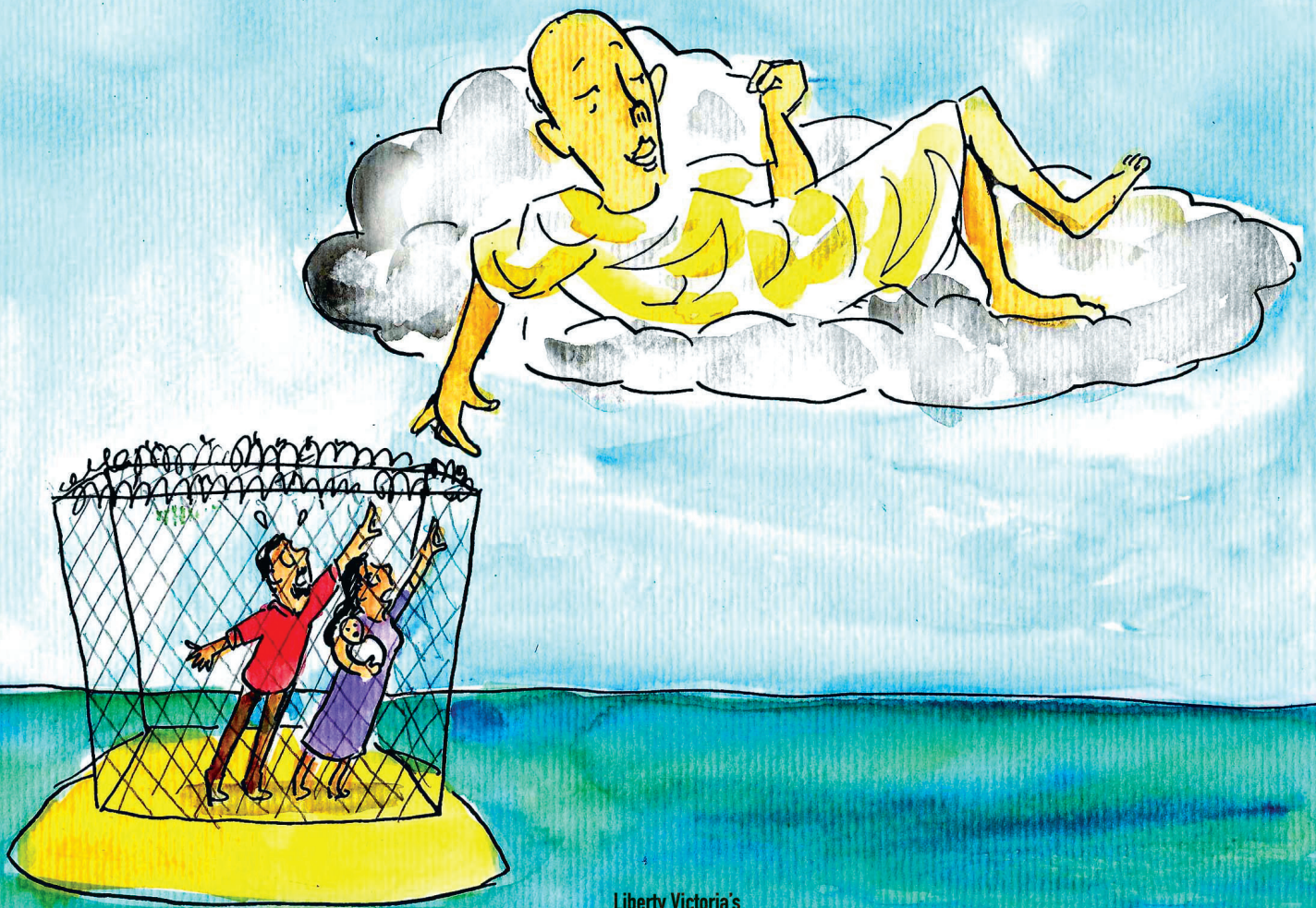


PLAYING GOD

The Immigration Minister's Unrestrained Power



Liberty Victoria's
**RIGHTS
ADVOCACY
PROJECT**

Katouskas

About the Report

This report was written by Lauren Bull, Elizabeth Colliver, Emily Fischer, Shawn Rajanayagam and Edmund Simpson as members of Liberty Victoria's Rights Advocacy Project ('RAP'). RAP is a community of lawyers and activists working to advance human rights in Australia. RAP works across a range of issues including equality, government accountability, refugee and asylum seeker rights and criminal justice reform.

The authors wish to thank their supervisors, Matthew Albert and Daniel Webb, and Lexi Lachal, for their unwavering generosity, encouragement and guidance over the last 12 months. They also thank their fellow members of RAP. Finally, the authors are very grateful to Fiona Katauskas for providing the cartoon that appears on the cover, and to Pooja Desai for the design of the report.

About Liberty Victoria

Liberty Victoria is one of Australia's leading civil liberties organisations. It has been working to defend and extend human rights and freedoms in Victoria for over 70 years. The aims of Liberty Victoria are to:

- help foster a society based on the democratic participation of all its members and the principles of justice, openness, the right to dissent and respect for diversity;
- secure the equal rights of everyone and oppose any abuse or excessive power by the state against its people;
- influence public debate and government policy on a range of human rights issues. Liberty Victoria has policy statements on issues such as access to justice, a charter of rights and freedom of speech and privacy; and
- prepare submissions to government, support court cases defending infringements of civil liberties, issue media releases and hold events.

About Rights Advocacy Project

Formerly known as Young Liberty for Law Reform, Rights Advocacy Project is a community of lawyers and activists working to advance human rights in Australia. We're part of Liberty Victoria, one of Australia's leading human rights organisations.

We work across a range of issues including equality, government accountability, refugee and asylum seeker rights and criminal justice reform.

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Abbreviations

AAT	Administrative Appeals Tribunal
ASIO Act	<i>Australian Security Intelligence Organisation Act 1979 (Cth)</i>
Asylum Legacy Caseload Act	<i>Migration Amendment (Resolving the Asylum Legacy Caseload) Act 2014 (Cth)</i>
Convention against Torture	<i>Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment</i> , opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987)
DFT	Detained Fast Track
IAA	Immigration Assessment Authority
Immigration Act	<i>Immigration Act 1940 (Cth)</i>
Maritime Powers Act	<i>Maritime Powers Act 2013 (Cth)</i>
Migration Act	<i>Migration Act 1958 (Cth)</i>
Minister	Minister for Immigration and Border Protection
MRT	Migration Review Tribunal
Refugee Convention	<i>Convention relating to the Status of Refugees</i> , opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954) and <i>Protocol relating to the Status of Refugees</i> , opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967)
RPC	Regional processing centre
RRT	Refugee Review Tribunal
UK	United Kingdom

Foreword

It is a privilege to support this work of young Australians who care about our cherished values. This work outlines the extraordinary power currently given to the Minister for Immigration. As one who held the portfolio from 1979–82, when the Fraser Government and Labor opposition welcomed thousands of Vietnamese, Cambodians and others fleeing tyranny, I am disgusted by the power accorded to current ministers regarding the lives of people fleeing persecution.

As this report reveals, ministers now exercise power that is mostly beyond the review of judges. Such power should be exercised humanely and in accordance with morality, not absolute law. Yet, this report reveals that this is no longer the case. The sheer breadth of the Minister's discretionary power ensures that unfair decisions will be made in haste and rarely subject to objective review. The law and its practice is now unjust. It is un-Australian.

Fraser Government policies and law were strongly supported by Labor in opposition and in the subsequent government after 1983. From the Howard Government onwards, however, the law has changed and justice has disappeared. This report reveals that. I congratulate its authors and hope that it stimulates public debate on this issue vital to justice, humanity and Australia's sense of a fair go.

Ian Macphee AO

Minister for Immigration and Ethnic Affairs (1979–82)

Executive Summary

In a general sense I have formed the view that I have too much power. The [Migration Act] is unlike any Act I have seen in terms of the power given to the Minister to make decisions about individual cases. I am uncomfortable with that not just because of a concern about playing God but also because of the lack of transparency and accountability for those ministerial decisions, the lack in some cases of any appeal rights against those decisions and the fact that what I thought was to be a power that was to be used in rare cases has become very much the norm.¹

These words, spoken by former Minister for Immigration and Citizenship Chris Evans, foreshadowed the explosion of personal ministerial power in one of the most contentious and life-altering portfolios in government.

The personal powers of the Minister are broad and substantial. This report refers to them as 'problematic ministerial powers' or 'the God powers'. They merit this description because of the significance of the Minister's decision to people's lives coupled with the limited review options, if any, with respect to these decisions.

In Australia, we can appeal all manner of decisions in a range of different contexts. Football players can appeal suspensions. People can challenge parking fines. Decisions made by Centrelink are contested and reconsidered every day. People bring appeals against government decisions all the way to the High Court of Australia to make sure they are getting a fair go.

Yet for many refugees and people seeking asylum in Australia, for whom the fight is not about money but can be about life and death, there is no way of challenging decisions against them. Whether they are barred for years from applying for a visa, in immigration detention and unexpectedly moved in the middle of the night to an offshore detention centre, or aboard a boat headed to our shores which is turned around at sea by the Australian navy, these people do not have the same rights or legal second chances as the rest of us.

The God powers are mostly non-compellable (meaning the decision-maker cannot be required by a court to exercise them) and not subject to the rules of natural justice. Often, the Minister must exercise these powers personally, not through a delegate. Many of these decisions, made by one authorised person, are not amenable to any review. The same checks and balances don't exist to ensure decisions affecting them are fair and reasonable and increasingly they are being denied access to processes to correct mistakes.

The dilemma for the Australian public is this: we do not know what our government is doing in our name. People's rights and interests are being harmed and inadequate, unfair decision-making processes that lead to that harm are being kept secret.

This report examines these expanding powers found within three key pieces of Australian legislation that affect people seeking asylum: the Migration Act, the ASIO Act and the Maritime Powers Act. The passage of the Maritime Powers Act in 2013 and numerous recent amendments to the Migration Act, most notably the introduction of the IAA, show that the use of these powers is expanding at a disturbing pace. The Minister is playing God more and more of the time.

Who, other than the Minister, is comfortable with this?

¹ Evidence to Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, Canberra, 19 February 2008, 31 (Chris Evans, Minister for Immigration and Citizenship).

A Brief History of the God Powers

Almost 30 years ago, then Minister for Immigration Robert Ray sought to remove all ministerial discretion from the Migration Act:

*The wide discretionary powers conferred by the Migration Act have long been a source of public criticism. Decision-making guidelines are perceived to be obscure, arbitrarily changed and applied, and subject to day-to-day political intervention in individual cases.*²

However, Parliament decided that ministerial discretion should be codified in order to provide for matters that did not fit strict statutory visa criteria but were considered deserving of humanitarian assistance in ‘extenuating or exceptional circumstances’.³ Indeed, Senator Ray considered that the notion of the ‘public interest’ extended to circumstances requiring compassion and a humane response.⁴ Importantly, the amendments to the Migration Act that were passed during Senator Ray’s term as Minister, as well as codifying ministerial discretion, established tribunals to review decisions of the Department of Immigration and promoted transparency in departmental decision-making.⁵ Ministerial discretion was only intended to be a stop gap.

‘Public interest’ and the cognate notion of ‘national interest’ appear regularly through the legislation examined in this report. Their meaning is discussed in greater detail in the next section of this report. Briefly, however, decisions to be made ‘in the public interest’ have been considered by courts to be a matter for politicians. In 1987, the High Court of Australia found that ‘a Minister or a Cabinet may determine general policy or the interests of the general public free of procedural constraints’.⁶ Courts and politicians alike have consistently affirmed this since.⁷ In *Re Patterson; Ex parte Taylor*, the High Court held that ‘national interest’ cannot be given a confined meaning and is largely a political question.⁸ In *Madafferi v Minister for Immigration and Multicultural Affairs*, it was held that the question of national interest was ‘an evaluative one entrusted by the legislature to the Minister to determine according to his satisfaction’ and did not require any kind of public emergency.⁹ And in *Maurangi v Bowen*, the broad scope of the ‘national interest’ was reaffirmed as being entirely at the discretion of the Minister.¹⁰

Unsurprisingly, given his statement in Parliament, Robert Ray refused to exercise his ministerial discretion at any time during his term as Minister for Immigration from 1988 to 1990. By 2002–03, then Minister Philip Ruddock exercised his personal power in 483 cases, and likely considered many more.¹¹

This gave rise to sufficient concern in Parliament that a parliamentary inquiry was conducted into ministerial discretion in migration matters.¹² The Senate select committee tabled its findings in 2004. It recommended that ministerial discretion remain a part of Australia’s migration provisions, as ‘the ultimate safety net’ only; ‘a last resort to deal with cases that are truly exceptional or unforeseeable’.¹³ Where a series of interventions in similar cases were to occur, the inquiry recommended that this be impetus for law reform to address the issue, rather than allowing the Minister to ‘micro-manag[e]’ the immigration system.¹⁴

2 Senate Select Committee on Ministerial Discretion in Migration Matters, Parliament of Australia, *Inquiry into Ministerial Discretion in Migration Matters* (2004) 16 [2.5].

3 Ibid 18 [2.13].

4 Ibid 46 [4.5]. This is supported by humanitarian organisations such as Amnesty International, which stated: ‘The Ministerial Discretion under s 417 of the [Migration] Act is an essential part of the current system, as it is the only opportunity for those with a well-founded fear of returning to their country (though not for reasons as set out in the 1951 Convention ...) to be granted protection’: ibid 151 [9.12].

5 Ibid 17–18 [2.9]–[2.10], 18 [2.12]. The amendments were enacted by the *Migration Legislation Amendment Act (No 2) 1989* (Cth).

6 *South Australia v O’Shea* (1987) 163 CLR 378, 411 (Brennan J) (‘O’Shea’).

7 See also the second reading speech for the Migration Legislation Amendment Bill (No 1) 1998 (Cth): Commonwealth, *Parliamentary Debates*, House of Representatives, 2 December 1998, 1132 (Phillip Ruddock).

8 (2001) 207 CLR 391.

9 (2002) 118 FCR 326, 353 [89] (French, O’Loughlin and Whitlam JJ).

10 (2012) 200 FCR 191, 202 [65], 203 [69] (Lander J).

11 Senate Select Committee on Ministerial Discretion in Migration Matters, Parliament of Australia, *Inquiry into Ministerial Discretion in Migration Matters* (2004) 28–9, 149 [9.3].

12 Ibid.

13 Ibid xxv (Recommendation 20).

14 Ibid xvii.

Ultimately, the committee concluded that it had a significant concern

*that vesting a non-delegable, non-reviewable and non-compellable discretion with the immigration minister without an adequate accountability mechanism creates both the possibility and perception of corruption.*¹⁵

The committee strongly recommended the establishment of an independent committee to counter this and to review cases referred for ministerial intervention and the exercise of ministerial discretion.¹⁶ Further, it was recommended that the Department of Immigration and the MRT and RRT audit their referrals to the Minister each year, and make these statistics publicly available to achieve greater transparency.¹⁷

No such scrutiny body has been established.

By the time of the 2008 scandal in which former Minister Amanda Vanstone was accused of abusing her ministerial power when she personally revoked a deportation order for an alleged 'crime figure', Mr Francesco Madafferi,¹⁸ personal and unilateral ministerial power was well and truly entrenched in the Australian immigration system.¹⁹ Ms Vanstone was alleged to have halted Mr Madafferi's deportation after numerous Liberal Party MPs implored her to do so, reportedly due to his family's significant political donations.²⁰ While Ms Vanstone maintained that she had revoked the deportation for 'humanitarian reasons' based on an AAT ruling,²¹ this incident clearly highlighted how a lack of transparency and accountability in decision-making could lead to abuses of power, or the making of decisions for improper purposes.

In December 2016, the Commonwealth Ombudsman released a report examining ministerial discretion and power in the context of people who have had their bridging visa cancelled due to criminal charges (even if the charges were eventually proven to be unfounded) or convictions, and who are detained in immigration detention.²² The report recommended that the Department of Immigration and Border Protection's role be greater in particular decisions. In particular, it should actively seek the exercise of the Minister's personal discretion in matters where an AAT decision to revoke a visa cancellation has been made but the individual is in immigration detention due to not holding a valid visa²³ and should create a framework to identify and refer cases requiring ministerial intervention to the Minister's office in a timely manner.²⁴

These narrow recommendations echo those of the 2004 inquiry, with both identifying the need to strengthen frameworks around personal ministerial powers and increase transparency and accountability in the referral and decision-making processes.

Despite continuing agitation, this report shows that ministerial discretions in the Migration Act have continued to expand and the independent, non-reviewable power of the Minister has only grown.

In comparison to the rest of the front bench, the Minister for Immigration and Border Protection is responsible for the administration of a small number of Acts. However, the Minister for Immigration and Border Protection is granted the most personal discretion of any Minister by an overwhelming margin. More legislative provisions confer 'public interest' or 'national interest' discretions on him than on any other Minister.

15 Ibid xix.

16 Ibid xxv (Recommendation 21).

17 Ibid xxi–xxii (Recommendations 1–5).

18 Nick McKenzie and Richard Baker, 'Vanstone Quizzed in "Mafia" case', *The Sydney Morning Herald* (online), 10 November 2009 <<http://www.smh.com.au/national/vanstone-quizzed-in-mafia-case-20091109-i5d1.html>>.

19 In an interesting and, in the context, ironic, turn of events, in 2015 Ms Vanstone publicly denounced plans by the Turnbull government to allow the Minister to personally revoke the Australian citizenship of dual citizens in cases in certain circumstances: see Rosie Lewis, 'Amanda Vanstone Slams Terror Citizenship Law Process', *The Australian* (online), 8 June 2015 <<http://www.theaustralian.com.au/national-affairs/amanda-vanstone-slams-terror-citizenship-laws-as-lazy-sneaky/news-story/d8d9223e296a5b7984d2b14c2d14fe00>>.

20 Nick McKenzie and Richard Baker, 'Visa Ruling Came after Donation', *The Sydney Morning Herald* (online), 20 September 2008 <<http://www.smh.com.au/news/national/visa-ruling-row/2008/09/19/1221331218636.html>>.

21 Nick McKenzie and Richard Baker, 'Mafia Figure's Visa "in Interests of Humane Society": Vanstone', *The Sydney Morning Herald* (online), 23 September 2008 <<http://www.smh.com.au/national/mafia-figures-visa-in-interests-of-humane-society-vanstone-20080922-4lsk.html>>.

22 Commonwealth Ombudsman, *Department of Immigration and Border Protection: The Administration of People Who Have Had Their Bridging Visa Cancelled Due to Criminal Charges or Convictions and Are Held in Immigration Detention* (2016).

23 Ibid 2 (Recommendation 4).

24 Ibid 2 (Recommendation 5).

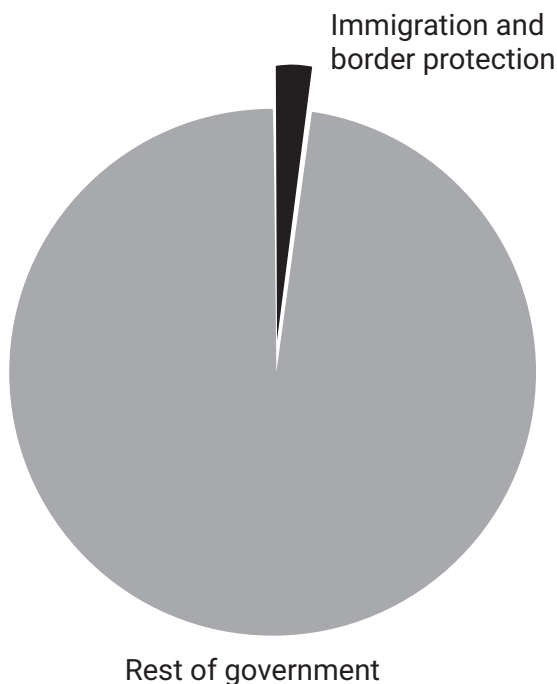
Compare the position of Minister for Defence, who is responsible for 21 Acts – just one more than the Minister for Immigration and Border Protection. The Minister for Defence, however, has ‘national interest’ or ‘public interest’ powers in just two legislative provisions. Only three provisions grant such personal discretion to the Prime Minister.

In this sense, the Minister is in a class of his or her own. He or she has a power over individual lives, relatively unchecked by courts, that is greater than that of any other Minister, including the Prime Minister.

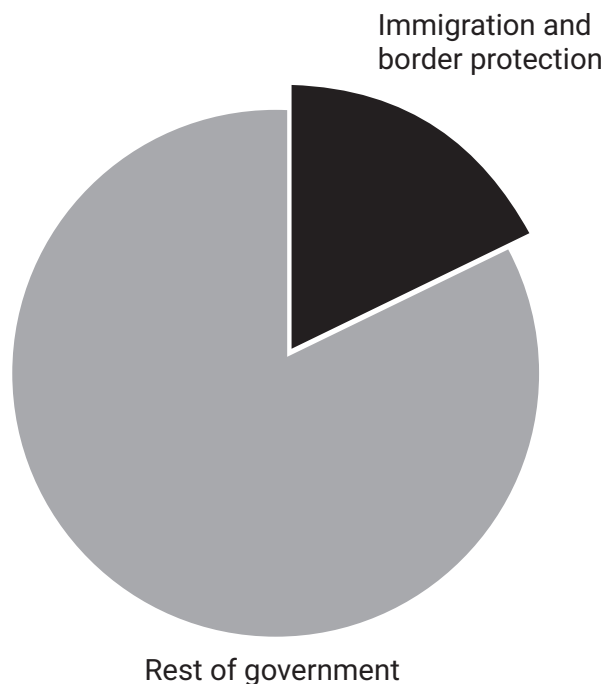
Table 1: ‘Public interest’ and ‘national interest’ powers across portfolios

Portfolio	Number of Acts administered	Number of ‘public interest’ or ‘national interest’ powers
Immigration and Border Protection	20	47
Attorney-General	152	38
Treasurer	153	26
Environment	42	24
Health	40	17
Industry, Innovation and Science	50	17
Agriculture	50	13
Education	22	6
Employment	20	6
Infrastructure and Transport	69	6
Communications	24	5
Foreign Affairs and Trade	35	4
Prime Minister	43	3
Defence	21	2
Finance	50	1
Social Services	39	1
Veteran’s Affairs	21	0

Graph 1: Number of Acts administered



Graph 2: Public interest powers



In 2004, the Senate Select Committee on Ministerial Discretion in Migration Matters found that there was ‘a pressing need for reform’ of ministerial discretion in the Migration Act.²⁵

Despite these findings, the number of ministerial discretionary powers in migration matters has since expanded at an alarming rate. As this report explains, the Migration Act is now littered with discretionary powers, many of which are non-delegable, non-compellable and non-reviewable. The Minister now not only has the power to grant a visa on discretionary grounds; the Minister can detain or re-detain a person seeking asylum without any warning, send them to an offshore detention centre, refuse or cancel their visa on character grounds, or, in some instances, remove any possibility of reviewing a decision not to grant them a protection visa.

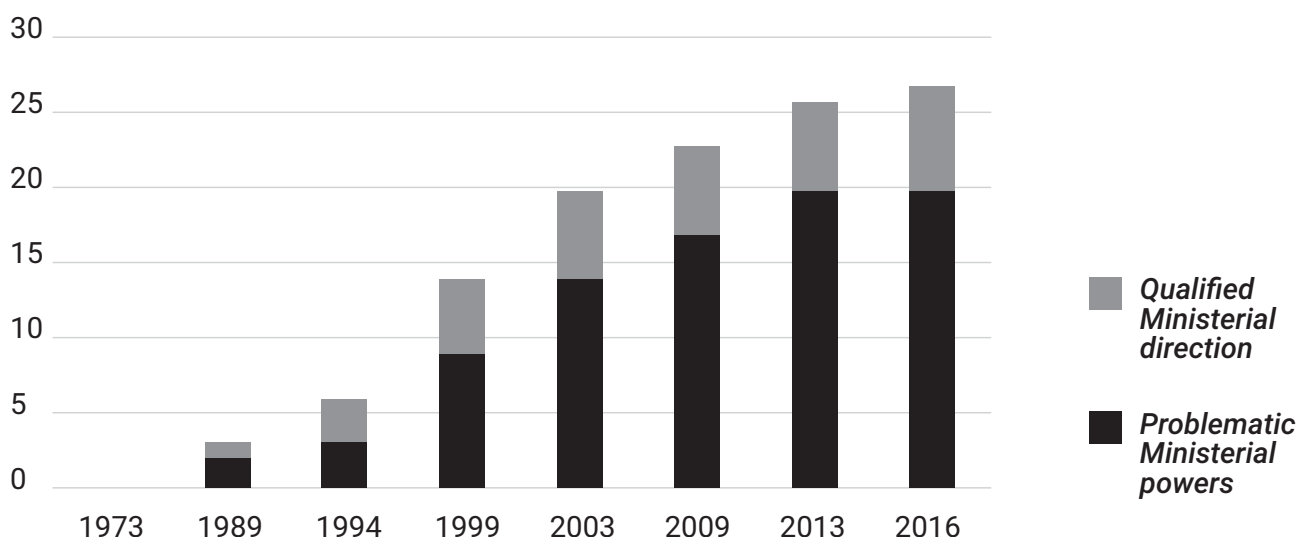
This represents a disturbing trend of conferring unfettered discretionary powers on the Minister. As this report details, we have now progressed so far in this direction that our laws enable, and in some instances even require, the Minister (or other select officers of the Commonwealth) to play God with the lives of people who seek asylum in Australia.

²⁵ See Senate Select Committee on Ministerial Discretion in Migration Matters, Parliament of Australia, *Inquiry into Ministerial Discretion in Migration Matters* (2004) 165. This inquiry was principally concerned with the operation of sections 351 and 417 of the Migration Act. However, as this report shows, since 2004 the number of problematic ministerial powers in the Migration Act has increased significantly.

The Rise of the God Powers

Problematic ministerial powers have existed within the Migration Act since 1989. Their scope has evolved far beyond their initial parameters and has now reached disconcerting levels as a result of a series of amendments. Graph 3 outlines the rapid expansion of these powers within the Migration Act during the past four decades.

Graph 3: The Development of the God Powers



The Minister for Immigration and Border Protection now possesses at least 20 individual, non-delegable, non-reviewable and non-compellable discretionary powers.²⁶ This is an astonishing development of unchecked discretionary power considering that in 1989 there were only three comparable public interest based discretionary powers, and prior to that there were none whatsoever. Two allowed for a decision of ‘more favourable’ outcome for applicants in certain situations.²⁷ The third allowed the Minister to deny an applicant’s immigration review in situations where it would ‘prejudice the security, defence or international relations of Australia’²⁸ or if the matter would ‘involve the disclosure of deliberations or decisions of the Cabinet or of a committee of the Cabinet’,²⁹ thereby placing some qualification on the exercise of the power.

As previously noted, the early public interest ministerial powers were introduced primarily for the benefit of those seeking asylum, where the strict application of the Migration Act would result in unjust outcomes.

Indeed, the Minister’s discretionary power to grant a visa (or a similar form of permission for a person to remain in Australia) has a long history. The *Immigration Restriction Act 1901* (Cth) – the legislative instrument that implemented the White Australia Policy³⁰ – and the subsequent *Immigration Act 1940* (Cth) (‘Immigration Act’) both allowed the Minister (or an authorised officer) to grant a person a ‘certificate of exemption’ authorising him or her to remain in the Commonwealth.³¹ The Minister

²⁶ See, eg, *Migration Act 1958* (Cth) ss 46A–46B, 48B, 72, 91F, 91L, 91Q, 133A, 133C, 137N, 197AB, 198AB, 198AE, 339, 411, 473BD, 336L, 351, 417, 501J.

²⁷ Ibid ss 115, 137.

²⁸ Ibid s 146(a).

²⁹ Ibid s 146(b).

³⁰ The White Australia Policy was a policy adopted by the Australian government that ‘favoured applicants from certain countries’. It was implemented from 1901 until the mid-20th century. The *Immigration Restriction Act 1901* (Cth) imposed a dictation test which was used to exclude non-European immigrants. It required all applicants to pass a written test, which was often conducted in a language that the applicant was not familiar with, as the language of the test was nominated by an immigration officer: Department of Immigration and Border Protection, *Fact Sheet – Abolition of the ‘White Australia’ Policy* (2016) <<https://www.border.gov.au/about/corporate/information/fact-sheets/08abolition>>.

³¹ See *Immigration Restriction Act 1901* (Cth) s 3; *Immigration Act 1940* (Cth) s 4.

also had the power to cancel a certificate of exemption.³²

On 1 June 1959, the Immigration Act was repealed by the Migration Act. When it was first enacted, the Migration Act allowed an 'officer' to grant an entry permit at the request of, or with the consent of, the recipient.³³ An 'officer' included an officer of the Department of Immigration, an officer under the *Customs Act 1901* (Cth) or a member of the police force of the Commonwealth or a State or Territory.³⁴ Therefore, the category of persons who could exercise the discretionary power to allow a person to remain in Australia was initially much broader than just the Minister.

This changed in 1964, when the Migration Act was amended to provide that the requirements under the Act relating to 'entry permits' did not apply to a person exempted 'by instrument under the hand of the Minister'.³⁵ In 1980, the Migration Act was again amended to allow the Minister to, 'at the request of an immigrant who has entered Australia, grant to the immigrant an entry permit'.³⁶

The provisions of the Migration Act dealing with entry permits were subsequently repealed.³⁷ A new section 6(1) was introduced, which provided that 'on entering Australia, a non-citizen becomes an illegal entrant unless he or she is the holder of a valid entry permit' or the entry was authorised by section 9 (for example, by travelling to Australia on a 'pre-cleared flight' approved by the Minister).³⁸ Section 53A(2) of the Migration Act allowed the Minister to, by instrument published in the Gazette, exempt a person or class of persons from the operation of section 6(1).³⁹ Therefore, section 53A did not specifically empower the Minister to *grant* a visa or entry permit, but it did allow the Minister to exempt a person or class of persons from the requirement to hold a visa or entry permit in order to enter, and remain in, Australia.

By 1999, discretionary powers that previously could only be exercised in prescribed conditions, such as where a review may prejudice national security, were stripped of those conditions, leaving only vague and unqualified references to 'national interest'.⁴⁰ The effect of this was to remove judicial review and expand significantly the Minister's discretion when applying the provision.

Following various other reforms to the Migration Act,⁴¹ section 195A was inserted in 2005.⁴² By itself, section 195A is not particularly remarkable or problematic; it has existed in some form since the early 1900s. However, as this report shows, what is concerning is the many other significant and potentially more harmful discretionary powers that have been included in legislation affecting people seeking asylum over the past two decades. Indeed, in 2004, the Senate Select Committee on Ministerial Discretion in Migration Matters found that there was 'a pressing need for reform' of ministerial discretion in the Migration Act.⁴³ Unfortunately, ministerial discretion has continued to expand unabated.

The Migration Act is now littered with discretionary powers, many of which are non-delegable, non-compellable and non-reviewable. As well as having the power to grant a visa on discretionary grounds, the Minister can now detain or re-detain a person seeking asylum without any warning, send them to an offshore detention centre, refuse or cancel their visa on character grounds, and, in some circumstances, oust any possibility of the review of a decision not to grant an applicant a

32 See *Immigration Restriction Act 1901* (Cth) s 4; *Immigration Act 1940* (Cth) s 4. Initially, the Immigration Act provided for persons who had previously held a certificate of exemption to be given notice of its cancellation/expiry requiring them to leave the Commonwealth: at s 4(4). In 1948, s 4(4) was amended so that, if found within the Commonwealth, the holder of an expired certificate of exemption could be 'deported from the Commonwealth in pursuance of an order of the Minister'.

33 *Migration Act 1958* (Cth) s 6(1) (since amended).

34 *Ibid* s 5(1) (since amended).

35 *Ibid* s 8(1)(e) (since amended).

36 *Ibid* s 6(2A) (since amended).

37 See *Migration Legislation Amendment Act 1989* (Cth).

38 Section 6(1) was repealed in 1992 by the *Migration Reform Act 1992* (Cth). Under this Act, a non-citizen in the migration zone who did not hold a valid visa was an unlawful non-citizen and could be removed from Australia if they did not receive immigration clearance and had no substantive visa application pending: *Migration Act 1958* (Cth) s 54ZF.

39 This instrument could also provide that the person (or class of persons) entered Australia without an entry permit and that that person (or class of persons) shall not be granted an entry permit while in Australia: *Migration Act 1958* (Cth) s 53A(3).

40 See, eg, *Migration Act 1958* (Cth) s 338.

41 See, eg, *Migration Reform Act 1992* (Cth) ss 23, 26ZF(1) (repealed).

42 *Migration Amendment (Detention Arrangements) Act 2005* (Cth) sch 1 item 10.

43 See Senate Select Committee on Ministerial Discretion in Migration Matters, Parliament of Australia, *Inquiry into Ministerial Discretion in Migration Matters* (2004) 165. This inquiry was principally concerned with the operation of sections 351 and 417 of the Migration Act. However, as this report shows, since 2004 the number of problematic ministerial powers in the Migration Act has increased significantly.

protection visa.

Currently, there are two bills before federal Parliament which seek to further expand the Minister's problematic powers.⁴⁴ One bill proposes to prevent any adult taken to Nauru or Manus Island after 19 July 2013 from ever making a valid Australian visa application. The other proposes to allow the Minister to personally issue a revalidation requirement for entire specified cohorts of visa holders, immediately preventing them from being able to enter Australia until their visa is revalidated. The power is not limited to any particular class of visa. If successful, these would continue to expand the Minister's personal, discretionary power while decreasing government accountability and deny judicial review.⁴⁵

44 Migration Legislation Amendment (Regional Processing Cohort) Bill 2016 (Cth); Migration Amendment (Visa Revalidation and Other Measures) Bill 2016 (Cth).

45 See also Elizabeth Colliver, Lauren Bull and Shawn Rajanayagam, 'Think Trump's Travel Ban Was Bad? Peter Dutton May Soon Have the Power to Play God', *The Guardian* (online), 1 March 2017 <<https://www.theguardian.com/commentisfree/2017/mar/01/think-trumps-travel-ban-was-bad-peter-dutton-may-soon-have-the-power-to-play-god>>.

The Tools of Power

There are several legal devices that allow the Minister to arrogate more power to himself and his delegates, and to immunise their decisions against effective review by the courts. Three recur with alarming regularity in the legislation that we discuss in this report: exclusion of the principle of natural justice, ministerial satisfaction, and ‘national interest’ and ‘public interest’ tests. In this section, we briefly explain the content of these concepts and why they are important.

Natural justice

I do not think it too bold to say that the notion of procedural fairness would be widely regarded within the Australian community as indispensable to justice. If the notion of a ‘fair go’ means anything in this context, it must mean that before a decision is made affecting a person’s interests, they should have a right to be heard by an impartial decision-maker.⁴⁶

Natural justice, or procedural fairness, is a fundamental principle of Australia’s common law. In law, natural justice applies to decisions made by government decision-makers which affect individuals. The decisions that attract the requirements of natural justice will be those which will affect a person’s rights or interests, including their personal liberty, status, livelihood, and proprietary rights.⁴⁷ Natural justice ensures that everyone has the right to be informed of, to understand, and to participate in decisions made about their lives. Natural justice is a cornerstone of the Australian legal system and a presumed part of all governmental decision-making.

There are two rules of natural justice – ‘the hearing rule’ and ‘the bias rule’, the latter of which has been explained as involving ‘the absence of the actuality or the appearance of disqualifying bias and the according of an appropriate opportunity of being heard’.⁴⁸ In the context of Australia’s migration system, it is the hearing rule that is being compromised.

All that the hearing rule requires the decision-maker to ensure is that the affected individual is given ‘a fair hearing, not [necessarily] a fair outcome’.⁴⁹ The concept has recently been described by the High Court as requiring ‘a procedure that is reasonable in the circumstances to afford an opportunity to be heard’,⁵⁰ a ‘full opportunity’.⁵¹

The concept of natural justice is so fundamental to Australian law that the courts have repeatedly held that it cannot be excluded from such a decision without ‘plain words of necessary intendment’,⁵² a ‘clear manifestation’ of the legislature’s intention to deny it.⁵³ Without such plain words, legislation will always be read to include natural justice and decisions must be made in accordance with its requirements.⁵⁴

46 Chief Justice Robert S French, ‘Procedural Fairness – Indispensable to Justice?’ (Speech delivered at the Sir Anthony Mason Lecture, Melbourne Law School, The University of Melbourne, 7 October 2010).

47 *Kioa v West* (1985) 159 CLR 550, 582 (Mason J).

48 *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, 367 (Mason J).

49 *SZEBL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152, 160 [25] (Gleeson CJ, Kirby, Hayne, Callinan and Heydon JJ).

50 *Minister for Immigration and Border Protection v SZSSJ* (2016) 90 ALJR 901, 914–15 [82] (French CJ, Kiefel, Bell, Gageler, Keane, Nettle and Gordon JJ) (*‘SZSSJ’*).

51 *Salemi v McKellar [No 2]* (1977) 137 CLR 396, 421 (Gibbs CJ).

52 *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319, 352 [74] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ) (*‘Offshore Processing Case’*).

53 *Kioa v West* (1985) 159 CLR 550, 584 (Mason J). This was also expressed as the ‘irresistible clearness’ of the legislature’s intention in *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, 259 [15] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ). See also the more recent High Court judgement in *Offshore Processing Case* (2010) 243 CLR 319, 352 [74] (citations omitted): ‘It was said, in *Annetts v McCann*, that it can now be taken as settled that when a statute confers power to destroy, defeat or prejudice a person’s rights, interests or legitimate expectations, principles of natural justice generally regulate the exercise of that power’.

54 *Kioa v West* (1985) 159 CLR 550, 610 (Brennan J). See also the classic case of *Annetts v McCann* (1990) 170 CLR 596; the unsuccessful attempt to exclude natural justice in *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57; and the discussion by Flick J in the aptly titled section ‘Disturbing undercurrents?’ in his judgment in *Minister for Immigration and Citizenship v SZQRB* (2013) 210 FCR 505, 570 [359]–[360].

Ministerial satisfaction

Many powers of the Minister to determine asylum seekers' ability to seek and obtain protection can or must be exercised where the Minister is 'satisfied' that certain criteria are met.⁵⁵

To exercise powers that are predicated upon some form of ministerial satisfaction, the Minister must follow a two-step process.⁵⁶ Firstly, the Minister must be satisfied that any 'prerequisite conditions' prescribed by the legislation exist, as only then will the Minister's decision-making power be enlivened.⁵⁷ The Minister must also have attained the relevant satisfaction reasonably.⁵⁸ Once the Minister has decided whether or not he or she is satisfied of the relevant criteria, the Minister can exercise the power.

If a power is predicated on ministerial satisfaction, whether or not it is problematic will depend on the nature of the criteria of which the Minister is required to be satisfied. Where the criteria are specific and refer to objective conditions, ministerial power will be restrained by the fact that there must be 'material capable of supporting the conclusion reached as a reasonably formed conclusion'.⁵⁹ This means that the ministerial exercise of power will, absent any provision to the contrary, be amenable to judicial review. The Minister's state of satisfaction will constitute a 'jurisdictional fact'.⁶⁰ If there are no facts before the Minister that are capable of enabling him or her to be satisfied, reasonably and rationally, that a particular requirement has been met, 'the Minister will not have formed a state of satisfaction in the legally required sense' and the decision 'will be invalid at law'.⁶¹

However, where criteria are more subjective and require the Minister to undertake some form of evaluative judgment, the exercise of a power is unlikely to be reviewable. As French CJ observed in *Plaintiff M70/2011 v Minister for Immigration and Citizenship* ('*Plaintiff M70*'), 'when a criterion conditioning the exercise of statutory power involves assessment and value judgments on the part of the decision-maker, it is difficult to characterise the criterion as a jurisdictional fact, the existence or non-existence of which may be reviewed by a court'.⁶²

Therefore, where the subject matter that the Minister must be satisfied of has an 'evaluative and polycentric' character, a court is likely to interpret the legislative provision as one that does not provide a basis for it to determine whether the Minister was actually satisfied that those criteria were met. Accordingly, any ministerial exercise of these types of powers will not be readily amenable to judicial review.⁶³

The Migration Act contains many examples of powers predicated on ministerial satisfaction that are evaluative and polycentric in nature and hence likely to be immune from judicial scrutiny. For example, multiple provisions allow the Minister to refuse or cancel a visa where he or she is satisfied that certain criteria exist and the refusal or cancellation is in the 'national interest'.⁶⁴ As discussed below, the exercise of these powers 'calls for a broad evaluative judgment'.⁶⁵ They are therefore likely to fall within the non-reviewable category described by French CJ in *Plaintiff M70*.

Similarly, sections 133A and 133C of the Migration Act allow the Minister to cancel a visa where he or she is satisfied that prescribed conditions are met and that the refusal would be in the 'public interest'. Again, as discussed below, as 'public interest' is a nebulous term, these provisions

55 See *Migration Act 1958* (Cth) ss 133A, 133C, 501(3)(d), 501A(2)(e), 501A(3)(d), 501B, 501BA.

56 See *Gbojueh v Minister for Immigration and Citizenship* (2012) 202 FCR 417, 421 [12] (Bromberg J) ('*Gbojueh*').

57 Ibid.

58 *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507, 532 [73] (Gleeson CJ and Gummow J) ('*Jia Legeng*'). See also *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611, 652–4 [133]–[137] (Gummow J).

59 Joanne Kinslor and James English, 'Decision-Making in the National Interest?' (2015) 79 *AIAL Forum* 35, 41. An example of this type of power is the Minister's power to grant a visa, or refuse to grant a visa, under s 65 of the *Migration Act 1958* (Cth). Section 65 provides that the Minister is to grant a visa if satisfied that the four listed criteria are met but is not to grant a visa otherwise. The factors that the Minister must be satisfied of include that the applicant has met any health criteria or other criteria prescribed for the relevant visa; that specific provisions of the Act do not preclude the grant of the visa; and that any required fee has been paid.

60 *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144, 179–80 [57] (French CJ) ('*Malaysian Declaration Case*').

61 Ibid.

62 Ibid 179 [57] (French CJ).

63 *P1 v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 1029; *Sadiqi v Commonwealth* [No 2] (2009) 181 FCR 1.

64 See, eg, *Migration Act 1958* (Cth) ss 501(3)(d), 501A(2)(e), 501A(3)(d), 501B, 501A.

65 *Gbojueh* (2012) 202 FCR 417, 426 [44] (Bromberg J).

essentially require the Minister to make ‘a discretionary value judgment’.⁶⁶ A court is therefore likely to find that any ministerial exercise of power under sections 133A or 133C is lawful.

‘Evaluative’ powers of the type listed above are therefore problematic. They allow the Minister to use his or her discretion and exercise a power that can have consequences for asylum seekers, including by obstructing or removing their ability to access protection. As decisions made pursuant to these provisions are difficult or impossible to review, the Minister’s power to decide asylum seekers’ fate goes unchecked.

‘National interest’ and ‘public interest’

The key laws examined in this report contain numerous references to decisions to be made in the ‘national interest’ and in the ‘public interest’. The High Court has stated that national interest ‘is an expression different from “the public interest”’,⁶⁷ yet these two concepts are similarly broad and non-definitive in scope.

The very object of the Migration Act ‘is to regulate, *in the national interest*, the coming into, and presence in, Australia of non-citizens’.⁶⁸ Further, the explanatory memorandum to the Bill that introduced recent amendments to the Maritime Powers Act explains that the term ‘national interest’ has ‘a broad meaning and refers to matters which relate to Australia’s standing, security and interests’.⁶⁹

The High Court has stated that the term ‘national interest’ cannot be given a confined meaning. There are a broad range of considerations potentially relevant to Australia’s national interest⁷⁰ and ‘what is in the national interest is largely a political question’.⁷¹ The Court has consistently acknowledged ‘the wide range of subject matters that may be taken into account in making decisions “in the public interest”’.⁷² The High Court stated:

When we reach the area of ministerial policy giving effect to the general public interest, we enter the political field. In that field a Minister or a Cabinet may determine general policy or the interests of the general public free of procedural constraints.⁷³

A decision made ‘in the public interest’ requires ‘a discretionary value judgment to be made by reference to undefined factual matters’ relevant to the scope and purpose of the relevant statute. It has been described as ‘a matter of political responsibility’.⁷⁴

As French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ observed in *The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal*, ‘[i]t is well established that, when used in a statute, the expression “public interest” imports a discretionary value judgment to be made by reference to undefined factual matters’.⁷⁵ The ‘public interest’ is ‘a matter which, within the general scope and purposes of the [Migration] Act’, is for the Minister to judge.⁷⁶

The Federal Court has concluded that national interest is to be considered at a broad level that is not

66 *O’Sullivan v Farrer* (1989) 168 CLR 210, 216 (Mason CJ, Brennan, Dawson and Gaudron JJ).

67 *Jia Legeng* (2001) 205 CLR 507, 561 [172] (Hayne J). See also the reasoning of Brennan J in *O’Shea* (1987) 163 CLR 378, 411.

68 *Migration Act 1958* (Cth) s 4(1).

69 Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth), 5.

70 *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391, 502 [331] (Kirby J).

71 *Plaintiff S156/2013 v Minister for Immigration and Border Protection* (2014) 254 CLR 28, 46 [40] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

72 *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391, 502 [331]. See also *O’Sullivan v Farrer* (1989) 168 CLR 210, 216–17 (Mason CJ, Brennan, Dawson and Gaudron JJ).

73 *O’Shea* (1987) 163 CLR 378, 411 (Brennan J).

74 *Ibid.*

75 (2012) 246 CLR 379, 400–1 [42]. See also *O’Sullivan v Farrer* (1989) 168 CLR 210, 216 (Mason CJ, Brennan, Dawson and Gaudron JJ); *Malaysian Declaration Case* (2011) 244 CLR 144, 218 [190] (Heydon J).

76 *Plaintiff M79/2012 v Minister for Immigration and Citizenship* (2013) 87 ALJR 682, 690 [32] (French CJ, Crennan and Bell JJ). See also *Gbojueh* (2012) 202 FCR 417, 426 [43] (Bromberg J); *Madaffer v Minister for Immigration and Multicultural Affairs* (2002) 118 FCR 326, 353 [89] (French, O’Loughlin and Whitlam JJ); *Minister for Immigration and Multicultural and Indigenous Affairs v Huynh* (2004) 139 FCR 505, 523 [74] (Kiefel and Bennett JJ); *Tewao v Minister for Immigration and Citizenship* [2011] FCA 1515, [12], [32] (Katzmann J); *Maurangi v Bowen* (2012) 200 FCR 191, 203 [70] (Lander J); *Minister for Immigration v Jia Legeng* (2001) 205 CLR 507, 528 [61] (Gleeson CJ and Gummow J); *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391, 418–19 [76]–[80] (Gaudron J), 502–3 [331] (Kirby J).

necessarily specific to the individual:⁷⁷

*The exercise calls for a broad evaluative judgment. It calls for the Minister's satisfaction in relation to a power that may only be exercised personally by the Minister ... Political responsibility and accountability is reposed in the Minister in relation to a subject matter of wide scope. All of that, strongly suggests that the Minister is left largely unrestrained to determine for him or herself what factors are to be regarded as relevant when determining whether the cancellation or refusal of a visa is in the national interest.*⁷⁸

The scope of the considerations relevant to these powers is broad, as is a decisionmaker's discretion as to how they define these powers. Put simply, what is in the national or public interest is left undefined. It represents legal carte blanche for the Minister in the face of which the courts are made to remain silent.

The inability to review the Minister's decision about whether the exercise of a non-compellable power is in 'the public interest' increases the likelihood that the power will not be exercised even in the most deserving of cases. As Senator Ray noted in the second reading speech to the Migration Legislation Amendment Bill (No 2) 1989 (Cth), a key objection to this type of personal ministerial power is the fact that many asylum seekers clearly do not have access to the Minister. The Minister cannot personally decide every immigration case, and 'those who tend to get access to a Minister are members of Parliament and other prominent people'.⁷⁹ Refugees who arrive in Australia by boat without a visa and in dire need of protection rarely fall within either category. For them, the national interest test is often an unreviewable, immovable barrier to safety in Australia.

⁷⁷ *Gbojueh* (2012) 202 FCR 417, 427 [49].

⁷⁸ *Ibid* 426 [44].

⁷⁹ Commonwealth, *Parliamentary Debates*, Senate, 30 May 1989, 3012 (Robert Ray).

The God Powers

Problematic ministerial powers are a pervasive feature of the legislation that governs the treatment of people seeking asylum in Australia. In this section, we discuss the instances of problematic ministerial powers that affect people seeking asylum at each stage of the process: the government's powers with respect to their interception at sea; their detention; and those that affect their entitlement to visas.

Before turning to those problematic powers, however, this section begins with a discussion of the Minister's power to grant a visa if he or she considers it is in the public interest to do so: a seemingly innocuous example of so-called 'beneficial discretion'.

Beneficial discretion

Granting a visa on the basis of the public interest

The power conferred by section 195A of the Migration Act, which has existed in various forms since Australia's federation, can be viewed as the original ministerial discretion in the area of migration. Section 195A allows the Minister to grant a person who is in immigration detention a visa of a particular class (whether or not the person has applied for that visa) if the Minister considers that it is in the 'public interest' to do so. This power can only be exercised by the Minister personally and the Minister cannot be compelled to exercise it.

The Minister's power to arbitrarily grant a visa and allow a person seeking asylum to find safety in Australia is relatively benign compared to some of the other discretionary powers in the Migration Act, Maritime Powers Act and ASIO Act. We have outlined its long history in Australian migration law above.

Although the power under section 195A of the Migration Act confers an excessive degree of personal discretion on the Minister, it is essentially a beneficial power that allows the Minister to give protection, rather than to withhold it. What is concerning is that we are now seeing an alarming inclination by Parliament to confer unrestrained discretionary powers on the Minister.

On-water matters: powers at sea

Maritime powers and screening out

In 2013, the federal government expanded its legislative power to respond, among other things, to boats of asylum seekers seeking to reach Australia well before they were in Australian territorial waters. The legislation demonstrates the substantial impact of a lack of natural justice on people seeking asylum. That legislation was soon the subject of a split decision in the High Court of Australia.

In *CPCF v Minister for Immigration and Border Protection*⁸⁰ (*CPCF*) a 4:3 majority of the High Court held that the Maritime Powers Act authorises a maritime officer to detain a passenger for the purpose of taking him or her from Australia's waters to a place outside Australia. In June 2014, the Royal Australian Navy intercepted an Indian vessel carrying 157 Sri Lankan asylum seekers of Tamil ethnicity at the edge of Australia's territorial waters. The asylum seekers were detained by officers of the Commonwealth and then taken on board the Australian vessel as their own vessel had become unseaworthy. The Australian vessel at first sailed to India pursuant to a direction of the federal government (a decision made by the National Security Committee of Cabinet, which includes the Minister for Immigration and Border Protection). After 12 days, the ship sailed to Cocos (Keeling) Islands and all the asylum seekers on board were taken into immigration detention pursuant to the Migration Act. The asylum seekers were detained on board for one month in total.

The High Court held that the detention of 157 Sri Lankan asylum seekers of Tamil ethnicity for one month on an Australian vessel was lawful. The Court also found that the power under section

80 (2015) 255 CLR 514 (*CPCF*).

72(4) of the Maritime Powers Act was not subject to an obligation to afford a detained passenger procedural fairness. It was held that whilst obtaining basic information about a detained passenger may be required under section 74, there was no requirement for a hearing to take place to determine that passenger's status as a person seeking asylum.

With the decision of *CPCF* in mind, as well as the subsequent amendments to the Maritime Powers Act by way of the Asylum Legacy Caseload Act, the following scenario is not only likely but consistent with the little that is known. The scenario demonstrates the impact of the absence of natural justice:

An Australian maritime vessel intercepts a boat carrying people seeking asylum. Those people are detained at sea by Australian authorities. They are then returned directly to the country from which they fled (or taken to another country to which they have no connection) without any assessment of their refugee claim.⁸¹ We don't know much more. Even though our taxes pay for it and it is done in our name, Australia's on-water operations are secret.

These asylum seekers are subjected to so-called 'enhanced screening' before their boat is turned around. An interview takes place. It is conducted by one or two immigration officers. If no immigration officer is present, the interview is conducted by phone. Maybe an interpreter is present; maybe they are dialled in.⁸² The interview is a short process, the aim of which, according to the Department of Immigration and Border Protection, is to assess the reason for that asylum seeker coming to Australia and whether that reason enlivens Australia's protection obligations under the Refugee Convention.⁸³ It may involve asylum seekers being interviewed without legal advice, without information about their rights and with no access to independent review of the decision made.⁸⁴ If a person is 'screened out', they are returned to their country of origin. If a person is 'screened in', they will be transferred to an offshore detention centre.

While most of the process is shrouded in secrecy, we know that decisions made on water under the Maritime Powers Act are not subject to natural justice. There is little transparency and an absence of accountability.

What is at stake? For a person who is fleeing persecution, it is safety; it can be the difference between life and death.

The process

The policy of 'screening out' asylum seekers on water before their arrival in Australia and before their status as an asylum seeker is properly determined is linked to Australia's maritime powers.

The Maritime Powers Act allows vessels to be boarded, searched and detained by an 'authorising officer'. It allows the Australian government to detain, move and arrest any person on these vessels.⁸⁵ Maritime decision-making powers are coupled with limited review options and the exclusion of Australia's international legal obligations. These powers are expansive. They highlight the government's attempt to 'sideline international law, natural justice and judicial oversight'⁸⁶ in matters relating to asylum seekers at sea. They also facilitate the secrecy surrounding Australia's 'screening out' practices.

Whilst maritime powers are not exercised personally by the Minister, they must, as mentioned above, be exercised by an 'authorising officer'. This could be a senior maritime officer,⁸⁷ anyone who is appointed in writing by the Minister⁸⁸ or anyone who reasonably believes he or she was

81 Human Rights Law Centre, Submission No 166 to Senate Legal and Constitutional Legislation Affairs Committee, Parliament of Australia, *Review of the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014*, 31 October 2014, 1–3.

82 Nick Evershed, Paul Farrell and Oliver Laughland "In" or "Out": What We Know about 'Enhanced Screening' of Asylum Seekers', *The Guardian* (online), 3 July 2014 <<https://www.theguardian.com/world/2014/jul/03/asylum-seekers-may-be-subject-to-speedy-on-water-screenings>>.

83 Ibid.

84 Rachel Ball, 'Screening Out' Asylum Seekers Undermines Rule of Law and Risks Returning People to Face Torture (20 December 2012) Human Rights Law Centre <<https://www.hrlc.org.au/news/screening-out-asylum-seekers-undermines-the-rule-of-law-and-risks-returning-people-to-face-torture>>.

85 See generally *Maritime Powers Act 2013* (Cth) pt 3.

86 George Georgiou, *Liberty Victoria Statement Following the Passing of the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014* (11 December 2014) Liberty Victoria <https://libertyvictoria.org.au/migration_and_maritime_powers_bill2014>.

87 *Maritime Powers Act 2013* (Cth) ss 16(1)(a), 16(1)(c).

88 Ibid s 16(1)(e).

an authorising officer at the time of decision.⁸⁹ An authorising officer exercises these maritime powers when administering an Australian ‘monitoring law’, a term that relevantly includes Australia’s migration laws.⁹⁰ In practice, this gives an officer the power to detain asylum seekers at sea, even if they are on international waters, and return them to the country from which they have fled or another country altogether.

What are the problems with these powers?

Turn backs and detention at sea

The most significant issue regarding on-water decisions about turn backs and detention at sea under the Maritime Powers Act is that natural justice is expressly excluded. Whilst the exclusion of Australia’s international obligations from this legislation is also concerning, the focus of this report is on the removal of the natural justice principle.

The Asylum Legacy Act amended the Maritime Powers Act to remove the requirement that maritime powers (under provisions of Part 2, Division 2, and Part 3, Divisions 7 and 8 of the Maritime Powers Act) be exercised in accordance with the rules of natural justice.⁹¹ Maritime powers are broad. What happens on water is not visible to the press, the public or, by careful legislative design, the courts. As we have explained above, natural justice is an essential principle in ensuring decision makers exercise their powers in a fair and proper manner. It ensures there is a procedure that affords a ‘full opportunity’⁹² for a person’s claim for asylum to be heard. Where natural justice is excluded, the courts’ role in supervising these decision-making powers is constrained. In turn, this undermines the public’s ability to scrutinise what occurs on water. It reveals a commitment to expanding powers beyond the reach and review of the courts.

In the context of Australia’s asylum seeker policy, the exclusion of natural justice in relation to on water matters is alarming. Mistakes will be made but cannot be checked or rectified. The Maritime Powers Act has sanctioned a ‘combination of increased power and decreased judicial oversight’.⁹³ It gives maritime officers control over life or death decisions that are not subject to proper review and cannot be challenged by reference to Australia’s commitments under international law.

Screening out

The process of screening out at sea is arbitrary. It lacks the transparency and accountability that ensures appropriate and fair decisions are made about the lives of people seeking asylum. Screening out relies, to a considerable extent, on the interviewer. There is no right to seek legal advice before being interviewed. Given the potential language barriers and the different cultural environment from which asylum seekers may come, access to legal advice is a practical way of ensuring processes are understood and procedural fairness is afforded to each individual.

The current process is likely to produce mistakes and risks excluding those with legitimate claims for protection. Screening out at sea is inappropriate and, according to the Kaldor Centre for International Refugee Law, ‘must not replace a full refugee determination process’.⁹⁴ Once people are screened out and returned to their country of origin, there is no avenue to correct mistakes. The Australian Human Rights Commission has detailed a number of concerns it has with Australia’s so-called ‘enhanced screening’ processes:

- people subjected to the screening process are not informed of their right to seek asylum;
- screening interviews may be brief and not sufficiently detailed or probing to ensure that all relevant protection claims are raised. Some asylum seekers may not be able to raise or adequately express their needs for protection in a brief interview shortly after their arrival in Australia, especially in the absence of legal advice about their right to seek asylum;

89 Ibid s 16(3).

90 Ibid s 18.

91 Ibid ss 22B, 75B.

92 SZSSJ (2016) 90 ALJR 901, 914–15 [82] (French CJ, Kiefel, Bell, Gageler, Keane, Nettle and Gordon JJ).

93 Human Rights Law Centre, Submission No 166 to Senate Legal and Constitutional Legislation Affairs Committee, Parliament of Australia, *Review of the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014*, 31 October 2014, 2 [8].

94 Andrew and Renata Kaldor Centre for International Refugee Law, *Maritime Interception and Screening of Asylum Seekers at Sea* (1 July 2015) <<http://www.kaldorcentre.unsw.edu.au/publication/maritime-interception-and-screening-asylum-seekers-sea>>.

- the screening process may in fact be used not for screening but for substantive assessment of claims, and people might be screened out where the Department of Immigration and Border Protection is of the view that their claims are remote, unfounded or insufficient;
- persons subject to the screening process may not be informed of their right to seek legal advice and are only provided with reasonable facilities to contact a legal adviser if they make a specific request;
- persons subject to the screening process may not be provided with an adequate opportunity to respond to adverse information; and
- persons who are screened out are not given a written record of the reasons for the decision, nor do they have access to independent review of such decisions.⁹⁵

Once people are screened out and returned to their country of origin, there is no avenue to correct mistakes. The process is unjust and does not allow people a fair and full opportunity to be heard.

Restricting liberty: detention powers

Releasing an individual from detention and detaining or re-detaining them

Section 189 of the Migration Act prescribes that detention is mandatory for unlawful non-citizens – that is, people in Australia who are not citizens and do not currently have a valid visa. Mandatory detention was introduced into the Australian immigration system in 1992 by the Keating Labor government.⁹⁶ Although it was initially intended to be a temporary policy applicable to a specific cohort of migrants, mandatory detention has remained a fixture since, and shows no signs of being removed in the near future.⁹⁷

The power to make residence determinations is a power to release an individual from immigration detention, an enormously important decision to that person's life. The exercise of this power will mean the difference between a family having their own home to live in instead of a shared room in a camp, the ability of parents to walk their children to school in the morning rather than them being accompanied by guards. It affects the right of a person to simply go for a walk through their community whenever they wish to, and so many other important freedoms that have an immense impact on people's wellbeing and lives.

Residence determinations in the Migration Act

Section 197AB of the Migration Act allows the Minister to make residence determinations about a class of people called 'unlawful non-citizens'.⁹⁸ This classification refers to people living in the Australian migration zone who do not hold a valid visa. This section allows the Minister to decide that a person is to 'reside at a specified place rather than being held in a detention centre', if the Minister thinks it is in the public interest to do so.

Section 197AE of the Migration Act states that the Minister '*does not have a duty* to consider whether to exercise the power to make, vary or revoke a residence determination, whether he or she is requested to do so by any person, or in any other circumstances'.⁹⁹ This means that the decision to release an individual from detention, detain or re-detain them, is non-compellable. The Minister is under no compulsion or duty to consider the issue unless he personally chooses to do so, even if someone is appealing to him for help and even if they seek the assistance of a court.¹⁰⁰

Section 197AF of the Migration Act states that these powers may only be exercised by the Minister personally. For people reliant on visas to stay in Australia, the decision about where they are allowed to live is entirely in the hands of the Minister.

95 Australian Human Rights Commission, *Tell Me About: The 'Enhanced Screening Process'* (June 2013) 2.

96 Janet Phillips and Harriet Spinks, 'Immigration Detention in Australia' (Background Notes, Parliamentary Library, Parliament of Australia, 2013) 1.

97 Ibid 7.

98 See *Migration Act 1958* (Cth) ss 13–14, 189, 197AA. Section 197AC provides for the effect of residence determinations.

99 Emphasis added.

100 This was confirmed in *Plaintiff M47/2012 v Director General of Security* (2012) 251 CLR 1, 129–31 [331]–[336] (Heydon J) ('M47').

Releasing an individual from detention

There are guidelines for ministerial consideration of the issue of releasing someone from immigration detention. However, the decision is ultimately made if the Minister determines that it is in the public interest to do so. According to the guidelines prepared by then Minister Chris Evans, the Minister would, *inter alia*, take into account the circumstances of each case, including character, identity and security issues, the person's age and family composition, the health and well-being of the person, whether they have any Australian citizen or permanent resident family members, any other unique or exceptional characteristics and/or circumstances, and their cooperation with immigration processes and the likelihood of compliance with residence determination conditions.¹⁰¹

The Minister is under no compulsion to make such a determination, and will not consider applications from people living in detention requesting that he exercise this power.¹⁰² And as outlined above, a decision made on 'public interest' grounds is essentially not reviewable by the courts. Thus, even if a person was advised that a negative decision was made about releasing them from detention, they would be unable to challenge the decision.

As a result, people living in detention are reliant on the personal discretion of the Minister to allow them to leave immigration detention and live in the community.

Bridging visas

Section 73 of the Migration Act provides for the Minister's ability to grant bridging visas to individuals. Bridging visas allow their holders to stay in Australia lawfully while, for example, their protection visa application is being determined by the Department of Immigration. They also allow their holders to move lawfully from immigration detention to living in the Australian community while applying for a substantive visa.¹⁰³

As with residence determinations, the decision to either grant or not grant a bridging visa is a weighty one, with significant repercussions for the individual awaiting the decision. Despite the obvious importance of this decision to people's lives, the process for the grant of a bridging visa is unclear and lacks transparency and accountability, as well as fairness.

Section 73 provides, first, that the decision to grant a bridging visa relies on ministerial satisfaction, that is, that the Minister must be 'satisfied that an eligible non-citizen satisfies the criteria for a bridging visa as prescribed under subsection 31(3)'. As explained above, ministerial satisfaction can be a problematic criterion for the exercise of power.

Secondly, section 73 references 'the criteria for a bridging visa as prescribed under subsection 31(3)'. Section 31(3) of the Migration Act states that the criteria *may* be prescribed for visas of specified classes, which includes bridging visas under section 73 of the Migration Act.

The criteria that have been prescribed for granting bridging visas to people seeking asylum include that they must sign a 'Code of Behaviour', which is a document that outlines certain standards of conduct that must be adhered to,¹⁰⁴ and an undertaking from the eligible non-citizen that they will leave Australia within 28 days if their protection visa application is unsuccessful. If those criteria are met, the Minister must then be personally satisfied that the eligible non-citizen has met certain health standards, and that the grant of the visa is in the public interest.¹⁰⁵

A bridging visa is essential for a non-citizen without a substantive visa to be able to live in Australia

101 Minister for Immigration and Citizenship (Cth), *Minister's Residence Determination Power*, 1 September 2009, [3.1.2] <http://www.aph.gov.au/~media/Estimates/Live/legcon_ctte/estimates/bud_1213/diac/BE12-0392_Attachment_1.ashx>. The guidelines also state that children and their accompanying family members, persons who may have experienced torture or trauma, persons with significant physical or mental health problems, cases which will take a considerable period to substantively resolve and other cases with unique or exceptional characteristics will be prioritised for release from immigration detention: at [4.1.4].

102 'I will not consider a request for a residence determination directly from a person or any other agency. If a person wishes to be considered for a residence determination this should be considered by the Department and only referred to me for consideration if the request is supported by the Department as an appropriate way to manage a person in detention': *ibid* [4.1.3].

103 See Department of Immigration and Border Protection (Cth), *Bridging Visas* <<https://www.border.gov.au/Trav/Visi/Visi/Bridging-visas>>; Department of Immigration and Border Protection (Cth), *Fact Sheet – Bridging Visas for Illegal Maritime Arrivals* <<http://www.border.gov.au/about/corporate/information/fact-sheets/65onshore-processing-illegal-maritime-arrivals>>.

104 Minister for Immigration and Border Protection (Cth), *Legislative Instrument – Code of Behaviour for Public Interest Criterion 4022 – IMMI 13/155*, 12 December 2013.

105 *Migration Regulations 1994* (Cth) sch 2 cls 051.1–051.411.

lawfully, outside of immigration detention. The decision whether to grant one turns on the Minister's personal satisfaction that the person satisfies the criteria and that granting the visa is in the public interest. A person whose application is refused therefore faces a steep uphill battle to have the Minister's decision overturned, a battle they will invariably lose because of the breadth and flexibility of the 'public interest' test.

Detention and re-detention

Section 197AD provides the Minister with the ability to detain or re-detain an individual in immigration detention, if they think that it is in the public interest to do so, even if that person is living in the Australian community. This section refers to this power as revoking or varying a residence determination. If the Minister decides to revoke a residence determination and does not make one in its place, the individual in question must be re-detained in immigration detention under section 189.

A very public example of this was in the recent case of two Vietnamese teenagers who were living in Adelaide when they were informed that the Minister had decided that their residence determinations were 'no longer in the public interest' and were therefore revoked. The two teenagers were removed from their homes in South Australia without warning and detained in an immigration detention centre in Darwin.¹⁰⁶

The Migration Act provides in 'Note 1' to section 197AD that if the individual concerned does not comply with a condition of their residence determination, the Minister may revoke or vary the determination. However, this is subject only to the public interest test and, once again, does not make reference to any other criteria or legal process.¹⁰⁷

It is not essential that the individual being detained or re-detained has not complied with their residence determination. It is not essential that they have done anything wrong at all. Section 197AD(1) simply states that, based on the 'public interest' test, the Minister may at any time revoke or vary a residence determination. There are no other criteria listed. Nor is there, as is clear, any real option for the affected individual to appeal this decision, given the use of the untouchable 'public interest' test.

The magnitude of a decision to detain or re-detain an individual cannot be overstated. It is a question of an individual's personal liberty. As the High Court said in *Bunning v Cross*:

*The liberty of the subject is in increasing need of protection as governments, in response to the demand for more active regulatory intervention in the affairs of their citizens, enact a continuing flood of measures affecting day-to-day conduct, much of it hedged about with safeguards for the individual. These safeguards the executive ... should not be free to disregard. Were there to occur wholesale and deliberate disregard of these safeguards its toleration by the courts would result in the effective abrogation of the legislature's safeguards of individual liberties, subordinating it to the executive arm.*¹⁰⁸

The decision to detain an individual denies them freedom. And as is well-established, it may be a decision to send them to places where their safety cannot be guaranteed and their mental and physical health is in grave danger.¹⁰⁹ The worsening conditions in immigration detention centres

106 Max Opray, 'Adelaide Child Asylum Seekers on the Run', *The Saturday Paper* (online) 26 July 2014 <<https://www.thesaturdaypaper.com.au/news/politics/2014/07/26/adelaide-child-asylum-seekers-the-run/1406296800>>.

107 The Explanatory Memorandum that accompanied the bill introducing the residence determination provisions clearly illustrates the government's intention that this power should be discretionary to the Minister:

Where a detainee has only committed a minor breach of the conditions, the Minister may decide to vary the determination by altering the conditions, for example by imposing additional reporting conditions to minimise the risk of a detainee absconding. Where a detainee frequently breaches the conditions associated with the residence determination, or the circumstances of the breach are considered to be serious, the Minister may decide that it is in the public interest to revoke the residence determination and return the person to an immigration detention centre or other secured arrangements.

Explanatory Memorandum, Migration Amendment (Detention Arrangements) Bill 2005 (Cth) 54.

108 (1978) 141 CLR 54, 77–8 (Stephen and Aickin JJ).

109 See recent publications providing examples of such danger: Amnesty International, *Island of Despair: Australia's 'Processing' of Refugees on Nauru* (2016) 18–48; No Business in Abuse, *Business in Abuse: Transfield's Complicity in Gross Human Rights Abuses within Australia's Offshore Detention Regime* (2015) 31 [6.2], ch 7, app 11.2; No Business in Abuse, *Association with Abuse: The Financial Sector's Association with Gross Human Rights Abuses of People Seeking Asylum in Australia* (2016) ch 7; Australian Human Rights Commission, *The Health and Well-being of Children in Immigration Detention* (2016) 9–20.

under Australian control have made this ministerial power even more concerning.

One individual has the all-encompassing power to take another individual out of the Australian community and move them to an immigration detention centre. There is no requirement for that person to justify their decision beyond satisfying the vague 'public interest' test, nor any need for concern that the decision could be overturned on appeal. Given the consequences for liberty – that most basic of rights – this should be cause for great concern.

Removal to immigration detention

The decision to relocate a person to an RPC on Manus Island or Nauru is serious and irreversible. Yet, since the reintroduction of RPCs by the Labor Government in 2012, for every person seeking asylum arriving in Australia by boat this is their fate. As at November 2016, there were 1262 people held in either Manus Island or Nauru RPCs (including 56 women and 50 children).¹¹⁰

Despite the unprecedented secrecy surrounding RPCs,¹¹¹ since 2012 there have been at least 19 reports and inquiries confirming the appalling conditions at both Manus Island and Nauru RPCs.¹¹² Resoundingly, these reports highlight the damage that these RPCs inflict on detained people.

The RPCs are overcrowded and unsanitary, failing to provide detainees with basic health services and security. Reports of physical and sexual assaults within these RPCs are common but are mostly not pursued or prosecuted.¹¹³ Inadequate medical services and poor conditions in the RPC on Manus Island contributed to the death of Hamid Khazaei, a 24-year-old refugee who died in September 2014 after a blister on his leg became infected and turned septic. Doctors have stated that the cramped, tropical and unhygienic conditions in the centre contributed to Mr Khazaei's initial infection.¹¹⁴ An expert medical report prepared for the Coroner investigating the death has indicated that delay in receiving appropriate medical treatment and poor communication also contributed to Mr Khazaei's death.¹¹⁵

The profound, negative effect of the conditions in these centres is also clearly reflected in the levels of self-harm engaged in by detainees. In the first eight months of 2015, there were 74 reported incidents of self-harm on Nauru and 34 on Manus Island.¹¹⁶ The despair behind these acts is illustrated by the case of Omid Masoumali, a 23-year-old Iranian man who travelled to Australia by boat to seek refuge. Mr Masoumali had a 'well-founded fear of persecution' and was recognised as a refugee.¹¹⁷ However, because he arrived by boat in 2013 he was automatically transferred to Nauru. In April 2016, after being detained on Nauru for three years, Mr Masoumali died after setting himself on fire in front of UN officials visiting Nauru. Before setting himself alight, Mr Masoumali shouted at the officials: 'This is how tired we are. This action will prove how exhausted we are. I cannot take it anymore'.¹¹⁸ This was not an isolated incident. In the six days following Mr Masoumali's death, at least six more asylum seekers attempted suicide. On the sixth day, Hodan Yasin, a 21-year-old Somali refugee, also

110 Elibritt Karlsen, 'Australia's Offshore Processing of Asylum Seekers in Nauru and PNG: A Quick Guide to Statistics and Resources' (Research Paper Series, 19 December 2016, Parliamentary Library, Parliament of Australia, 2016) 4–5.

111 Young Liberty for Law Reform, *Operation Secret Borders: What We Don't Know, Can Hurt Us* (2016). See also Ben Doherty and Helen Davidson, 'Self-immolation: Desperate Protests against Australia's Detention Regime' *The Guardian* (online), 3 May 2016 <<https://www.theguardian.com/australia-news/2016/may/03/asylum-seekers-set-themselves-alight-nauru>>.

112 See, eg, Amnesty International, *Nauru Offshore Processing Facility Review 2012* (2012); Australian Human Rights Commission, *The Forgotten Children: National Inquiry into Children in Immigration Detention* (2014); Phillip Moss, *Review into Recent Allegations Relating to Conditions and Circumstances at the Regional Processing Centre in Nauru* (2015); Senate Select Committee on the Recent Allegations Relating to Conditions and Circumstances at the Regional Processing Centre in Nauru, Parliament of Australia, *Taking Responsibility: Conditions and Circumstances at Australia's Regional Processing Centre in Nauru* (2015); Amnesty International, *This Is Breaking People: Human Rights Violations at Australia's Asylum Seeker Processing Centre on Manus Island, Papua New Guinea* (2013); Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Incident at the Manus Island Detention Centre from 16 February to 18 February 2014* (2014); Human Rights Watch and Human Rights Law Centre, *The Pacific Non-Solution: Two Years On, Refugees Face Uncertainty, Restrictions on Rights* (2015).

113 Stephanie Anderson, 'No Prosecutions for 14 Cases of Sexual Assault Reported in Past 18 Months on Manus Island', *ABC News* (online), 20 October 2015 <<http://www.abc.net.au/news/2015-10-20/no-prosecutions-for-reported-sexual-assaults/6867794>>.

114 Sarah Keenan and Nadine El-Enany, 'Why We Took a Boat into the Australian Embassy on World Refugee Day', *New Matilda* (online), 6 July 2016 <<https://newmatilda.com/2016/07/06/why-we-took-a-boat-into-the-australian-embassy-on-world-refugee-day/>>.

115 Louisa Rebgetz, 'Inadequate Care, Communication Failures in Lead-Up to Asylum Seeker's Death, Court Hears', *ABC News* (online), 10 June 2016 <<http://www.abc.net.au/news/2016-06-10/khazaei-coronial-inquest-inadequate-care-in-lead-up-to-death/7501106>>.

116 Anderson, above n 113.

117 Ibid.

118 Ibid.

set herself on fire.¹¹⁹ More recently, Faysal Ishak Ahmed, a Sudanese refugee, collapsed and died in December 2016 after having sought medical help 13 times in the two months prior to his death.¹²⁰

In addition to the inhumane conditions in which detainees are kept, successive Australian governments have added to the plight of these individuals by pledging to deny all those detained in RPCs any prospect of refuge in Australia, irrespective of the validity of their claim for asylum.¹²¹

The decision to place all people seeking asylum who arrive by boat in RPCs has caused enormous suffering and irreparable damage to many lives. Refugees in these offshore detention centres are being kept for prolonged periods in appalling conditions, with no certainty as to when their detention will end and no prospect of settlement in Australia. The profound deterioration in mental health, most clearly manifest in the high levels of self-harm and suicide among detainees, is a highly predictable outcome of detention in these circumstances. Of particular concern is the willingness of the Minister to continue to send children to RPCs following a plethora of damning reports exposing the threats to their mental and physical wellbeing, partially due to the prevalence of physical violence and sexual assault.¹²²

The process

The core statutory provisions governing the relocation of people to Manus Island and Nauru are found in Part 2, Division 7, Subdivision B of the Migration Act; in particular, sections 198AA–198AJ. Perhaps the most alarming aspect of these powers is the removal of the principles of natural justice combined with the centralisation of extensive powers vested in the Minister. The cumulative effect of these provisions is to remove the fundamental checks and balances that characterise a fair review process and to provide the Minister with exceptional powers. Subdivision B empowers the Minister to:

- designate an RPC;¹²³
- send a person seeking asylum to an RPC;¹²⁴
- choose not to send a person seeking asylum to an RPC;¹²⁵ and
- select an RPC and instruct officers to send a person seeking asylum to that RPC.¹²⁶

The Act also empowers the Minister's officers to use as much force as is necessary and reasonable to:¹²⁷

- place a person seeking asylum onto a vessel or vehicle;¹²⁸
- restrain a person seeking asylum in a vessel or vehicle;¹²⁹ and
- remove a person seeking asylum from a vessel or vehicle, or from the place where the asylum seeker is detained.¹³⁰

These powers may be exercised in circumstances where a transfer would be oppressive and involve human rights violations. Even in these circumstances, the protection against additional human rights violations depends on the Minister choosing to exercise his personal and non-compellable powers.

In essence, sections 198AA–198AJ of the Migration Act empowers the Minister to unilaterally make fundamental decisions affecting the lives of people seeking asylum who arrive in Australia by boat. Each key provision relating to the powers of the Minister expressly excludes the application of the rules of natural justice¹³¹ and instead imposes the 'sole condition' that the Minister 'consider'

119 Joshua Robertson, 'Nauru Refugee Who Set Herself Alight "Denied Basic Social Support" in Brisbane Hospital', *The Guardian* (online), 22 September 2016 <<https://www.theguardian.com/australia-news/2016/sep/22/nauru-refugee-who-set-herself-alight-denied-basic-social-support-in-brisbane-hospital>>.

120 Ben Doherty, 'Manus Refugee Who Collapsed and Died Sought Medical Help 13 Times in Two Months', *The Guardian* (online), 10 February 2017 <<https://www.theguardian.com/australia-news/2017/feb/10/manus-refugee-who-collapsed-and-died-sought-medical-help-13-times-in-two-months>>.

121 Minister for Immigration and Border Protection (Cth), 'PNG Supreme Court Judgment' (Media Release, 26 April 2016).

122 Australian Human Rights Commission, *The Forgotten Children: National Inquiry into Children in Immigration Detention* (2014).

123 *Migration Act 1958* (Cth) s 198AB(1).

124 *Ibid* s 198AD.

125 *Ibid* s 198AE(1).

126 *Ibid* s 198AD(5).

127 *Ibid* s 198AD(3)(d).

128 *Ibid* s 198AD(3)(a).

129 *Ibid* s 198AD(3)(b).

130 *Ibid* s 198AD(3)(c)(i)–(ii).

131 *Ibid* ss 198AB(7), 198AD(9), 198AE(3).

either the national interest¹³² or the public interest.¹³³ For the reasons we have explained above, sidestepping the principles of natural justice and conditioning the exercise of powers on the national interest or the public interest decreases accountability and denies those affected the power to seek redress for wrong decisions.

132 Ibid ss 198AB(2)–(3).

133 Ibid ss 198AD(8), 198AE(1A).

Visa powers

The power to lift the bar

Section 46A(1) of the Migration Act prohibits all 'unauthorised maritime arrivals' from applying for a visa. A person will be an 'unauthorised maritime arrival' if he or she has entered Australia by sea without holding a valid visa.¹³⁴ The effect of this is that 'boat arrivals' — people who have fled their country and endured a perilous journey at sea — are precluded from seeking safety in Australia.¹³⁵

However, the Minister may 'lift the bar' imposed by section 46A(1). If the Minister 'thinks it is in the public interest to do so', he or she may decide that a person who has arrived in Australia by boat is allowed to apply for a visa.¹³⁶ This power may only be exercised by the Minister personally and is non-compellable.¹³⁷ As section 189 of the Migration Act requires the detention of all 'unlawful non-citizens', the people to whom the section 46A(1) bar applies are generally in immigration detention.¹³⁸

Although the Minister has the power to lift the bar, the fact that this power is non-compellable and non-delegable means that only people who are successful in gaining the attention of the Minister will be allowed to apply for a visa.

The exercise of the Minister's power to lift the bar was considered by the High Court in *Plaintiff M61/2010E v Commonwealth*.¹³⁹ It was held that the exercise of the power involves 'two distinct steps'.¹⁴⁰ First, the Minister must decide whether or not to 'consider exercising the power'.¹⁴¹ Secondly, the Minister must decide whether to actually lift the bar.¹⁴² Exercising this power therefore requires a procedural and substantive decision.¹⁴³ The Minister is under no obligation to make either of these decisions, and neither of them 'are conditioned by any requirement that the Minister afford procedural fairness'.¹⁴⁴

The substantive decision of whether or not to actually lift the bar or grant a visa is, in practice, generally made pursuant to departmental advice. However, these decisions are fundamentally based on the Minister's opinion about whether or not exercising the relevant power would be in the 'public interest'. The extent to which the Minister's powers hinge on personal discretion is extremely problematic for asylum seekers who are subject to them.

Thus, the effect of section 46A is to 'deny the concept of asylum'.¹⁴⁵ It is 'a matter of ministerial discretion to grant the privilege of asking for protection to anyone who arrives by boat'.¹⁴⁶ People who flee their country of origin and manage to reach Australia by boat (and who are not removed to a regional processing country) may be allowed to apply for a visa and have their claims considered. However, 'all of this occurs at the Minister's pleasure in the exercise of powers which the Minister

134 See *ibid* ss 5AA, 14.

135 Note that unauthorised maritime arrivals who arrive in Australia after 31 December 2013 will be transferred to processing centres in Papua New Guinea or Nauru and their claims will be assessed in accordance with local laws: see Refugee Advice and Casework Service, *Overview of Refugee Process* (16 September 2016) <<http://www.racs.org.au/factsheets/>>.

136 *Migration Act 1958* (Cth) s 46A(2).

137 *Ibid* s 46A(3).

138 Megan Driscoll, 'The Misnomer of "Temporary Safe Haven": Granting Visas "in the Public Interest" as a Tool to Limit Asylum Seekers' Access to Australia's Protection: *Plaintiff M79/2012 v Commonwealth*' (1 November 2013) <<https://blogs.unimelb.edu.au/opinionsonhigh/2013/11/01/driscoll-plaintiff-m79/>>.

139 (2010) 243 CLR 319.

140 *Ibid* 350 [70] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

141 *Ibid* 350–1 [70] (emphasis in original), cited in SZSSJ (2016) 90 ALJR 901, 909 [43] (French CJ, Kiefel, Bell, Gageler, Keane, Nettle and Gordon JJ).

142 *Offshore Processing Case* (2010) 243 CLR 319, 350–1 [70], cited in SZSSJ (2016) 90 ALJR 901, 909 [43].

143 See SZSSJ (2016) 90 ALJR 901, 911 [53].

144 See SZSSJ (2016) 90 ALJR 901, 911 [53] (French CJ, Kiefel, Bell, Gageler, Keane, Nettle and Gordon JJ). In that case, the High Court of Australia considered the operation of sections 48B, 195A and 417. However, their analysis in this respect arguably also applies to section 46A given the similarities between sections 46A and 48B. Whether 'processes undertaken by the Department to assist in the Minister's consideration of the possible exercise of a non-compellable power' are subject to the requirements of procedural fairness will depend on 'what the Minister personally has or has not done': at 911 [54]. If the Minister has personally made a 'personal procedural decision' to consider exercising his or her powers under section 46A, then a process undertaken by the Department to assist the Minister's consideration ... attracts an implied statutory requirement to afford procedural fairness where the process has the effect of prolonging immigration detention. If the Minister has not made a personal procedural decision to consider whether to make a substantive decision, a process undertaken by the Department on the Minister's instructions to assist the Minister to make the procedural decision has no statutory basis and does not attract a requirement to afford procedural fairness.

145 See Mary Crock and Hannah Martin, 'Refugee Rights and the Merits of Appeals' (2013) 32 *University of Queensland Law Journal* 137, 145.

146 *Ibid*.

has no obligation to exercise or even to *consider* exercising'.¹⁴⁷

The substantive decisions that the Minister makes pursuant to section 46A therefore suffer from a manifest lack of transparency and consistency.¹⁴⁸ As former Minister Chris Evans observed, the Migration Act is unlike any other 'in terms of the power given to the Minister to make decisions about individual cases'.¹⁴⁹ As discussed above, given the nature of the 'public interest' criterion, any decision of the Minister as to whether exercising a power is in the public interest is unlikely to be reviewable.

Limiting appeal rights

The right to appeal a decision is a fundamental one. We take the right to appeal a decision that we think is wrong for granted. The right of appeal is an important check and balance which involves the application of the rule of law.¹⁵⁰

Applicants who have their asylum claims rejected by the Department of Immigration and Border Protection should have the right to have that decision reviewed by an independent body. Indeed, considering the very significant consequences of an adverse decision, the right of appeal plays a very important function in the migration context.

Yet provisions in the Migration Act aim to circumscribe the rights of appeal of people seeking asylum. Those provisions, although interpreted narrowly by courts, serve to concentrate a great deal of power in the hands of the Minister or the Department. In effect, they seek to make the edicts of the government the first and the last word on the topic that they address.

The process

The main mechanism through which the individual's right of appeal is limited in the Migration Act is through what is known as a conclusive certificate. For the purposes of this report, we are concerned with the conclusive certificate as it appears in two parts of the Act: part 7 and part 7AA.¹⁵¹

Section 411 deals with 'Part 7-reviewable decisions', a definition that includes decisions to refuse to grant, or to cancel, a protection visa on various grounds. Decisions where a Minister has issued a conclusive certificate are excluded from the definition of Part 7-reviewable decisions.¹⁵² Section 411(3) provides that the Minister may issue a conclusive certificate in relation to a decision if he or she believes that it would be contrary to the national interest for the Minister to change the decision or for the decision to be reviewed.

Part 7AA of the Act deals with the 'fast track process' for review, which we deal with in detail later in this report. In short, part 7AA allows for review by the IAA of decisions to refuse to grant a protection visa made between 13 August 2012 and 1 January 2014. Section 473BD provides the Minister power to issue a conclusive certificate in identical terms to section 411(3). Decisions in respect of which a conclusive certificate has been issued are excluded from the review system established by part 7AA.¹⁵³

The conclusive certificate thereby plays a crucial role in allowing the Department to cut off review rights normally available to asylum applicants. By issuing a conclusive certificate, the Minister in effect immunises a decision from merits review, unless an applicant is able to convince a court that the certificate was itself not issued in accordance with law. Such an argument is unlikely to succeed because of the requirement that the Minister believe that the decision to issue a conclusive certificate be in the national interest.

Earlier in this report, we discussed the protean concept of the national interest. We noted that the

147 Ibid (emphasis in original).

148 Law Council of Australia, Submission No 24 to Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2013*, 24 January 2014, 17 [61].

149 Mark Metherell, 'I Should Not Play God: Evans', *The Sydney Morning Herald* (online), 20 February 2008 <<http://www.smh.com.au/news/national/i-should-not-play-god-evans/2008/02/19/1203190824140.html>>.

150 Chief Justice Murray Gleeson, 'Courts and the Rule of Law' (Speech delivered at the Rule of Law Series, The University of Melbourne, 7 November 2001) <http://www.hcourt.gov.au/assets/publications/speeches/former-justices/gleeson/cj_ruleoflaw.htm>.

151 It also appears in part 5: see *Migration Act 1958* (Cth) s 339.

152 Ibid s 411(2)(b).

153 Ibid s 473BB (definition of 'fast track reviewable decision').

Federal Court has found that ‘the Minister is left largely unrestrained to determine for him or herself what factors are to be regarded as relevant when determining whether the cancellation or refusal of a visa is in the national interest’.¹⁵⁴ It is likely that this is the reason that no applicant has ever challenged the validity of a conclusive certificate issued under section 411(3) or 473BC. Such a challenge is probably doomed to fail. For a person seeking asylum, this means that the decision of the Minister is final and their chance of building a life in Australia are at an end.

Refusal and cancellation of visas

The refusal or cancellation of a visa has substantial and lifelong consequences for a person seeking asylum. It can end their prospect of creating a life in Australia and result in their return to a place that they fled for fear of harm. Given its significant effect, the decision to refuse or cancel a visa should, as far as possible, be made in a way that is transparent and open to scrutiny. But the provisions of the Migration Act give the Minister and his delegates unjustifiable latitude in making those decisions.

Part 9 of the Migration Act provides for various grounds upon which a visa may be either refused or cancelled. The most commonly invoked provision is section 501, which allows for refusal or cancellation on character grounds – a wide-ranging test that reflects, as its name suggests, matters that might be taken to reflect adversely on an applicant’s character. Sections 109 and 116 provide additional bases for the cancellation (but not the refusal) of a visa. Section 109 provides for cancellation where a visa holder has failed to comply with certain provisions of the Migration Act, whereas section 116 provides for cancellation if the Minister is satisfied of one of a series of matters, including that the presence of the visa holder might be a risk to the health, safety or good order of the Australian community, a segment thereof or an individual or individuals, or on the basis of information that the Minister is satisfied is incorrect. Under sections 133A and 133C, the Minister is able to override a decision made under section 109 or section 116 by a delegate or by the AAT. We deal with the sections 133A and 133C override powers first, before turning to section 501.

Ministerial override to cancel visa

Take a case where a delegate of the Minister, or the AAT, decides that a ground for cancellation of a visa under section 109 exists, or decides on discretionary grounds not to cancel a visa. Section 133A gives the Minister a personal power to override that decision where he or she considers the ground for cancellation exists, the visa holder does not satisfy him or her otherwise, and the Minister is satisfied that cancellation is in the public interest.¹⁵⁵ Where the visa holder has been immigration cleared, the Minister must be satisfied that the ground exists and that cancellation is in the public interest.¹⁵⁶

The provisions of section 133C are identical, except that they apply instead to decisions made under section 116.

The Minister’s power to override a decision of his delegate may not be especially problematic. But the Minister’s power to override a decision of the AAT is another matter. Because the AAT has jurisdiction to review decisions made by the Minister, usually it is the AAT that overturns the decisions of the Minister, rather than the other way around. In that sense, the provisions reverse the usual hierarchy. Moreover, the Minister’s override decision is, in effect, not amenable to review, given the requirement that the Minister is satisfied that the decision is in the public interest. For the reasons we have explored above, a public interest criterion confers significant discretion on the Minister and is practically impossible to challenge in a court.

Refusal or cancellation on character grounds

The power to refuse or cancel a visa on character grounds is a significant one. Hundreds of applications are refused, or visas cancelled, on that basis every year.¹⁵⁷ The Minister’s powers in relation to refusal or cancellation on character grounds are extensive. The ‘character test’ is defined

¹⁵⁴ *Gbojueh* (2012) 202 FCR 417, 426 [44] (Bromberg J).

¹⁵⁵ *Migration Act 1958* (Cth) s 133A(1).

¹⁵⁶ *Ibid* s 133A(3).

¹⁵⁷ Minister for Immigration and Border Protection (Cth), *Key Visa Cancellation Statistics* <<https://www.border.gov.au/about/reports-publications/research-statistics/statistics/key-cancellation-statistics>>.

in sections 501(6)–(7) of the Migration Act, which provide that a person does not pass the ‘character test’ for various reasons, including if they have a substantial criminal record (a term defined to include a person sentenced to a term of imprisonment of 12 months or more);¹⁵⁸ they were convicted of an offence committed while in immigration detention;¹⁵⁹ the Minister reasonably suspects that the person has had an association with a group, organisation or person involved in criminal conduct;¹⁶⁰ and that, having regard to their past and present conduct, they are not of good character.¹⁶¹

Under section 501(3), the Minister may refuse or cancel a visa where he or she reasonably suspects that the person does not pass the character test and is satisfied that the refusal or cancellation is in the national interest.

To like effect are provisions in sections 501A, 501B and 501BA of the Migration Act. In the case of section 501A, the Minister is empowered to set aside a decision by his or her delegate, or the AAT, not to exercise a power to refuse or cancel a visa where he or she reasonably suspects that the person does not pass the character test and is satisfied that refusal or cancellation is in the national interest.¹⁶² Under section 501B, the Minister may set aside a decision of his delegate not to refuse or cancel a visa and may refuse or cancel the visa, if it is reasonably suspected that the person does not pass the character test, that the person does not satisfy him otherwise, and that he is satisfied that the refusal or cancellation is in the national interest. And finally, under section 501BA the Minister may set aside a decision by his or her delegate or the AAT to revoke a decision to cancel a visa under section 501(3A) and may cancel the visa where satisfied that the person does not pass the character test on particular grounds¹⁶³ and satisfied that cancellation is in the national interest.

As we have discussed, any power that has as a requirement of its exercise that the Minister be satisfied that it is in the national interest to do so is very problematic, given the very broad meaning that courts have accorded to that phrase.

Justice Kirby of the High Court considered the meaning of ‘national interest’ as it appears in section 501(3)(d) in *Re Patterson; Ex parte Taylor*.¹⁶⁴ He found that the phrase ‘national interest’ should be given a broad meaning, albeit that the Minister’s mere satisfaction that refusal or cancellation was in the national interest would not be sufficient where there was no reasonable justification for that view.¹⁶⁵ Despite stating that national interest ought to be given a broad meaning, Kirby J construed it relatively narrowly. He found that the national interest test was not satisfied as ‘[t]here was no “emergency”, nor did the case “involve a significant threat to the *nation* as a whole or the community of the *nation*’.¹⁶⁶ Further, the Parliamentary Secretary’s reasons for cancelling the visa did not separately address the national interest issue, instead conflating it with the question whether Mr Taylor had a substantial criminal record.¹⁶⁷ For these reasons, Kirby J concluded that there was no reasonable justification for cancellation having been in the national interest.

But Kirby J was the only member of the Court to even consider the national interest issue, much less to decide it in favour of Mr Taylor. And while, as Kirby J said, a decision made on the basis of a view for which there is no reasonable justification may be successfully challenged in a court,¹⁶⁸ the case law shows that it is extremely difficult to satisfy that test.¹⁶⁹

The accountability gap created by the deployment of a ‘national interest’ test is amplified even further by the second criterion of refusal or cancellation, which is not that the character test is satisfied, but that the Minister *reasonably suspects* that it is satisfied. A requirement of ‘reasonable suspicion’ introduces a further level of personal ministerial power, as it need not be true that the character

158 Ibid ss 501(6)(a), 501(7).

159 Ibid s 501(6)(aa)(i).

160 Ibid s 501(6)(b).

161 Ibid s 501(6)(c).

162 Ibid ss 501A(2)–(3). In the case of decisions under section 501A(2), to which natural justice applies, it is also a requirement that the person does not satisfy the Minister that he or she passes the character test. Natural justice does not apply to section 501A(3): at s 501(4).

163 In particular, because of the operation of section 501(6)(a), on the basis of sections 501(7)(a), (b) or (c), or section 501(6)(e).

164 (2001) 207 CLR 391.

165 Ibid 502–3 [330]–[331].

166 Ibid 503 [332].

167 Ibid 504 [336].

168 See *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332.

169 For a rare example of such an argument succeeding, see *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611.

test is in fact satisfied, but rather merely that the Minister (on reasonable grounds) *thinks* that it is satisfied. The concept of ministerial satisfaction, which is employed in sections 501A, 501B and 501BA, has been canvassed earlier. It confers a very broad discretion on the decision-maker, subject only to very limited review. What's more, a test of reasonable suspicion is, and is intended, to set a bar even lower than that which applies to mere ministerial satisfaction.

When these problems are combined, it becomes obvious that the power to refuse or cancel a visa — a power which effectively spells the end of a person seeking asylum's chance of a life in Australia — is almost immune from any independent form of review. An incredible degree of discretion is therefore conferred on the Minister and his delegates, with courts and tribunals only able to intervene and set aside decisions in the most grievous cases, if at all.

Adverse security assessments

Imagine that you have come to Australia seeking protection under the Refugee Convention. Indeed, you have been assessed by the Department of Immigration and Border Protection, who have found that you are a refugee. You are not granted a visa, however, for reasons that may never be given to you. It is also likely that, on the basis of that information, you will not be allowed to stay in Australia.

The right to respond to allegations adverse to you — a right that is an intrinsic aspect of procedural fairness — is not available to some people seeking asylum. Without any forewarning, an application for a protection visa by a person seeking asylum may be refused because ASIO considers that they are a risk to security. They do not get told the basis for that finding; they will therefore find it very difficult to review the finding in a court or tribunal. For those people seeking protection in Australia, it means spending an indefinite period in immigration detention, not knowing what they allegedly did wrong and with no prospect of finding out.

The process

Under the *Migration Regulations 1994* (Cth), it was a prerequisite of the grant of a protection visa that the applicant not be assessed by ASIO to be 'directly or indirectly a risk to security'.¹⁷⁰ 'Security' was defined in section 4 of the ASIO Act to mean 'the protection of the Commonwealth, the states and territories and the people from espionage, sabotage, politically motivated violence, attacks on Australia's defence system, acts of foreign interference, the protection of Australia's territorial and border integrity from serious threats', and the carrying out Australia's responsibilities to any foreign country in respect of those matters.

Some 56 Tamil people seeking asylum in Australia, all of whom were found to be refugees, were the subject of an 'adverse security assessment' made under the ASIO Act.¹⁷¹ Under the ASIO Act, those individuals were required to be provided with a statement of the grounds of the assessment. That statement could not include any information which, in the opinion of the Director General of Security, would be contrary to the requirements of security.¹⁷²

The result of an adverse security assessment is the denial of a protection visa and the person seeking asylum being held in immigration detention pending removal. But of course, removal of these people to another country is highly unlikely; other countries have historically been reluctant to take people seeking asylum who have also been found to be a risk to security.

The requirement that a person not be assessed by ASIO to be 'directly or indirectly a risk to security' was found to be invalid by the High Court in *Plaintiff M47/2012 v Director General of Security* ('M47').¹⁷³ According to the Court, that requirement was inconsistent with the provisions of the Migration Act.

A well-known example of the harsh operation of the adverse security assessment regime is the case of 'Ranjini', a Tamil asylum seeker who was held in immigration detention from mid 2012 to late 2015. She and her two sons boarded a boat from India which was intercepted in Australian waters. They eventually received refugee status, and Ranjini married another Sri Lankan Tamil who had previously

¹⁷⁰ *Migration Regulations 1994* (Cth) sch 2 cl 866.225(a).

¹⁷¹ Andrew and Renata Kaldor Centre for International Refugee Law, *Refugees with an Adverse Security Assessment by ASIO* (23 May 2016) <<http://www.kaldorcentre.unsw.edu.au/publication/refugees-adverse-security-assessment-asio>>.

¹⁷² *Australian Security Intelligence Organisation Act 1979* (Cth) s 37(2).

¹⁷³ (2012) 251 CLR 1.

been granted a protection visa. After all of this had occurred, the Department of Immigration and Citizenship withdrew her protection visa on the basis of an adverse security assessment from ASIO. Ranjini was pregnant at the time. She delivered her third son while in immigration detention. Ranjini and the newborn were sent back to detention just three days later. Ranjini brought an appeal against the Department's failure to refer her case to the Minister to exercise his discretion. She was successful in the High Court in establishing that the Department committed an error of law.¹⁷⁴ Ranjini continued to languish in immigration detention for more than three years, not told why she was considered a threat to security nor able to challenge that assessment. She was finally released in November 2015, without any reason being given.¹⁷⁵

The government had two responses to the decision in *M47*, which generated significant critical attention on the adverse security assessment regime. First, it appointed an Independent Reviewer of Adverse Security Assessments¹⁷⁶ whose task is to review adverse security assessments and form an opinion as to whether those assessments are appropriate. The Independent Reviewer is entitled to ask the applicant to submit material for his or her consideration. The Independent Reviewer is also entitled to an unclassified written summary of ASIO's reasons for issuing an adverse security assessment, which could in turn be provided to the person seeking asylum in question. The Independent Reviewer is also required to conduct a periodic review of adverse security assessments every 12 months.¹⁷⁷

The second response was to make amendments to the Migration Act which cured the problems that the High Court identified in *M47*.¹⁷⁸ They provided a statutory basis for the requirement, before a protection visa can be granted, that the applicant not be subject to an adverse security assessment from ASIO.

The adverse security assessment process suffers from many problems. First is the lack of procedural fairness, and in particular transparency, afforded to people seeking asylum. For the most part, people seeking Australia's protection have no advance notice of the allegations that form the basis of ASIO's adverse security assessment. Moreover, the requirement to give 'reasons' under the ASIO Act is very thin, as ASIO may redact reference to any matters that would, in the Director General's opinion, be contrary to the requirements of security.¹⁷⁹ Attempts to access the reasons, or the evidence on which the assessments were based, have been unsuccessful.¹⁸⁰ ASIO is able to rely on several legal rules that shield it from revealing the material in those documents — principally public interest immunity¹⁸¹ and the statutory requirement that, in deciding whether to allow someone to adduce evidence as to national security matters, the court must consider the prejudice to national security in allowing the evidence to be adduced.¹⁸²

While the introduction of the Independent Reviewer was a step in the right direction, the role of that office is necessarily limited. The Independent Reviewer does not have the power to overturn an adverse security assessment; rather, all he or she can do is make a recommendation to the Director General that an adverse security assessment be reversed, which the Director General may or may not act upon. As the Australian Human Rights Commission has said, 'a non-statutory review mechanism with nonbinding recommendations does not adequately reflect the gravity of the consequences of an adverse security assessment'.¹⁸³ Moreover, the Independent Reviewer's position has no statutory foundation — the position exists on a purely administrative, extra-legal basis. No doubt this is at least in part to avoid potential legal challenges to the carrying out of the duties conferred on the Independent Reviewer. The position of the Independent Reviewer should be placed on a statutory footing, in order that there be more transparency as to the precise obligations of that body.

174 *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322.

175 Michael Gordon, 'Free at Last, Ranjini Is Deemed Not a Security Threat after All', *The Sydney Morning Herald* (online), 13 November 2015 <<http://www.smh.com.au/federal-politics/political-news/free-at-last-ranjini-is-deemed-not-a-security-threat-after-all-20151113-gkyngv.html>>.

176 Initially the Hon Margaret Stone, now Robert Cornall AO.

177 See Attorney-General (Cth), *Independent Review Function — Terms of Reference*.

178 See *Migration Act 1958* (Cth) s 36(1B), as inserted by *Migration Amendment Act 2014* (Cth) sch 3 item 1.

179 *Australian Security Intelligence Organisation Act 1979* (Cth) s 38(2)(b).

180 *Leghaei v Director General of Security* [2005] FCA 1576; *SBEG v Secretary, Department of Immigration and Citizenship* (2012) 291 ALR 281; *Jaffarie v Director General of Security* (2014) 226 FCR 505.

181 See *Sankey v Whitlam* (1978) 142 CLR 1, 38 (Gibbs ACJ); *Evidence Act 1995* (Cth) s 130.

182 *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) s 38L.

183 Australian Human Rights Commission, *Tell Me About: Refugees with Adverse Security Assessments* (2013) 3.

The secrecy that shrouds the adverse security assessment process is highly problematic. The glaring lack of natural justice available to people seeking asylum who have received an adverse security assessment only makes matters worse. The government must take steps to deal with this glaringly unfair process by providing applicants with greater opportunities to respond to allegations put against them, and to give them, or at a minimum their legal representatives, access to sufficient information to understand and respond to the findings that ASIO has made. If such changes were made, people seeking asylum would be able to rely on fairer, more transparent processes in relation to decision that have a significant effect on their prospects of a life free of persecution.

The IAA: The God Powers in Action

The previous section of the report was directed to showing how Australia's migration legislation involves, at every stage of the process, injustices that make the process of seeking asylum dangerously contingent on the broad, discretionary powers of one politician. In this section, we use the case study of the IAA regime — a system for the fast-track review of decisions made by the Minister — to show how all of the God powers we have discussed above can come together to create a process that is manifestly unjust.

The IAA: What's at stake?

The introduction of the fast track system in Australia, and particularly the limited review provided by the IAA, has removed fundamental principles of procedural fairness, including the right to be heard, to be present and to challenge evidence. The increasingly complicated visa applications which asylum seekers are required to complete, coupled with the lack of support to obtain legal assistance and the absence of a fair and just merits review process by the IAA, reflects a deeply flawed system for dealing with people seeking asylum. Of equal concern is the scope to extend this restricted review process to anyone in a class of persons specified by the Minister in a legislative instrument.¹⁸⁴

The IAA review process applies to 'fast track reviewable decisions'; that is, a decision to refuse to grant a protection visa.¹⁸⁵ Currently, the process applies to asylum seekers who arrived in Australia without a visa and by boat between August 2012 and January 2014.¹⁸⁶

The countries of origin of people who have been processed through the fast track system include Sri Lanka (27%), Iran (24%), Afghanistan (20%), Pakistan (7%) and Iraq (6%). Stateless asylum seekers also account for about 9 per cent.¹⁸⁷ Many of the countries that people seeking asylum have fled from are recognised as having undergone significant turmoil during 2012–13.¹⁸⁸

The IAA process significantly restricts the fundamental principles of natural justice. Perhaps the most alarming aspect of the IAA process is the broad powers given to the Minister which allows individuals or entire classes of people seeking asylum to be excluded from any form of review at all. Essentially, *individual* applicants who might be excluded from any merits review by the IAA are those:

- whose visa applications are considered to be 'manifestly unfounded';
- who, without reasonable explanation, submit a document which is suspected to be 'non-genuine or counterfeit';
- who already have protection elsewhere through nationality or a right to enter and reside in a third country; and
- who have been refused a visa by Australia, another country, or the United Nations High Commission for Refugees.¹⁸⁹

In addition to this, the Minister may also exclude *classes* of applicants from IAA merits review (albeit subject to 'disallowance' by either House of Parliament).¹⁹⁰ The Minister also possesses a broad discretion to exclude applicants on the basis of the 'national interest'.¹⁹¹

Significant concerns have been expressed in relation to the effect of these exclusionary criteria. For instance, in relation to the Minister's power to deny review based on an applicant's submission of allegedly 'bogus documents', the Human Rights Law Centre notes:

184 However, it does not include asylum seekers who have been relocated to a regional processing country: see *Migration Act 1958* (Cth) s 5(1) (definition of 'fast track applicant' para (a)(i)).

185 *Migration Act 1958* (Cth) ss 473JA–473JF.

186 *Ibid* s 5(1).

187 Department of Immigration and Border Protection, *Asylum Trends, Australia 2012–13: Annual Publication* (2013) 24.

188 See, eg, Human Rights Watch, *World Report 2013: Sri Lanka* (2013) <<https://www.hrw.org/world-report/2013/country-chapters/sri-lanka>>; Human Rights Watch, *World Report 2013: Iran* (2013) <<https://www.hrw.org/world-report/2013/country-chapters/iran>>; Human Rights Watch, *World Report 2013: Afghanistan* (2013) <<https://www.hrw.org/world-report/2013/country-chapters/afghanistan>>.

189 *Migration Act 1958* (Cth) s 5(1) (definition of 'excluded fast track review applicant').

190 *Ibid* ss 5(1) (definition of 'excluded fast track applicant' para (b)), 5(1AA)–(1AD).

191 *Ibid* s 473BD.

*a person may be unfairly caught by the operation of these provisions. For instance, there are many good reasons refugees often arrive with 'bogus documents'. They often cannot ask the regimes from which they are fleeing for help getting all their paperwork in order. Sometimes they require and obtain fake documentation to escape. As the UNHCR recognises in its Handbook on Procedures and Criteria for Determining Refugee Status, 'in most cases a person fleeing from persecution will have arrived with the barest necessities and very frequently even without personal documents'.*¹⁹²

The overall effect of these exclusionary provisions is to deny many people seeking asylum any form of review of the decision to reject their application for a protection visa. This decision is made by a single Department of Immigration and Border Protection officer who has assessed the application. It is noteworthy that these applications are often drafted by volunteer solicitor and migration agents at community legal centres and that the less restrictive review process that operated prior to the introduction of the fast track system frequently upheld appeals when people seeking asylum were denied protection visas. In fact, in the four years prior to the introduction of the fast track process in 2013, 93% of those who arrived by boat and were seeking asylum who had their applications considered by the RRT (the body that previously considered reviewable protection claims) were found to be genuine refugees.¹⁹³

The fast-track system has eliminated fundamental principles of fairness and reduced the information available in a decision-making process where outcomes often mean life or death. The risk of error has increased while at the same time the ability to correct mistakes has been diminished. There is a very real likelihood that this attenuated process has resulted in, and will continue to result in, poorly based decisions that adversely affect an already vulnerable and disadvantaged group.

The process

Applicants who undergo the IAA review process are subjected to significant procedural unfairness. Integral to the IAA's expedited processing of fast-track claims is a significantly limited review process, incorporating drastic limitations on established principles of natural justice in conjunction with broad ministerial powers to entirely exclude applicants from review.

The IAA operates within the Migration and Refugee Division of the RRT.¹⁹⁴ However, the IAA operates under distinctly different principles to those of the RRT. In particular, the IAA's objective of expediency in decision-making raises serious concerns as to the diminished procedural fairness and justice afforded to people seeking asylum who are processed through the fast track assessment system.

Upon being deemed a 'fast track reviewable decision',¹⁹⁵ applicants who have had their applications for protection visas rejected are automatically referred to the IAA, a division of the Migration and Refugee Division of the RRT, for a limited review. This review is merely an 'on the papers' assessment¹⁹⁶ and is based solely on material that was previously submitted by applicants when their original application was rejected by the Department of Immigration and Border Protection. Personal interviews and 'new' information will only be permitted in 'exceptional circumstances'.¹⁹⁷

Significantly, the Migration Act exhaustively and restrictively defines the operation of the principles of natural justice that apply to the IAA.¹⁹⁸ The effect of this is generally to deny affected people seeking asylum:

- a hearing;
- a right to respond to adverse information raised by the rejection of their application at the

192 Daniel Webb and Rhys Ryan, Submission No 166 to Senate Legal and Constitutional Legislation Affairs Committee, *Review of the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Seeker Legacy Caseload) Bill 2014 (Cth)*, 31 October 2014, [64].

193 Mary Anne Kenny and Nicholas Procter, "Fast Track" Asylum Processing Risks Fairness for Efficiency', *The Conversation* (online), 8 December 2014 <<http://theconversation.com/fast-track-asylum-processing-risks-fairness-for-efficiency-35146>>.

194 *Migration Act 1958* (Cth) s 473JA.

195 See *ibid* s 473BB.

196 *Ibid* s 473DB(1).

197 *Ibid* s 473DD.

198 *Ibid* ss 473DA, 473GA, 473GB.

previous stage;

- the ability to raise new information; instead, only information which was contained in the original application is considered (unless the applicant can establish that 'exceptional circumstances' apply); and
- a right of access to any documents that may have been relied upon to reach the initial adverse decision.

The term 'exceptional circumstances' is *not* defined in the Migration Act. Notably, according to the explanatory memorandum that introduced the IAA, misunderstanding of the fast track process and procedures will not constitute exceptional circumstances.¹⁹⁹ Significantly, even where an applicant satisfies one or more of the criteria for exceptional circumstances, the IAA retains an unfettered discretion as to whether to admit the new material for consideration.²⁰⁰

Furthermore, the onus is on the applicant to establish that any new material which they wish to submit:

- was not, and could not have been, available to them at the time they submitted the original application;²⁰¹ or
- is credible personal information which was not previously known and, had it been known, may have affected consideration of their protection claim.²⁰²

In addition to this highly attenuated review process, the relevant visa information required from applicants (contained in the Safe Haven Enterprise Visa and the Temporary Protection Visa forms) is lengthy, detailed and complex.²⁰³ These documents comprise approximately 80 pages of sometimes nuanced legal questions and require applicants to account for their residences, education and occupation since birth. Even with the assistance of experienced lawyers, the completion of these documents may take several hours, including in circumstances where a protection visa application has previously been submitted. It is worth noting that although the process is described as a 'fast track', the system is characterised by extraordinary delay; by 26 April 2016, only 38 claims had been processed by the IAA.²⁰⁴

The IAA process was loosely based on the UK's DFT process. Like the IAA process, the DFT regime imposes severe time restrictions on applicants seeking review of migration decisions. Under the DFT, a notice of appeal must be filed within just two business days of receiving notice of the initial decision; the respondent (that is, the government) must file its materials two business days after that; and so on. The effect is severely to curb the ability of asylum applicants to present their case effectively.

A series of court cases have found that aspects of the DFT are invalid. In 2014, a court found that the delays and restrictions on applicants' access to legal assistance meant that the DFT 'carrie[d] an unacceptably high risk of unfairness'.²⁰⁵ On appeal from that decision, the English Court of Appeal further held that the detention of DFT applicants under the 'quick processing criteria' policy was not 'clear and transparent'.²⁰⁶ In 2015, a judge held that the UK's fast track rules, due to the time restrictions they imposed and the limited powers to extend time afforded to the reviewing body, 'incorporate[d] structural unfairness' and 'put [applicants] at a serious procedural disadvantage'.²⁰⁷ The Court of Appeal subsequently confirmed that the fast track system was structurally unfair, observing that 'the time limits are so tight as to make it impossible for there to be a fair hearing of appeals in a significant number of cases'.²⁰⁸

Australia's fast track regime goes even further than its UK counterpart in limiting the procedural

199 Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth) [916].

200 Ibid [914].

201 Migration Act 1958 (Cth) s 473DD(b)(i).

202 Ibid s 473DD(b)(ii).

203 See, eg, Department of Immigration and Border Protection, *Form 866* (2015).

204 Natasha Robinson, "Fast-Track" Process for Asylum Seekers to Result in Lengthy Delays as Court Challenges Mount, *ABC News* (online), 16 April 2016 <<http://www.abc.net.au/news/2016-04-16/fast-track-process-asylum-seekers-lengthy-delays-court-challenge/7331296>>.

205 *Detention Action v Secretary of State for the Home Department* [2014] EWHC 2245 (Admin) [197] (Ouseley J).

206 *R (Detention Action) v Secretary of State for the Home Department* [2014] EWCA Civ 1634 [64]–[70] (Beatson LJ; Floyd and Fulford LJJ agreeing).

207 *Detention Action v First-tier Tribunal (Immigration and Asylum Chamber)* [2015] EWHC 1689 (Admin) [57].

208 *Lord Chancellor v Detention Action* [2015] 1 WLR 5341, 5354 [45] (Lord Dyson MR; Briggs and Bean LJJ agreeing).

fairness afforded to people seeking asylum. Some examples of how the UK's DFT system is fairer than the IAA include:

- the default position is that DFT applicants are entitled to a hearing, while under the IAA scheme, as mentioned above, hearings only occur in a limited range of circumstances;
- the policy of the UK government is that DFT will not be applied to vulnerable groups (eg children, pregnant women and persons with a disability),²⁰⁹ whereas under the IAA scheme, the ability to exclude people seeking asylum is within the Minister's unfettered discretion;
- the DFT entitles applicants to free legal representation, whereas in Australia the Commonwealth government does not provide free legal assistance to people seeking asylum who do not hold a valid visa; and
- the DFT is only intended to be applied where 'it appears that a quick decision is possible';²¹⁰ however, the IAA applies to all 'unauthorised maritime arrivals' who arrived in Australia during the relevant period.

In light of these differences, the strong criticisms levelled by English courts at the DFT apply with even greater force to the IAA.

The IAA regime shows the worst aspects of the God powers coalescing in one process. By abridging the time available to seek review, excluding the common law of procedural fairness, and refusing applicants the right to a hearing and the opportunity to put forward new information, it demonstrates how the creeping expansion of problematic ministerial powers has led to a migration regime that is all too willing to sacrifice justice and transparency at the altar of political expediency.

²⁰⁹ Home Office (UK), *Detained Fast Track Processes* (at 6 July 2015) [2.3].

²¹⁰ *Ibid* [2.1].

Recommendations

The concerns raised in this report centrally involve important decisions that affect the fundamental rights of very vulnerable people. Those decisions are not made in a transparent way in accordance with fair processes; rather, the Minister is empowered to an alarming degree to make decisions based upon his whim, with scant regard for due process. These recommendations are aimed at reversing that, and restoring a fair, accountable migration system. Proper processes, not political power, should prevail.

Reinstate natural justice

Natural justice is a foundational common law right. Courts presume, absent clear words or necessary implication, that a statute is intended to be read in light of the principle of procedural fairness. Yet several key pieces of migration legislation expressly exclude the principles of natural justice. Those provisions which exclude natural justice should be repealed. They are:

- sections 22B and 75B of the Maritime Powers Act – in relation to powers exercised under parts 2, 7 and 8; and
- sections 198AB(7), 198AD(9) and 198AE(3) of the Migration Act – in relation to designating a regional processing country and removing a person to a regional processing country.

Further, the IAA, although it does not expressly exclude natural justice, involves a radical departure from natural justice as understood at common law. As discussed below, the IAA should be abolished altogether so as to ensure that asylum applicants are accorded due process.

Eradicate the ministerial satisfaction test

Ministerial satisfaction is a tool that government can use to provide a level of discretion before a decision will be interfered with by a court. To that extent, it detracts from notions of accountability that are central to all governmental decision-making. We consider that the concept of ministerial satisfaction should be removed from the legislation examined in this report. By removing ministerial satisfaction, people seeking asylum will be better able to challenge decisions made on the basis of criteria that are not satisfied.

Ministerial satisfaction appears throughout the Migration Act. The examples highlighted in this report are:

- section 73 – bridging visas;
- section 116 – the Minister's power to cancel a visa;
- sections 133A and 133C – the Minister's power to override a decision and cancel a visa;
- section 501, 501A, 501B and 501BA – the power to cancel a visa on character grounds.

Remove references to 'national interest' and 'public interest'

The concepts of the 'national interest' and the 'public interest' pervade the legislation examined in this report. As we have shown, powers that may be exercised on the basis of the national interest or the public interest essentially give decision-makers a blank cheque to make decisions by reference to whatever considerations suit them at the time. This creates a serious accountability loophole. For that reason, powers that have significant consequences for the lives of asylum seekers should not be exercisable upon the Minister (or the relevant decision-maker) being satisfied that it is in the national interest or the public interest to do so.

This would require amendments to be made to the following provisions of the Migration Act:

- section 197AB – the power to make a residence determination;
- section 73 – bridging visas;

- section 197AD — the power to revoke or vary a residence determination;
- section 198AB — the power to designate a regional processing country;
- section 46A — the power to lift the bar;
- sections 411(3) and 473BD — the power to issue conclusive certificates; and
- sections 133A and 133C — the power to override a decision and cancel a visa; and
- section 501, 501A, 501B and 501BA — the power to cancel a visa on character grounds.

Section 195A should remain in its current form. We do not take issue with the public interest test in section 195A because of its long history and the fact that it exists for the benefit of people seeking asylum.

Provide proper avenues of review

The mechanism of the conclusive certificate is demonstrably unfair. It runs counter to the principle, taken for granted throughout our legal system, that a person should have a right to review the decision of a government decision-maker that impacts them where they think it is wrong. Persons seeking asylum, who are in a far more vulnerable position than the ordinary Australian and whose rights are affected in a very significant way by these decisions, should have that right too. The powers to issue a conclusive certificate contained in sections 411 and 473BD of the Migration Act should be abolished.

Abolish the IAA

The IAA reflects all of the above problems in one process. Added to that are the abridged timelines, which are likely to impact adversely on the ability of an applicant to put all relevant material before the Department. For that reason, the IAA process should be abolished altogether and the Migration and Refugee Division of the AAT should be reinstated as the body that reviews all unsuccessful applications for refugee status.



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