

Sabina Wynn  
Executive Director  
Australian Law Reform Commission  
GPO Box 3708  
SYDNEY NSW 2001

10 September 2015

Dear Ms Wynn,

The Andrew & Renata Kaldor Centre for International Refugee Law welcomes the opportunity to provide a submission in response to the interim report of the Australian Law Reform Commission (ALRC) on *Traditional Rights and Freedoms*, in particular to identify Commonwealth laws that warrant further review.

The Kaldor Centre is the world's first research centre dedicated to the study of international refugee law. Based in the Faculty of Law at the University of NSW, it was established in 2013 with the aim of bringing a principled, evidence-based approach to refugee law and policy in Australia.

Our expertise relates to the operation of Commonwealth laws that impact on the rights and freedoms of asylum seekers and refugees. We note the very helpful submissions made at the outset of the inquiry by the Refugee Council of Australia, the Castan Centre for Human Rights, the Human Rights Law Centre, the Law Council of Australia, the Migration Law Program (ANU) and the Refugee Advice and Casework Service.

## 1 Changes to the Migration Act in 2014

We wish to draw the ALRC's attention to the widespread changes made to the Migration Act 1958 (Cth) in 2014 which raise a number of concerns within the ALRC's terms of reference.

Our particular concerns are set out in detail in our submissions to the relevant bills, which can be found here:

- Submission to the Senate Legal and Constitutional Affairs Committee inquiry into the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth)  
<http://www.kaldorcentre.unsw.edu.au/sites/default/files/Final%20legacy%20caseload%20sub%2031%2010%2014%20SENT.pdf>
- Submission to the Senate Legal and Constitutional Affairs Committee inquiry into the Migration Amendment (Protection and Other Measures) Bill 2014  
[http://www.kaldorcentre.unsw.edu.au/sites/default/files/migration\\_amendment\\_protection\\_and\\_other\\_measures\\_bill\\_2014\\_submission\\_final\\_0.pdf](http://www.kaldorcentre.unsw.edu.au/sites/default/files/migration_amendment_protection_and_other_measures_bill_2014_submission_final_0.pdf)

Our concerns can be summarized as follows:

(a) *Changes introduced by the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth)*

- The powers granted to the Minister for Immigration to detain people on the high seas and return them to any country, with limited scrutiny, may lead to breaches of the right to a fair hearing, basic principles of procedural fairness, and the prohibition on arbitrary detention;
- The reintroduction of temporary protection visas infringes upon the right to family life, may breach the principle of non-discrimination, and may in certain circumstances constitute cruel, inhuman or degrading treatment (as a result of the cumulative effect of these factors, together with what is known about the adverse mental health impacts of temporary protection);
- The creation of a cap on protection visas creates a real risk of arbitrary and prolonged detention at the discretion of the executive;
- The procedures applying to fast track applicants, involving truncated timeframes and limited merits review, fail to ensure procedural fairness.

We would also like to draw the ALRC's attention to a recent decision of the English Court of Appeal (*The Lord Chancellor v Detention Action* [2015] EWCA Civ 840), which held that the severely truncated timescales involved in the detained fast-track process in the UK were 'structurally unfair and unjust' (para 45). As explained in our submission, the Australian fast-track system contains far fewer protections than the UK system.

(b) *Changes introduced by the Migration Amendment (Protection and Other Measures) Bill 2014 (Cth)*

- The powers granted to the Refugee Review Tribunal to dismiss an application if an applicant fails to appear, and the requirement to draw adverse inferences for presentation of late claims or evidence, are inconsistent with the principle of equality before the law;
- Denial of protection visas where a decision maker 'reasonably suspects' an applicant has provided 'bogus' identity documents without 'reasonable explanation' may result in a denial of procedural fairness;
- Imposition of a legal 'burden of proof' on asylum seekers to establish their protection claim is inappropriate in the context of refugee status determination and arguably inconsistent with the principles of equality before the law and non-discrimination;
- Increased Ministerial discretion in respect of whether asylum seekers are allowed to apply for visas undermines parliamentary intent;
- Retrospective application of changes to the refugee status determination process, without compelling justification, may cause injustice to some asylum seekers with pending claims.

Finally, various provisions introduced by the two bills risk breaching a number of Australia's international obligations, including the obligation not to return persons to any place where they face a real chance of persecution or other forms of significant harm (*non-refoulement*), which arises under international refugee law and international human rights law.

## 2 Freedom of movement and the right to personal liberty

We are concerned by the comment in the ALRC's interim report (para 6.126) suggesting that any curtailment of the right to freedom of movement for non-citizens under the Migration Act is consistent with international law. This is not the case. The UN Human Rights Committee noted in [General Comment 15](#) (para 8) that once a non-citizen is lawfully within the territory of a State, they are entitled to enjoy freedom of movement without discrimination. In accordance with article 12(3) of the International Covenant on Civil and Political Rights (ICCPR), freedom of movement may only be restricted insofar as is necessary to protect national security, public order, public health or morals, or the rights and freedoms of others.

Further, article 26 of the 1951 Refugee Convention stipulates that: 'Each Contracting State shall accord to refugees lawfully in its territory the right to choose their place of residence to move freely within its territory, subject to any regulations applicable to aliens generally in the same circumstances.'

This requires Australia to ensure that recognized refugees have the right to move freely within Australia. Provisions in Commonwealth Law that authorize the detention of recognized refugees violate article 26 of the Refugee Convention. This is the case for the 'ASIO caseload', namely individuals who have been recognized by the Australian government as Convention refugees, but who are being indefinitely detained on account of adverse security clearances by ASIO. For more information, please see <http://www.kaldorcentre.unsw.edu.au/publication/refugees-adverse-security-assessment-asio>.

In international law, the right to freedom of movement (ICCPR, art 12) is spelt out separately from the right to personal liberty (ICCPR, art 9), but both rights derive from the same intellectual history.<sup>1</sup> The former is, in fact, an element of the latter, which applies to all persons within a State's territory or jurisdiction.<sup>2</sup> If liberty is constrained, then an individual's right to free movement is necessarily restricted as well.

The protection of individual liberty is a hallmark of the common law. As such, it is most peculiar that the ALRC inquiry has not addressed this right, most notably in relation to the writ of *habeas corpus* which allows a person who is detained to challenge the lawfulness of that detention.

Australia's policy of mandatory detention breaches article 9 of the ICCPR which protects the right to liberty and security of the person, and prohibits arbitrary detention (discussed in many of the original ALRC submissions referred to above). Such detention is arbitrary because individuals are automatically detained without an assessment of whether detention is reasonable, necessary or proportionate in all the circumstances. Further, individuals cannot challenge the legality of their detention, which is commonly protracted and possibly indefinite. For more information, please see <http://www.kaldorcentre.unsw.edu.au/publication/immigration-detention>.

The UN Human Rights Committee has frequently stated that Australia's policy of mandatory detention is unlawful as a matter of international law. Significantly, however, in 2013 the Committee also found that the detention of the 'ASIO caseload' constituted cruel, inhuman or

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<sup>1</sup> See Jane McAdam, 'An Intellectual History of Freedom of Movement in International Law: The Right to Leave as a Personal Liberty' (2011) 12 *Melbourne Journal of International Law* 27.

<sup>2</sup> 'Freedom of movement is a constituent element of personal liberty': UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, *The Right of Everyone to Leave Any Country, Including His Own, and to Return to His Country*, UN ESCOR, 40th sess, Agenda Item 15(e), UN Doc E/CN.4/SUB.2/1988/35 (20 June 1988) [30].

degrading treatment in violation of article 7 of the ICCPR. This was because of its arbitrary character, its protracted and/or indefinite duration, difficult living conditions, as well as the government's refusal to provide the detainees with information and proper procedural rights.

If we can provide further information, please do not hesitate to contact us:  
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Yours sincerely,

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