

## **Submission on the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Caseload) Bill 2014**

### **Submitted on behalf of the Blue Mountains Refugee Support Group**

#### **Contact:**

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This submission is in response to the invitation to make submissions on the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 referred on 25 September 2014 to the Senate Legal and Constitutional Affairs Legislation Committee for inquiry and report on 27 November 2014.

#### **Who we are**

The Blue Mountains Refugee Support Group (BMRSG) was established in 2001 as a project of Blue Mountains Family Support Service Inc. The aims of the BMRSG are to:

- provide financial support to asylum seekers and refugees in the community
- provide practical assistance to those released from detention
- provide support to asylum seekers in detention
- raise public awareness of refugee and asylum seeker issues.

The latest Annual Report of the BMRSG is available at <http://bmrsg.org.au/wp-content/uploads/2013/10/Annual-Report-2013.pdf>

#### **Purpose of the Bill**

As indicated on the Senate Committee website, the Bill amends the Maritime Powers Act 2013 to provide clarity and consistency in relation to powers to detain and move vessels and people; clarify the relationship between the Act and other laws; and provide for the minister to give directions about the exercise of maritime powers; Migration Act 1958 to: introduce temporary protection for those who engage Australia's non-refoulement obligations and who arrive in Australia illegally<sup>1</sup>; create

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<sup>1</sup> It is disappointing that the term "illegal" has been used in reference to the Migration Act 1958 as this Act currently refers to those who arrive by any means and seeking asylum as either "unauthorised maritime arrivals" or "unlawful".

the authority to make deeming regulations; create the Safe Haven Enterprise Visa class; introduce a fast track assessment process and remove access to the Refugee Review Tribunal (RRT); establish the Immigration Assessment Authority within the RRT to consider fast track reviewable decisions; clarify the availability of removal powers independent of assessments of Australia's non-refoulement obligations; codify Australia's interpretation of its protection obligations under the Refugees Convention; clarify the legal status of children of unauthorised maritime arrivals and transitory persons; and enable the minister to place a statutory limit on the number of protection visas granted; and Maritime Powers Act 2013, Migration Act 1958, Administrative Decisions (Judicial Review) Act 1997, Immigration (Guardianship of Children) Act 1946 and Migration Regulations 1994 to make consequential amendments.

The Blue Mountains Refugee Support Group welcomes the invitation to make a submission to the Senate Committee concerning the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014. We offer the following brief comments.

**1. Removal of references to the UN Refugee Convention**

If this bill were passed, references to the UN Convention on the Status of Refugees would be removed from the Migration Act and replaced with an Australian interpretation of international law which would be subject to the whim and political expedience of the government of the day. We believe it is essential to retain references to the Refugee Convention in order to preserve a direct link between Australian law and policy and international law.

**2. Recourse to High Court challenge**

The bill would effectively remove the ability of the High Court to challenge refugee policy and operations. The High Court performs an essential and limited function in upholding human rights especially where these are subject to erosion by the government of the day.

**3. Exemption of Australian boats from maritime laws**

The bill would exempt Customs, Navy and Border Force boats from Australian maritime laws. This would have the effect of allowing actions such as removing safety devices, food, water and fuel from asylum-seeking boats. Such actions are in direct contrast to Australia's international humanitarian obligations and the just and compassionate face we seek to present to the international community.

**4. Freedom to send asylum seeker boats anywhere**

The bill would allow the government to send boats or individuals anywhere it chooses. The bill removes the need for Australia to have a Memorandum of Understanding in place with countries in the region, or for the country to be a

signatory to the Refugee Convention. It would also allow boats to be towed to a “place” that is not another country, and would allow boats to be towed beyond Australian waters and left there without regard for safety and wellbeing of those on board. These are not actions that can be countenanced by a civilized society and the relevant provisions should be struck from the bill. International law provides clear guidelines for the proper administration of justice with respect to the rights of asylum seekers who seek to come to Australia by boat.

#### **5. Safe Haven Enterprise Visa (SHEV)**

The provisions within the Regulations of the Bill means that SHEV’s do not apply to the legacy caseload as anyone who have already applied for a protection visa will be converted to an application for a TPV. In addition, no valid application for a SHEV can be made until the Executive make a regulation setting out the criteria for a SHEV and there is no deadline within the Act for establishing the criteria and regulation. This means that the SHEV many never be regulated.

#### **6. Fast track assessment process**

The bill would establish a fast track assessment process which removes access to the Refugee Review Tribunal and provides very limited review processes. Fast turnaround processing was ruled illegal in the United Kingdom in July 2014 as it carried an “unacceptable risk of unfairness.” It should be ruled illegal in Australia for the same reason. Further, the definition of “fast track applicants” is inherently discriminatory and the exclusion of such applicants bypasses primary assessment and effectively abrogates natural justice for those affected.

#### **7. Children born in Australia to asylum seekers**

The bill would classify children born in Australia to asylum seekers who arrive by boat as “transitory persons,” denying them access to permanent residency or citizenship. It is morally repugnant for the Australian Parliament to create such a new and punitive class of persons on the grounds of border protection. Further, such a classification would create inconsistency with respect to Australia’s international obligations toward children.

#### **8. Definition of “refugee”**

The bill would change the definition of “refugee” to allow the government to deny a claim for refugee status if it decides that there is a “safe area” in the country of origin, or that the nation’s police force is “reasonably effective.” There are serious questions regarding how such terms as “safe areas” and “reasonably effective” are defined. Situations in countries from which asylum seekers flee change rapidly; extremists who would persecute asylum seekers often have the capacity to move freely and quickly from one area to another in order to carry out intimidation and human rights violations. The existing definition of “refugee”

should be retained and decisions to send asylum seekers and refugees back into harm's way should not be taken.

#### **9. Abrogation of non-refoulement obligations**

The bill would allow the Australian government to return or remove people regardless of non-refoulement obligations under the Refugee Convention, the International Covenant on Civil and Political Rights and the Convention against Torture. This would represent a significant abrogation of Australia's international obligations to offer protection to refugees.

#### **10. Indefinite statelessness**

The bill would keep asylum seekers who are currently living in Australia in indefinite statelessness and uncertainty, unable to reunite with their families or move on with their lives. This would only compound the pain and suffering already experienced by such persons. No one should be subject to indefinite statelessness and the tragedies and trauma that attends such status. Stateless persons should be given priority compassionate treatment on humanitarian grounds for their security and wellbeing.

#### **11. More than legacy case load**

The title of the bill is misleading as its provisions manifestly go much further than addressing the "legacy case load" of applications for asylum. The bill is a Trojan horse packed with detailed reforms to existing law and policy and as such seeks to undo a great deal of good humanitarian work and deny the human rights of asylum seekers.

## Conclusion

This is a pernicious and morally offensive bill which, if enacted, would substantially set back Australia's already tarnished human rights reputation among the international community for nothing more than short term political gain. It is extremely concerning that that this Bill has been specifically written, as referred to in the Explanatory Memorandum circulated by authority of the Minister for Immigration and Border Protection, to:

- provide that the rules of natural justice do not apply to a range of powers in the Maritime Powers Act, including the powers to authorise the exercise of maritime powers, the new Ministerial powers and the exercise of powers to hold and move vessels and persons;
- ensure that the exercise of a range of powers cannot be invalidated because a court considers there has been a failure to consider, properly consider, or comply with Australia's international obligations, or the international obligations or domestic law of any other country;

We find it extraordinary that Australia, the land of "the fair go" would consider legislation where the right to "natural justice" and our international obligations are specifically written out. Not only that, decisions made cannot be challenged even if there has been a failure to consider, properly consider, or comply with Australia's international obligations, or the international obligations or domestic law of any other country and specifically removes the oversight of the Australian legal system. When transparency and the normal checks and balances within a democracy are removed, that country is on the slippery path to a dictatorship.

We recognise there are problems with the processing of the legacy case load but respectfully suggest that the solution lies in the Department of Immigration and Border Protection expediting and efficiently processing all of asylum claims rather than the extraordinary punitive measures contained in this bill.

The Blue Mountains Refugee Support Group recommends that the bill not be passed.