 of the *Migration Act* to provide a review that is ‘fair, just, economical, informal and quick’, the review provided by the IAA need only be ‘efficient and quick’.<sup>76</sup> The removal of ‘fair’ and ‘just’ as stated objectives of the review process for fast track decisions is indicative of the fact that merits review of these decisions

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<sup>71</sup> Prioritisation of the ‘fast track’ caseload could also be effected by way of a Ministerial Direction under section 499 of the *Migration Act*.

<sup>72</sup> See *Migration Act 1958* (Cth) ss 412 and 414 which together provide that a valid application for review made to the RRT must be reviewed by the RRT.

<sup>73</sup> Other than an ‘excluded fast track review applicant’ who cannot access IAA review.

<sup>74</sup> Proposed s 473CA.

<sup>75</sup> Proposed s 473CC.

<sup>76</sup> Proposed s 473FA.



by the non-independent IAA is, and is intended to be, an inferior form of merits review to that provided by the RRT under existing provisions of the Act.

Division 3 of the Act purports to be an exhaustive statement of the 'natural justice hearing rule' as it applies to reviews conducted by the IAA.<sup>77</sup> It provides that nothing in Part 7AA requires the IAA to give a referred applicant any material that was before the primary decision-maker,<sup>78</sup> and the applicant has no right to comment on the material before the IAA.<sup>79</sup> These provisions, together with the absence of a requirement to invite a 'fast track' applicant to a hearing of the IAA (discussed below) have the potential for an applicant to not only have no right to be heard in relation to the review, but to be completely unaware that their case is being reviewed by the IAA.<sup>80</sup>

Whereas section 425 of the Act requires the RRT to hold a hearing, the proposed amendments provide that the IAA must not conduct a hearing with or otherwise interview the applicant<sup>81</sup> except in exceptional circumstances.<sup>82</sup> IAA review decisions will therefore be made 'on the papers' and with reference only to the information that was available to the primary decision-maker.<sup>83</sup>

This is a marked departure from the processes mandated for the RRT by the Act. It will allow the IAA to make decisions without reference to the applicant, and without consideration being given to new evidence or updated country of origin information or any other relevant material the applicant, or a witness, may wish to draw to the attention of the Reviewer. The RRT by contrast must not make a decision adverse to the applicant without

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<sup>77</sup> Proposed s 473DA(1). *Migration Act 1958* (Cth) s 423 sets out the exhaustive statement of the natural justice hearing rule in relation to the RRT.

<sup>78</sup> Proposed s 473DA(2).

<sup>79</sup> Unless the new information is adverse information in which case the applicant is to be invited to comment on the information: see proposed section 473DE.

<sup>80</sup> Proposed section 473EB provides that the IAA must notify the applicant of its decision.

<sup>81</sup> Termed a 'referred applicant' – see proposed section 473BB.

<sup>82</sup> Proposed s 473DB obliges a Reviewer to review a fast track reviewable decision referred to it without accepting or requesting new information and without interviewing the referred applicant. The IAA may obtain documents and information that was not before the primary decision-maker if it considers it relevant but it does not have a duty to obtain, request or accept any new information. The IAA may invite a person to provide new information in writing or at an interview: see proposed s 473DC.

<sup>83</sup> Proposed s 473DD provides that the IAA must not consider new information unless there are exceptional circumstances and the information could not have been provided to the Minister before the primary decision was made.

inviting them to a hearing at which they can give evidence and present arguments relating to the issues arising in relation to the decision under review.<sup>84</sup>

The IAA has the discretion to obtain new information however a Reviewer is under no obligation to do so.<sup>85</sup> The proposed amendments make clear that the IAA must not consider new information unless there are exceptional circumstances and the information could not have been provided to the primary decision-maker.<sup>86</sup> The threshold for ‘exceptional circumstances’ is intended to be high and “should only be recognised if a fast track review applicant’s circumstances may now cause them to engage Australia’s protection obligations.”<sup>87</sup>

Whereas the IAA is not obliged to request or consider any new information a ‘fast track’ applicant may wish to present as part of the review process, the IAA is required to disclose new information considered by the Reviewer, which would be the reason or part of the reason for affirming the primary decision.<sup>88</sup> However such information is limited to information specifically in relation to the applicant and does not include general country of origin information.<sup>89</sup>

These proposed amendments significantly diminish the existing statutory procedural fairness obligations applicable to RRT reviews and remove entirely a fast track review applicant’s opportunity to correct factual errors or incorrect assumptions in the primary decision in the course of the review process.

A ‘fast track review applicant’ will be provided with a ‘written statement of decision’ by the IAA that will set out the decision and the reasons for decision.<sup>90</sup> There is no requirement that the IAA (unlike the RRT)<sup>91</sup> set out any findings of fact or to refer to the evidence on which

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<sup>84</sup> *Migration Act 1958* (Cth) s 425.

<sup>85</sup> Proposed s 473DC.

<sup>86</sup> Proposed s 473DD.

<sup>87</sup> Statement of Compatibility with Human Rights, Attachment A to Migration and Maritime Powers Legislation Amendment (Resolving The Asylum Legacy Caseload) Bill 2014 (Cth) 24. This lists three broad categories of events that have arisen in a fast track review applicant’s case after the primary decision has been made.

<sup>88</sup> Proposed s 473DE. See also proposed s 473DF. See also *Migration Act 1958* (Cth) s 424A which imposes this obligation on the RRT.

<sup>89</sup> Proposed s 473DE(3).

<sup>90</sup> Proposed s 473EA.

<sup>91</sup> *Migration Act 1958* (Cth) s 430.

the findings were based. This is in contrast to the requirement that the statement containing the primary fast track decision provided by DIBP to the IAA must not only give reasons for the decision but also set out the findings of fact of the primary decision maker and refer to the evidence on which those findings were based.<sup>92</sup>

The merits review function of the IAA is vastly inferior to that of the RRT under the existing provisions of the Act. As a consequence there is considerable potential for inaccurate decision-making by the IAA in relation to reviews of adverse decisions affecting 'fast track applicants' by virtue in particular of the IAA's inability to accept or request new or updated information. The limited merits review function of the IAA exacerbates the high risk of inaccurate decision-making and thereby heightens the potential for refugees to be *refouled* to danger.

#### POWERS FOR THE MINISTER TO SET ASIDE A DECISION OF THE MRT OR AAT WITHOUT AFFORDING PROCEDURAL FAIRNESS

The Migration Amendment (Character and General Visa Cancellation) Act 2014 (Cth) inserted s 501(3A), which provides that the Minister must cancel a person's visa if the person is serving a full-time sentence of imprisonment of 12 months or more, or have been found guilty of a sexually based offence involving a child. As the cancellation is mandatory, the Act provides that the Minister must inform the person as soon as reasonably practicable after the decision has been made, and set out the particulars of relevant information relied upon in making the decision. The affected person has the opportunity to seek a revocation of the cancellation decision,<sup>93</sup> and the Minister may revoke the cancellation if satisfied that the person passes the character test or another reason exists as to why the cancellation should be revoked.<sup>94</sup>

If the Minister chooses not to revoke the cancellation, the decision is not appealable to the MRT or RRT, but is reviewable by the AAT.

However, s 501BA allows the Minister to set aside a decision of the AAT to revoke the cancellation of the visa Minister is satisfied that the prerequisites for mandatory visa cancellation under subsection 501(3A) are met and that such cancellation is in the national interest. The power is exercisable by the Minister alone, and the rules of natural justice to

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<sup>92</sup> Proposed s 473CB.

<sup>93</sup> *Migration Act 1958* (Cth) s 501(3A).

<sup>94</sup> *Ibid* s 501 CA(4).

do not apply to such a decision. The amending Act's explanatory memorandum provides that 'natural justice will have already been provided to the non-citizen through the revocation process available under s 501CA'.<sup>95</sup>

Section 501BA(5) makes clear that the decision of the Minister cannot be appealed to the MRT, RRT or AAT. A further rationale for the Minister having the final power is expressed by the Explanatory Memorandum in these terms:

*The community holds the Minister responsible for decisions within his portfolio, even where those decisions have resulted in merits review. Therefore, it is appropriate that the Minister have the power to be the final decision-maker in the public interest.*<sup>96</sup>

As the ANU Migration Program has previously argued, these provisions should not be supported as they create further inroads into the essential first tier review of administrative decision-making. Elimination of merits review, and the neutering of the decisions of merits review tribunals, is antithetical to transparency and independent scrutiny in administrative decision-making.

Visa cancellation has serious consequences for the individuals concerned, and for this reason, visa cancellation decisions should be subject to strict procedural fairness obligations. At a minimum, the *Migration Act* needs to be amended by require the Minister to table in parliament decisions to set aside a decision of the AAT that the visa cancellation should be revoked, and set out what the 'national interest' grounds for the decision are. Similar obligations are in place for the Minister's personal powers to set aside a decision of the MRT or RRT under s 417 and 351 of the Act.

#### RESTRICTING REVIEW OF CITIZENSHIP DECISIONS BY THE AAT

Similarly, the Australian Citizenship and Other Legislation Amendment Bill 2014 (Cth) deprives the AAT of the ability to review decisions of relating to citizenship. Currently, the

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<sup>95</sup> Explanatory Memorandum *Migration Amendment (Character and General Visa Cancellation) Act 2014* (Cth) 15.

<sup>96</sup> *Ibid*, 27.

Administrative Appeals Tribunal (AAT) can review a range of decisions relating to citizenship, including refusal of application for citizenship and revocation of citizenship.<sup>97</sup>

The Bill proposes to prevent the AAT from reviewing citizenship decisions made personally by the Minister.<sup>98</sup> Further, it would allow the Minister to substitute a decision made by the AAT to set aside a decision not to grant citizenship made on the basis that the person was not of good character or on identity grounds.<sup>99</sup> In both cases, the Minister must table a statement of reasons in Parliament.<sup>100</sup>

Just like visa cancellations, decisions to refuse or revoke of citizenship affects fundamental rights and interests of persons and should be subject to merits review. It is antithesis to fundamental administrative law principles to have the executive check on independent merits tribunal.

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<sup>97</sup> *Australian Citizenship Act 2007 (Cth) s 52.*

<sup>98</sup> Australian Citizenship and Other Legislation Amendment Bill 2014 (Cth) Sch 1, item 72, inserting new subsection 52(4).

<sup>99</sup> Ibid Sch 1, item 73, inserting new section 52A.

<sup>100</sup> Ibid Sch 1, item 73, inserting new section 52B.