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HIV/AIDS Legal Centre Incorporated (NSW) ABN 39 045 530 926

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Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

by email to: legcon.sen@aph.gov.au

Dear Sir/Madam

The Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014

Please find attached the submission of the HIV/AIDS Legal Centre on the above Bill.

If you have any questions in relation to this letter, please do not hesitate to contact us.

Yours sincerely,

Melissa Woodroffe
Solicitor

414 Elizabeth Street Surry Hills
PO Box 350 Darlinghurst NSW 1300
email: halc@halc.org.au
www.halc.org.au

Tel: (02) 9206 2060
Fax: (02) 9206 2053
Freecall: 1800 063 060

SUBMISSION BY THE HIV/AIDS LEGAL CENTRE (NSW) INC.

The HIV/AIDS Legal Centre (HALC) is a specialist community legal centre that provides free legal representation and advice to people with HIV-related legal matters. The Centre was established in 1992. Approximately 30% of our casework is migration, including assisting asylum seekers to apply for permanent protection on the basis of their membership of the social group of 'people living with HIV/AIDS' and/or those who face persecution on the basis of their sexuality.

HALC opposes the proposed changes and endorses the submission made by the Bar Association of New South Wales. Where a particular section of the Bill is not specifically mentioned, this does indicate that we support that section. We make the following specific submission in relation to the Bill.

Schedules 2 and 3

These schedules allow for the reintroduction of Temporary Protection Visas (TPVs), and a new visa, the Safe Haven Enterprise Visa (SHEV). Neither visa offers a pathway to a permanent visa. Granting temporary protection leaves people in a state of fear and limbo as they await their next application for a further temporary visa. Our clients will generally be claiming protection on the basis of persecution due to their HIV status, and/or their sexuality. HIV remains a lifelong condition and the stigma, fear and discrimination towards people with HIV in many countries is unlikely to change or improve significantly any time soon. Similarly, the persecution of homosexuals in many countries (for example, Iran, Bangladesh, Lebanon, Tonga, India) is unlikely to be ameliorated in our lifetime. We submit that issuing temporary visas does not provide any form of long term security or sustainable options for refugees, and will generate a vast amount of additional processing requirements for the Department.

Schedule 4

This schedule sets out a fast track process for certain asylum seekers who arrived irregularly on or after 13 August 2012. Such applicants will not be entitled to review by the Refugee Review Tribunal, rather, any review process will be undertaken by a new statutory body, the Immigration Assessment Authority (IAA). The IAA will review a decision without a hearing, and without consideration of any new evidence other than in exceptional circumstances. There will be no automatic right of review by the IAA, as fast track applicants will be referred to the IAA by the Minister.

This effectively removes procedural fairness in relation to the review process for a particular group of asylum seekers. Whilst we support the timely processing of applications, we are concerned that the objective of the IAA fast track process is to be 'efficient and quick' rather than the current RRT process which is required to be fair and just. Fairness should not be sacrificed in favour of speed.

In summary, we do not support the introduction of a separate review process via the IAA, whereby applicants have reduced access to natural justice. This proposed system has the potential to increase the risk of *refoulement* of genuine refugees due to an inadequate review process focussed more on speed than fairness.

Schedule 5 Part 1

As a signatory to the Refugees Convention, Australia is bound by the *non-refoulement* obligation to not return asylum seekers to a country where their life or freedom would be at risk. The new section 197C allows for Australia to depart from the obligations under the Refugees Convention, Convention against Torture and the ICCPR.
A person can be removed as an unlawful non-citizen under s198 of the Act, even if such removal would result in a breach of Australia's *non-refoulement* obligations under the Convention.

This proposed amendment also authorises removal even if the *non-refoulement* obligations have not been considered. Such authorisation of breaches of International obligations are of particular concern, given that the asylum seeker cannot challenge their removal on the basis that there has been no assessment of protection obligations. It is our submission that this is an attempt to circumvent the Refugees Convention without explicitly admitting that Australia is withdrawing from its international obligations.

Schedule 5 Part 2

These sections narrow aspects of the Refugees Convention and will apply to all asylum seekers irrespective of their method of arrival in Australia. HALC does not support the narrowing of Australia's obligations under international law.

- Section 5J(c) ('the real chance of persecution relation to all areas of a receiving country') relates to possible relocation within a country. Existing requirements are that where a person has a well-founded fear of persecution that is localised to one area of a country, and it would be unreasonable for them to relocate to another area, they are found to be a refugee. The amendment requires that the asylum seeker demonstrate a real chance of persecution in <u>all</u> areas of the country. This is a substantial deviation from international law.
- Section 5J(3) ('reasonable steps to modify his or her behaviour') is in direct contradiction to the High Court decision in *s395/2002 v Minister for Immigration* [2003] HCA.

Schedule 6

Children born in Australia, to asylum seekers who arrived by irregular means will be deemed to be 'unauthorised maritime arrivals'. This contradicts Australia's international obligations towards children in the Convention on the Rights of the Child (especially at Article 22).

Schedule 7

This amendment allows for the Minister to cap the number of protection visas that may be granted in a financial year. According to the explanatory memorandum, this amendment deals with the decision in *Plaintiff S297/2013 v MIBP [2014] HCA 24.*

Here the High Court found that the power to cap visas in the Act did not apply to protection visas.

This amendment could result in many asylum seekers who have been found to be owed protection remaining in limbo for many months or even years waiting for a visa to be granted. This will have an even more detrimental impact upon those asylum seekers in detention awaiting visa grants, resulting in prolonged and extended periods of detention in breach of Australia's obligations in relation to arbitrary detention. In our experience, the stress of waiting for visa outcomes can severely affect client's mental and physical health, even when they are in the community on bridging visas.

Summary

HALC opposes the Bill in that is fails to deal with any "legacy caseload" in a fair or procedurally just manner. The proposal for reintroduction of temporary protection visas is inappropriate, unsustainable and cruel in providing no pathway to permanent residency for genuine refugees. The Bill goes beyond dealing with the current asylum seekers classed as unauthorised maritime arrivals, introducing changes to the Migration Act that will affect all applicants for protection visas.