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31 October 2014

Committee Secretary

Senate Legal and Constitutional Affairs Committee

PO Box 6100

Parliament House

Canberra ACT 2600

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Dear Secretary

Refugee and Immigration Legal Service: Submission on the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014

1 Introduction

1.1 We thank the Senate Legal and Constitutional Affairs Committee for this opportunity to provide a submission on the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (**'the Bill'**).

1.2 Our submission addresses the following issues that are most relevant to our expertise and experience:

- The enhanced screening process that is at the core of the proposed amendments to the Maritime Powers Act (*Schedule 1 to the Bill*);
- Temporary Protection Visas (*Schedule 2 to the Bill*);
- The Fast Track Assessment Process (*Schedule 4 to the Bill*);
- Changes to Australia's international law obligations in relation to the scope of the refugee definition (*Schedule 5 to the Bill*); and
- The removal of the right of babies born in Australia to unauthorised maritime arrivals and transitory persons to make a valid application for a visa (*Schedule 6 to the Bill*).

2 About RAILS

2.1 The Refugee and Immigration Legal Service Inc (RAILS) (www.rails.org.au) is an incorporated not for profit association governed by an independent management committee. RAILS began as the South Brisbane Community Legal Service in 1980. RAILS is the only free legal assistance service in Queensland for persons applying for protection.

2.2 Details of RAILS' current senior staff are at **Appendix 1**. The Principal Solicitor, Dr Angus Francis, is available to appear before the Committee in hearings in Canberra, Sydney or Brisbane.

2.3 RAILS expertise and experience relevant to this Inquiry is as follows:

Schedule 1 to the Bill

- RAILS has provided assistance, including urgent High Court applications, to many clients who have been subject to the 'screening out process' that is at the core of the Bill's proposed amendments to the Maritime Powers Act.

Schedule 2 to the Bill

- RAILS represented hundreds of refugees granted TPVs under the previous TPV regime, and has considerable experience of the legal, social, economic, and psychological effects of TPVs. RAILS currently represents clients who arrived by boat and underwent the process for applying for a permanent protection visa and who are likely to be denied permanent visas if the Bill proceeds.

Schedule 4 to the Bill

- RAILS operates the Unrepresented Asylum Seeker Project which provides pro bono, privately funded, legal assistance to unrepresented unauthorised maritime arrivals who are likely to be subject to the 'fast track procedure' proposed in the Bill.

Schedule 5 to the Bill

- RAILS has successfully provided assistance to thousands of protection visa applicants over the years and has considerable expertise on the definition of 'refugee' that is the subject of proposed amendments in the Bill.

Schedule 6 to the Bill

- With the assistance of Maurice Blackburn, RAILS represents 'baby Ferouz', the Rohingya baby born in Australia to parents brought from Nauru, and over 60

other babies in similar circumstances across Australia who are likely to be adversely affected by the passage of Schedule 6 to the Bill.

3 Schedule 1 amendments to the Maritime Powers Act

Australia's international obligations

3.1 The principle of *non-refoulement* is the cornerstone of international refugee protection and requires that a State not expel or return a refugee 'in any manner whatsoever' to the frontiers of territories where his or her life or freedom would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion.'[1] States are also obliged not to expel or return a person to a territory where they face a real risk of irreparable harm, such as a threat to the right to life or torture or other cruel, inhuman, or degrading treatment or punishment.[2]

3.2 The United Nations High Commissioner for Refugees (UNHCR) made clear in its application for leave to intervene as amicus curiae in the High Court case of *CPCF v Minister for Immigration and Border Protection* (***'CPCF'***), which triggered the Schedule 1 amendments, that Australia's *non-refoulement* obligations apply wherever it exercises jurisdiction in relation to a refugee or asylum seeker.[3]

3.3 The UNHCR's view, as expressed in *CPCF*, is that the power in the current section 72(4) of the *Maritime Powers Act* (to detain a person and take them to a place outside Australia) and any equivalent non-statutory power is constrained by Australia's *non-refoulement* obligations. According to the UNHCR, this would mean:

(a) these powers are not used to return a person to a country which, although not the country in relation to which the harm is feared, will not afford the

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[1] Art 33(1) of the *1951 Convention relating to the Status of Refugees*, UNTS No. 8791, Vol. 606, p 267.

[2] UN Human Rights Committee, General Comment No. 20: Art 7; UN doc. HRI/GEN/I/Rev.7, 10 Mar. 1992, para.9; UN Human Rights Committee, General Comment No. 31: Nature of the General Legal Obligation on States Parties to the Covenant, UN doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004, paras. 12-4; *ARJ v Australia* (Communication No. 692/1996, 11 Aug. 1997, UN doc. CCPR/C/60/D/692/1996), paras. 6.8-6.9.

[3] Submissions of the Office of the United Nations High Commissioner for Refugees, Seeking Leave to Intervene as Amicus Curiae, 16 September 2014, http://www.hcourt.gov.au/assets/cases/s169-2014/CPCF_UNHCR.pdf, p 5, 7-9. UNHCR intervenes, with the Court's permission, in light of its supervisory responsibility in respect of the 1951 Convention and its 1967 Protocol relating to the Status of Refugees (UNTS No. 8791, Vol. 606, p 267). Paragraph 8(a) of its Statute confers responsibility upon UNHCR to supervise the application of international conventions for the protection of refugees, whereas Article 35(1) of the 1951 Convention and Article II of the 1967 Protocol oblige States Parties to co-operate with UNHCR in the exercise of its functions, including the supervision of these instruments.

person claiming asylum effective protection against return to the place where he or she has a well-founded fear of persecution (so-called indirect *refoulement*);[4] and

(b) Australia must assess, prior to returning a person to another country, that the person is not at risk of those harms, including indirect return, covered by the *non-refoulement* obligations (duty of inquiry).[5]

3.4 Australia is obligated to take positive steps to adopt a fair and effective process for determining those in need of protection.[6] The following have been identified as core requirements for a fair and effective protection process: a right of review before an independent body, a right to legal representation and assistance, access to independent interpreters, a personal interview, an opportunity to present a case, and reasons for the decision.[7]

RAILS comments on the proposed amendments in Schedule 1

3.5 The Bill proposes to insert new sections 22A and 75A into the Maritime Powers Act, which will provide that an exercise of a power is not invalid because of a failure to consider, or correctly consider, Australia's international obligations or the international obligations or domestic law of any other country. The Bill's Explanatory Memorandum states in relation to the proposed s 22A that '[a]ppropriate measures are always taken to ensure that operational activities involving the exercise of maritime powers comply with Australia's international obligations. This amendment merely reflects the intention that the interpretation and application of such obligations is, in this context, a matter for the executive government.'

3.6 RAILS's concerns with how the new sections 22A and 75A are expressed are twofold. First, the amendments place on the face of critical national legislation that an exercise of power by an Australian government official cannot be questioned or challenged on the basis that it fails to comply with Australia's international obligations, which include the *non-refoulement* obligations. In our

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[4] Ibid p 15.
[5] Ibid p 15.
[6] UNHCR, Global Consultations on International Protection, 2nd meeting, 'Asylum Processes (Fair and Efficient Asylum Procedures', EC/GC/01/12, 31 May 2001, paras. 4-5; ExCom Conclusions No. 8 (XXVIII) – 1977, paras. (d) and (e), No. 28 (XXXIII) – 1982, para. (c), and No. 85 (XLIX – 1998), para. (r).
[7] UNHCR, Global Consultations on International Protection, 2nd meeting, 'Asylum Processes (Fair and Efficient Asylum Procedures', EC/GC/01/12, 31 May 2001, paras. 43, 50.

view, this sets a damaging precedent and tone for Australia's engagement with its protection obligations.

3.7 Second, the amendments purport to place sole responsibility for Australia's compliance with its international obligations not to *refoule* in the hands of the Executive government without any rule of law protections essential to the implementation of a fair and effective asylum process (as identified in para 3.4 above (no right of review, no access to independent legal advice, no reasons for the decision)).

3.8 RAILS draws the Committee's attention to the public statements of the Minister for Immigration where he relies on the fact that persons intercepted under the Maritime Powers Act provisions have access to an 'enhanced screening process.'[8] It has since become clear from the *CPCF* proceedings in the High Court that Australia made no inquiries or assessment as to the circumstances of the plaintiff's departure from Sri Lanka or from India, nor did Australia make an assessment whether India would afford the plaintiff protection from *refoulement* to Sri Lanka.[9]

3.9 This account of the 'enhanced screening out process', as applied in practice to the plaintiff in *CPCF*, accords with RAILS' experience. As noted above, RAILS has represented a number of clients who have been 'screened out', i.e. told by Department of Immigration officials that they are to be removed from Australia without an opportunity to apply formally for protection. In our experience, the screening out process is:

(a) non-statutory – there are no provisions under the *Migration Act 1958* (Cth) or *Migration Regulations 1994* (Cth) (or the Maritime Powers Act) that could be read as providing a legal basis for the screening out process;

(b) non-transparent – little or no reasons are given to clients explaining why they have been screened out, including what country of origin information was relied upon to reach this conclusion or what aspects of their claims were found to be not credible or otherwise not sufficient to engage Australia's protection obligations;

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[8] Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014, p 11.

[9] Submissions of the Office of the United Nations High Commissioner for Refugees, Seeking Leave to Intervene as Amicus Curiae, 16 September 2014, http://www.hcourt.gov.au/assets/cases/s169-2014/CPCF_UNHCR.pdf, p 18.

(c) uncertain and arbitrary – there is no evidence from the Freedom of Information materials that RAILS has assembled from the Department of Immigration that any clearly defined procedure or standards have been applied to determine clients' screening out, e.g. no formal interview process, no right to present written or oral submissions on why they should be entitled to apply for protection, no formal criteria applied to determine screening out, no natural justice to respond to adverse information;

(d) a barrier to effective legal representation – clients we have represented have often been detained in remote locations, e.g. Curtin IDC or Scherger IDC, without access to independent legal advice and assistance, and have only been able to access us through unofficial advocacy networks; and

(e) non-reviewable – there is no merits review to the Refugee Review Tribunal or other tribunal from an adverse screening out decision.

3.10 RAILS has taken screening out matters to the courts, arguing that the Government lacks power to remove a person who has been screened out. Not surprisingly, given the deficiencies identified above, the Department of Immigration has conceded and permitted the applicants to stay in Australia, awaiting the opportunity to make an application for a Protection Visa. However, for many screened out persons who cannot access legal advice, recourse to the courts is not an option.

3.11 Thus, in RAILS' view the Government's assurance that the powers in the Maritime Powers Act will be exercised in a way that comply with Australia's international obligations, do not go far enough to safeguard persons in need of Australia's protection.

4 Schedule 2 – re-introduction of Temporary Protection Visas

4.1 Temporary Protection Visas were introduced by the Howard Government in 1999, and were abolished by the Rudd Government in August 2008.

4.2 Between 2000 and 2008, over 1000 Temporary Protection Visa (TPV) clients were assisted by RAILS at the department, tribunal and judicial review levels. RAILS dealt with a huge demand from mainly Afghan and Iraqi TPV holders for legal representation. Staff could not cope with the legal needs of this traumtised group and volunteers were recruited and trained from pro-bono law firms.

4.3 Our experiences during this time were that many of the TPV holders were released after long periods in detention centres and were often depressed and traumatised. They were also often highly distressed for not being able to see their wives and children who were still back in their home country or in unsafe transit countries. The TPV regime prevented family reunion for years and stymied durable solutions for refugees whose only real option was permanent protection in Australia.

4.4 It is reasonable to conclude that if a person has been accepted as a refugee, then their family members, who may still be in-country, would also have a well founded fear of persecution. The longer that person is there the greater will be the risk and greater the chance of them suffering serious harm , or even death. This is particularly so if they are living in a dangerous area. Even if they are 'out of country', the likelihood is they will be in unstable and often unsafe situations. The risk of serious harm is greatly increased if the immediate family of the refugee are unable to come to Australia because a TPV rather than a PPV is granted.

4.5 Having to reapply for protection after three years re-traumatised clients. It also placed a huge demand on services such as RAILS. As stated in our Annual Report from 2004-2005, the TPV project involved a 'long five year road of interviews, statement taking, application form filling, submissions writing, receipt of initial DIMIA refusals and subsequent grant of protection visas, initial Refugee Review Tribunal (RRT) confirmation of DIMIA refusals and then subsequent setting aside of these refusal decisions, and judicial review of unfavourable RRT decisions ... We are now seeing where favourable decision after favourable decision is occurring for TPV holders who have waited 3, 4, 5 and 6 years to finally hear that they are welcomed as permanent residents of Australia.'

4.6 RAILS supports criticisms of the TPV regime made by other refugee groups, human rights organisations and mental health experts: TPVs provided inadequate settlement support, lead to the separation of immediate family members for many years, and forced TPV holders to live in a state of limbo for many years so that they were unable to rebuild their lives, leading to significant physical and mental health problems.[10] This trauma and suffering was unnecessary as around 95 per cent of the 9,043 boat arrivals granted TPVs between 1999 and 2007

eventually gained permanent visas.[11] There is also a significant economic and resource cost for health, welfare and employment services.

4.7 The Bill proposes that TPV holders will be barred from ever making a valid application for a permanent protection visa.[12] Not only are TPV holders unable to ever make application for permanent residence, they will have no access to family reunion, will be barred from re-entering Australia should they travel overseas to visit their family, and will be required to reapply for a TPV after three years. These measures are likely to exacerbate the problems encountered by the first cohort of TPV holders.

SHEVs

4.8 The introduction of the Safe Haven Enterprise Visa (SHEV),[13] which will be valid for 5 years and require persons to live in a designated region and be encouraged to fill job vacancies in regional areas, will not alleviate the mental health issues identified above due to the uncertainty of future for SHEV holders and also the same restrictions on family reunion and re-entry to Australia. Based on our experience working with refugees, we echo concerns that most SHEV holders will find it very difficult to meet the eligibility requirements of mainstream permanent skilled and employment visas (high application fees, English language skills, recognised skills required for skilled migrant visas).[14]

4.9 The Bill seeks to enable regulations to convert an application for one type of visa into an application for a different type of visa (item 20) and inserts new regulation 2.08F which provides that certain applications for permanent protection visas are taken to be applications for temporary protection visas (item 38). These amendments will retrospectively deprive many of our clients who applied for permanent protection visas of their entitlement to a permanent visa under the current law.

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[10] Parliamentary Library, Bills Digest, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014, 23 October 2014, p 14.
[11] Australian Government, *Report of the Expert Panel on Asylum Seekers,* August 2012, p. 91, accessed 2 October 2014.
[12] The Bill, Schedule 2, Item 31.
[13] The Bill, Schedule 2, Item 16.
[14] Parliamentary Library, Bills Digest, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014, 23 October 2014, p 15.

TPV regime should not apply retrospectively

4.10 While we are against TPVs generally, IF the TPV regime is to come in then we strongly submit that it should only apply to those that arrived AFTER the passage of the Bill. To apply TPV's retrospectively is cruel, and serves no other purpose than to punish people (assessed as refugees) who were innocently seeking protection. If the 'boats have stopped' almost permanently, it is most likely because of the tow back policies, and not the TPV regime. No good policy rationale exists for applying TPV's to this cohort of pre-Abbott government arrivals. The savings in not having to reassess over 20,000 onshore boat arrival applications after 3 years would also be enormous.

4.11 RAILS supports the opposition to the reintroduction of TPVs and calls on the Government to grant permanent protection visas to those who have applied for and assessed to be owed Australia's protection.

5 Schedule 4 to the Bill – fast track assessment process

'Manifestly unfounded claims'

5.1 The Bill proposes to insert a new Part 7AA into the Migration Act, which will implement a new fast track assessment process for unauthorised maritime arrivals who entered Australia on or after 13 August 2012. This process will exclude certain asylum seekers from merits review (item 1), including those who present unmeritorious claims. The Minister also has the power to enlarge the class of persons who will be excluded from merits review by way of a non-disallowable legislative instrument (item 2).

5.2 RAILS has concerns that the new fast track procedure applied to persons with 'manifestly unfounded' claims lacks the necessary protection safeguards. While UNHCR recognizes that accelerated asylum procedures may facilitate the examination of manifestly unfounded claims,[15] it has expressed growing concern that states have established accelerated asylum procedures based on an excessively wide interpretation of the concept of 'manifestly unfounded'.[16] These procedures are 'often insufficient to allow the applicant effectively to

[15] ExCom Conclusion 30 (1983).

[16] UN High Commissioner for Refugees (UNHCR), *Intervention orale du HCR devant la Cour européenne des droits de l'homme - Audience dans l'affaire I.M. c. France*, 17 May 2011, available at: http://www.refworld.org/docid/4dd2b7912.html [accessed 28 October 2014], p 2 (English translation).

demonstrate his or her international protection need and to benefit from a close and rigorous scrutiny of his or her claim within a fair and efficient procedure.'[17]

5.3 The Explanatory Memorandum to the Bill proposes a very wide definition of 'manifestly unfounded': 'this provision captures those fast track applicants who have put forward claims that are without any substance (such as having no fear of mistreatment), have no plausible basis (including where there is no objective evidence supporting the claimed mistreatment) or are based on a deliberate attempt to mislead or abuse Australia's asylum process in an attempt to avoid removal'. This overly broad definition can be compared to the UNHCR definition: 'those which are clearly fraudulent or not related to the criteria for the granting of refugee status laid down in the 1951 United Nations Convention relating to the Status of Refugees nor to any other criteria justifying the grant of asylum'.[18]

5.4 The Explanatory Memorandum also seeks to justify the removal of merits review rights to persons with 'manifestly unfounded' claims on the basis that this is 'consistent with the UNHCR's policy on accelerated procedures for manifestly unfounded applications for refugee status or asylum.' However, the UNHCR's true position is that due to the substantive character of a decision that an application for refugee status is manifestly unfounded, and the grave consequence of a wrong determination, it is imperative that the decision be accompanied by appropriate procedural safeguards, including a review of a negative decision.[19]

5.5 Given the fact that the majority of unauthorised maritime arrivals currently awaiting processing in Australia are from war zones or fragile and/or persecutory states, such as Iraq, Afghanistan, Sri Lanka, Iran and other refugee producing countries, RAILS would submit that the Committee give serious consideration to whether the proposed amendment removing review rights for manifestly unfounded claims should proceed in its current form.

Immigration Assessment Authority

5.6 For those able to access merits review, the Bill creates a new Immigration Assessment Authority (IAA). While hosted within the Refugee Review Tribunal, the IAA's practices depart in significant respects from those of the RRT: the IAA

[17] Ibid.
[18] ExCom Conclusion 30 (1983).
[19] Ibid.

will not hold oral hearings (unless there are exceptional circumstances); and the IAA will only use information that was available to the original decision-maker (proposed sections 473DB and 473DD). As stated in the Explanatory Memorandum, 'the purpose of this provision is to stipulate that the default function of the IAA is to conduct a limited form of review, referred to as an 'on the papers' review, by only considering the review material provided to the Authority by the Secretary of the Department, which is the material that is available to the primary decision-maker. The IAA is not required to accept or request new information or interview the referred applicant.'

5.7 Generally speaking, RAILS is concerned that the emphasis on 'front-loading' of asylum decision-making in the Bill, where applicants are presumed to be able to provide all the information going to their claims at the point of entry or first interview, is an unrealistic expectation of an often vulnerable client group. These are also clients who will not necessarily know the aspects of their personal history that may be most relevant to a claim for protection, e.g. a woman from Iran who suffers domestic violence may not know that this can substantiate a claim to protection if the Iranian authorities will not or cannot protect her. This unrealistic expectation or presumption in the Bill is made more so now that the Government has announced that boat arrivals will no longer receive government-funded legal assistance in the presentation of their claims for protection.

5.8 Furthermore, there will be times where the circumstances of the individual claimant or their home country changes during the assessment process. For example, a client from Iraq claiming protection may have been unsuccessful before the Department of Immigration three months ago, but by the time they reach the review stage ISIS has overrun their city. The current amendments deny that person the right to put that new information to the IAA, which could be fatal to their claim - and their life and the lives of their family if returned to Iraq. Leaving it to the discretion of the IAA on its own motion to make an exception to the consideration of new information in 'exceptional circumstances', is an unsatisfactory protection safeguard. An individual and his or her advisors should be entitled to put this information to the IAA.

5.9 RAILS considers that the introduction of the IAA adds unnecessary complexity to the review process and, most likely, will simply result in significant increases in litigation as the scope of the new provisions is debated in the courts.

6 Schedule 5 – changes to Australia's international law obligations

Removing references to the Refugee Convention

6.1 Schedule 5 to the Bill seeks to 'codify[] in the Migration Act Australia's interpretation of its protection obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol (EM page 2).'

6.2 If the objective of Schedule 5 is to enunciate Australia's obligations under the Refugee Convention, it is not entirely clear why the Bill proposes to 'remove most references to the Refugees Convention from the Migration Act (EM page 5).' It seems illogical to remove references to the very Convention that forms the basis for Australia's principal protection obligations in the Act.

6.3 On the other hand, if the intention of the Bill is for Australia to 'chart its own course' on the Refugee Convention, RAILS would submit that the Committee should resist this approach. It is well recognised that the provisions of the Refugee Convention have a 'true and autonomous' meaning.[20] The dangers of States 'going their own way' on the Convention was pointed out by Lord Steyn in a widely quoted and accepted outline of the basic principle of interpretation of the Refugee Convention:

> It follows that the enquiry must be into the meaning of the Refugee Convention approached as an international instrument created by the agreement of contracting states as opposed to regulatory regimes established by national institutions. It is necessary to determine the autonomous meaning of the relevant treaty provision. This principle is part of the very alphabet of customary international law ... Closer to the context of the Refugee Convention are human rights conventions where the principle requiring an autonomous interpretation of convention concepts ensures that its guarantees are not undermined by unilateral state actions ... It follows that, as in the case of other multilateral treaties, the Refugee Convention must be given an independent meaning derivable from the sources mentioned in articles 31 and 32 and without taking colour from distinctive features of the legal system of any individual contracting state. In principle therefore there can only be one true interpretation of a treaty.[21]

6.4 Adopting a purposefully 'Australian' interpretation of the Convention (as to one that seeks to represent clearly and ambiguously in national legislation the scope

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[20] *R v. Secretary of State for the Home Department; Ex parte Adan* [2001] 2 AC 477, 517 (per Lord Steyn).
[21] Ibid.

of protection obligations in the Refugee Convention), risks fragmentation, inconsistency and divergence in the international approach to the Convention – something that 'would clearly undermine the principled goal of ensuring a single, universal standard for access to refugee protection.'[22] It would also undermine efforts by Australia and the UNHCR to promote the Convention throughout the region as a means of protection and equitable burden-sharing.[23]

Proposed 5J(2)(a) 'not have a well-founded fear of persecution if either or both of the following are available to the person in a receiving country: (a) an appropriate criminal law, a reasonably effective police force and an impartial judicial system provided by the relevant State'

6.5 Assessing whether a person has effective state protection from persecution in their home country is a complex task. Section 5J(2)(a) lists only some of the factors that could be taken into account in assessing whether a person has state protection. For example, RAILS has many female clients who flee their home countries because they have experienced severe domestic violence. When assessing whether a woman in such circumstances could access state protection, the decision-maker should consider a range of factors, including: effective domestic violence provisions in state laws, which may or may not have an 'appropriate criminal law'; the effectiveness of police, who may or may not otherwise be 'effective', in investigating and prosecuting alleged perpetrators of domestic violence; and the effectiveness, not just the 'impartiality', of local and regional courts, e.g. do the men simply ignore court rulings with no consequences? A blanket provision such as that proposed in s 5J(2)(a) simply does not do justice to the complexity of the decision-making task when assessing state protection.

6.6 The words 'are available to the person', in s 5J(2)(a), are ambiguous. Using the above example, do they mean that the police must investigate and prosecute the alleged perpetrator of domestic violence? Or do they simply mean that there exists, as a matter of fact, a generally 'effective' police force in the relevant State? If the latter, this would imply a much lower level of individualized protection for persons fleeing persecution – something that would be contrary to the

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[22] J Hathaway and M Foster, *The Law of Refugee Status* (2nd ed., 2014, CUP), p 3-4.
[23] A Francis and R Maguire, *Protection of Refugees and Displaced Persons in the Asia Pacific Region* (2013, Ashgate).

individualized assessment of protection that is at the heart of the protection afforded by the Refugee Convention.

7 Schedule 6 – children born in Australia to unauthorised maritime arrivals and transitory persons

7.1 Schedule 6 is intended to ensure that children born in Australia to unauthorised maritime arrivals and transitory persons are unable to make a valid application for a visa.

7.2 As noted above, RAILS represents 'baby Ferouz', who is the subject of well publicised court proceedings, and around 60 other babies, in their applications for permanent protection visas to remain in Australia (and citizenship in some cases).

7.3 We note that Maurice Blackburn, which is representing baby Ferouz and the other babies in the current or potential court proceedings, has made a submission to this Inquiry which specifically addresses the effects of Schedule 6 on this cohort. We endorse this submission.

7.4 We only add that the Government's current interpretation of the Migration Act, as argued before the Federal Circuit Court, would result in the absurd situation that children born to unlawful non-citizens who arrived by plane (e.g. visa over-stayers) would be required as a matter of law to be removed to a regional processing country, thus separating them from their parent/s.[24]

8 Conclusion

8.1 RAILS thank the Committee for this opportunity to provide submissions.

Raquel Aldunate (Director) Angus Francis (Principal Solicitor)

Refugee and Immigration Legal Service Inc

31 October 2014

[24] *Migration Act* s 198AD; *Plaintiff B9/2014 v Minister for Immigration* [2014] FCCA 2348, para 59.

Appendix 1 – Brief profiles of RAILS Senior Staff

Raquel Aldunate, Director	Raquel has been Director at RAILS since 2009. She holds a Bachelor of Social Work from the University of Queensland and is a Registered Migration Agent. Previously, she was the Co-ordinator at the Immigrant Women's Support Service, a Social Worker at Legal Aid QLD in the Women's Legal Aid Unit, Manager, Violence Prevention Team in the Department of Communities, and Community Development/Migration Agent at the South Brisbane Community and Immigration Legal Service (now RAILS). She has served in State and National Advisory Committees where issues for migrants and refugees have been a focus.
Angus Francis, Principal Solicitor	Angus did his legal training at Mallesons Stephen Jaques (now King & Wood Mallesons). He has worked as a solicitor/migration agent for various immigration and refugee services including RAILS, RACS, IARC, RCOA and WA Legal Aid. He has represented protection clients across the country, both in detention and in the community. He lectured in immigration and refugee law at Griffith Law School and Queensland University of Technology where he was a Senior Lecturer and Adjunct Associate Professor. He completed his Doctor of Philosophy in refugee law at the Australian National University in 2008. He was a Visiting Fellow of the Refugee Studies Centre, Oxford University, in 1996-97 and 2003. He has published widely on refugee law and is the author of *Protection of Refugees and Displaced Persons in the Asia Pacific Region* (Ashgate: 2013) and *Norms of Protection* (UNU Press: 2012). He represented the Law Council of Australia on the Nauru-Manus NGO Roundtable and, most recently, at the UNHCR Annual NGO Consultations in Geneva in June 2014.
Robert Lachowicz, Education Co-ordinator, Cross-cultural Trainer	Rob has around thirty years experience as a solicitor/migration agent and cross-cultural trainer and educator working with refugees and refugee communities in Australia and overseas. He was Principal Solicitor and Director of RAILS over a number of years. He has co-ordinated, created and presented a wide range of professional and community education programs on migration, refugee and cross-cultural law to judges, lawyers, migration agents, community workers, law students, refugee communities, school students, and volunteers.