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**THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA**

**HOUSE OF REPRESENTATIVES**

**Refugee Protection Bill 2018**

**EXPLANATORY MEMORANDUM  
and  
STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS**

Circulated by authority of  
Andrew Wilkie MP

## **Refugee Protection Bill 2018**

### **OUTLINE AND SCOPE**

This bill provides for a sustainable, equitable and humane response to the protection and processing of asylum seekers and refugees in the Asia Pacific region. A key component of this bill is the Asia Pacific Asylum Seeker Solution (APASS), a regional framework to be initiated by the Australian Government in partnership with other Asia Pacific countries. All countries party to APASS must be legally bound to provide effective protection for asylum seekers and refugees as provided under international law.

This Act enables the establishment of a network of centres, located in and run by Asia Pacific countries including Australia, where asylum seekers can go to be registered, have their immediate humanitarian needs met and lodge a preference for country of re-settlement. If the asylum seeker selects Australia, and is within the specified quota, this Act establishes a process for assessing their claim in Australia with appropriate oversight, limited timeframes and judicial review. The Act does not allow mandatory detention and prioritises the applicant's immediate needs and refugee and international human rights law.

The APASS centres will be located to enable ease of access to and for asylum seekers and refugees, providing a legal and safe alternative to the service of people smugglers. These centres will be developed in cooperation with, and funded by, parties to APASS. The purpose of the APASS centre is to stabilise people's situation as quickly as possible by screening and registering new arrivals and providing them with a recognised legal status. An APASS applicant may remain at the centre where they are registered or be transferred to another APASS centre. A transfer arrangement for an APASS applicant must prioritise the applicant's immediate needs, the best interests of the child, the principle of family unity, international human rights law and responsibility sharing between APASS member states as a priority. Each APASS applicant will be assigned an APASS case officer who will be responsible for the processing conditions of the applicant, including access to free independent legal advice, accommodation and financial support, as well as working with authorities to ensure an applicant's visa is processed within the statutory time frame. Each step of this process will have restricted time frames, appropriate oversight and review. Australia will take a specified quota of APASS applicants each year who will be considered for permanent visas in Australia based on their refugee status.

This bill provides that alternatives to immigration detention, which may take various forms depending on the particular circumstances of the individual, are preferred to immigration detention. Under this Act, immigration detention for APASS applicants must be lawful, necessary, proportionate and be for the shortest time possible. Mandatory detention is illegal under this Act. This bill clearly outlines the reasons and the time frames, communication and services that are to be available in immigration detention, which will be independently monitored.

APASS establishes a mechanism for regional cooperation on the registration, processing and settlement of asylum seekers and refugees in the Asia Pacific region. It incorporates principles of genuine responsibility and cost sharing between member states and is able to build on existing forums such as the Bali Process, the Association of Southeast Asian Nations (ASEAN) and the Asia Dialogue on Forced Migration. APASS enhances the region's capacity to respond effectively to the movement of asylum seekers and refugees as well as provide safe entry for people seeking protection in Australia. Such a framework may also play an important role in the allocation of foreign aid to beleaguered countries so that asylum seekers may safely

return to their country of origin. Fundamental to this bill is the primacy of international agreements for the protection of rights and the principle of family unity and the best interests of the child. These laws and principles are paramount to the development of the APASS framework and to all decision-making under this Act.

As it is unconstitutional for a bill to direct the executive arm of government to enter into a regional agreement, this bill is enabling legislation only. It should be seen by the executive as a viable alternative to Australia's current asylum seeker policy as it has been developed in accordance with United Nations High Commissioner for Refugees (UNHCR) guidelines, the Refugees Convention and international human rights law.

This bill should be read as a primary bill as it requires the subsequent passage of consequential amendments. The interaction of this bill with the Migration Act is complex, as is the legal status and transitory arrangements for current asylum seekers and refugees if this bill is passed. The consequential amendments bill will address this, and any other inconsistencies with Commonwealth, state or territory law.

## **FINANCIAL IMPACT**

The bill will have no financial impact.

## **NOTES ON CLAUSES**

### **PART 1 - PRELIMINARY**

#### **Clause 1: Short Title**

1. This clause is a formal provision and specifies that the short title of the bill is the *Refugee Protection Bill 2018*.

#### **Clause 2: Commencement**

2. This clause provides for the commencement of the Act on the day it receives Royal Assent.

#### **Clause 3: Simplified outline and object of this Act**

3. Subclauses 3(1) and (2) provides a simplified outline describing what this Act does and how it works.

4. Subclauses 3(3) and (4) sets out the object of the Act, which is to provide a sustainable, equitable and humane legislative response to people seeking asylum in Australia by enabling a regional framework for the protection of asylum seekers and refugees, initiated by the Australian Government in partnership with other countries in the Asia Pacific region.

5. Subclause 4(b) specifies that this Act uphold Australia's obligations under the Refugee Convention and international human rights law.

#### **Clause 4: Act binds the Crown**

6. This clause sets out that this Act binds the Crown in each of its capacities.

#### **Clause 5: Definitions**

7. Subclause 5(1) defines several terms used specifically in the Act. APASS (short for Asia Pacific Asylum Seeker Solution) is the name given to the regional framework, enabled by the Act, to manage movements and placement of asylum seekers and refugees in the region. A regional framework does not currently exist and it is intended that such a framework will be initiated by the executive, in cooperation with regional partners, as a long term policy solution.

8. Subclause 5(2) sets out that a term or expression used in the Act that is defined for the purposes of the Migration Act has the same meaning in this Act and it would in the *Migration Act 1958*. It is not the intention of this bill to rewrite definitions under migration law unless the current definitions are contrary to international law.

#### **Clause 6: Application – International agreements for the protection of rights**

9. This clause sets out that all actions and decisions made under this Act must be consistent with the international agreements listed in subclauses 6(a)-(h). The purpose of this is to ensure the full implementation of international refugee and human rights law into domestic legislation.

#### **Clause 7: Severability**

10. This clause sets out that this Act is constitutionally valid to the extent that it has a constitutional head of power, specifically the Commonwealth external affairs and aliens powers as outlined under subclauses (3) to (6).

#### **Clause 8: Principle of family unity**

11. This clause sets out that the principle of family unity should be paramount in all actions and decisions under this Act. It recognises the obligation to protect and respect family life and follows the principle, set in international law, that family unity is inherent to the right to family life and this right is entitled to protection by society and the State.<sup>1</sup> Maintaining refugee family life is essential to protection and a key to success of refugees restoring their lives.<sup>2</sup>

12. Subclause 8(2) directs that actions which would disrupt an intact family unit or prevent family reunification should be avoided.

13. Subclause 8(3) outlines that not only should a country refrain from splitting up an intact family unit, it must also take action to allow a dispersed family to reunite without being forced to return to the country from which they have fled. This clause is in line with the fundamental principle, within the UNHCR

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<sup>1</sup>See Article 16 of the Universal Declaration of Human Rights of 10 December 1948. See also Article 23 of the International Covenant on Civil and Political Rights of 16 December 1966; Article 10 of the International Covenant on Social, Economic and Cultural Rights of 16 December 1966; the Preamble of the Convention on the Rights of the Child of November 1989; Article 16 of the European Social Charter of 18 October 1961; Article 18 of the African Charter on Human and Peoples' Rights of 26 June 1981; and Article 17 of the American Convention on Human Rights of 22 November 1969. A useful summary of all relevant international instruments is found in Annex 2 of the UNHCR Resettlement Handbook.

<sup>2</sup> See '9.1 Family unity and refugee protection' at <http://www.unhcr.org/publications/legal/419dbf664/refugee-protection-international-law-family-unity-refugee-protection-91.html>

guidelines and under international human rights law, that as a fundamental unit of society the family is entitled to respect and protection.<sup>3</sup>

#### **Clause 8A: Principle of the rights and best interests of the child**

14. This clause sets out that the principle of the rights and best interests of the child should be paramount in all actions and decisions under this Act that affects a child.

15. Subclause 8A(2)(a) re-emphasises the principle of family unity as a priority in decisions relating to a child.

16. Subclause 8A(2)(b) re-iterates that when an APASS country is responsible for a child they must ensure that the child has full access to education, health and mental health services, phone and internet and free legal services. They must also be housed, clothed and fed and provided with other necessary financial assistance.

17. Subclause 8A(2)(c) states that children must be part of the decision making process about their future under APASS and that their views must be fully considered when their future is being determined.

#### **PART 2 – ENABLING OF APASS**

18. Part 2 enables APASS but the negotiation, development and implementation of the APASS framework must be led by the executive as it is unconstitutional for the Parliament to direct the executive arm of government.

19. The APASS regional framework is a long-term, sustainable policy that will be complex to negotiate and implement. It is intended that this process will respect the sovereignty of each member country and strictly adhere to international refugee and human rights law.

20. Negotiations regarding the APASS regional framework should be alert to the difficulties and priorities of refugee protection for each country involved as outlined by the Expert Roundtable on regional cooperation and refugee protection in the Asia Pacific.<sup>4</sup>

21. The negotiation and implementation of APASS can build on existing forums such as the Bali Process, the Association of Southeast Asian Nations (ASEAN) and the Asia Dialogue on Forced Migration.

22. It is important that Australia initiates negotiations for APASS. Australia's current deterrence-based policies have placed pressure on neighbouring countries and Australia must act first to amend its own domestic laws to fit with APASS in order to gain trust from the region.

#### **Clause 9: Intention that parties to APASS be legally bound**

23. This clause sets out that parties to APASS must be legally bound to provide effective protection for asylum seekers and refugees as outlined under international human rights law. Although Parliament has

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<sup>3</sup> As above.

<sup>4</sup>See Kaldor Centre for International Refugee Law, *Where to from here? Report from the Expert Roundtable on regional cooperation and refugee protection in the Asia-Pacific*, 12-13 September 2016. At [http://www.kaldorcentre.unsw.edu.au/sites/default/files/Where\\_to\\_from\\_here.pdf](http://www.kaldorcentre.unsw.edu.au/sites/default/files/Where_to_from_here.pdf).

since amended legislation, it is important to recognise the decision of the majority of the Full Bench of the High Court that the 'Malaysian Solution' was unlawful because Malaysia was not signatory to the UN Refugee Conventions and so adequate human rights protections could not be guaranteed. It is essential that all member countries of APASS act consistently with the international agreements outlined in section 6 of this Act.

#### **Clause 10: APASS centres**

24. This clause defines an APASS centre as it is envisaged to exist under the APASS regional agreement.

25. Subclause 10(a) reiterates the need for regional cooperation between countries and shared responsibility in terms of protection and cost. This follows the key commitment in the New York Declaration for Refugees and Migrants for a more equitable sharing of the burden and responsibility for hosting and supporting refugees instead of shifting responsibilities to countries less well-equipped to carry them, which is Australia's practise.

26. Subclause 10(b) reiterates that APASS centres should be developed in accordance with international refugee and human rights law.

27. Subclause 10(c) reiterates that the APASS centre should be strategically located in source countries, meaning countries from which asylum seekers are fleeing, or transit countries, meaning countries through which asylum seekers are routinely travelling. This is to enable ease of access for asylum seekers and to provide a safe alternative to obtaining the service of people smugglers or other illegal and dangerous means of seeking asylum.

#### **Clause 11: APASS applicants**

28. This clause sets out the criteria a person must meet in order to become an APASS applicant, as well as the criteria for a person to become an APASS applicant to Australia.

29. Subclause 11(1)(b) states that the person must have registered as an asylum seeker at an APASS centre. The intention is that there will be a formal registration process for a person when they first attend an APASS centre.

30. APASS centre registration may also include pre-screening that aims to identify and differentiate between categories of arrivals (eg. persons who are seeking international protection, victims of trafficking, unaccompanied children, irregular economic migrants). This could improve efficiency and effectiveness by identifying any vulnerability, such as trauma, unaccompanied children etc, as well as identifying claims that are manifestly unfounded. This process would require independent monitoring.<sup>5</sup>

31. Subclause 11(2)(a) states that a person can only be an APASS applicant to Australia if they have selected Australia as host country. This refers to the intention that upon registration an applicant selects three preferred host countries. It is a common misconception that asylum seekers would always choose Australia first. Many would prioritise countries where family is located or countries with familiar religion and culture.

32. Subclause 11(2)(b) refers to section 12 of this Act and the requirement that each year the Minister will

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<sup>5</sup>See Kaldor Centre for International Refugee Law, *Where to from here? Report from the Expert Roundtable on regional cooperation and refugee protection in the Asia-Pacific*, 12-13 September 2016. At [http://www.kaldorcentre.unsw.edu.au/sites/default/files/Where\\_to\\_from\\_here.pdf](http://www.kaldorcentre.unsw.edu.au/sites/default/files/Where_to_from_here.pdf).18-19

announce the quota of APASS applicants that will be considered for permanent visas in Australia. If the number of APASS applicants to Australia exceeds this quota then applicants will be directed to their alternative countries of choice. Under international law there is no unfettered right for asylum seekers to choose the country of asylum. However asylum seeker's preferences ought to be taken into account when possible, as should other primary considerations such as family reunification and non-refoulement obligations.

33. Subclause 11(2)(c) refers to the intention that APASS applicants will only be referred to the Secretary by APASS once subclause 10(a) to (c) has been fulfilled.

34. Subclause 11(3) is based on the principal of shared responsibility between member countries of APASS (see paragraph 25 above). Australia is currently a host country but due to geographical isolation it is generally not a transit country. This subclause ensures Australia has the ability to share responsibility with source and transit countries by directing Australia take responsibility for specified APASS applicants. This includes responsibility for ensuring that the legally binding provision of this Act, challengeable and enforceable in a court of law by the asylum seeker, is fully applied.

#### **Clause 12: Australian quota of APASS applicants**

35. Subclause 12(1) specifies that the number of APASS applicants accepted by Australia each year must be determined by the Minister and made publicly available. It is expected that Australia's quota would match or exceed other parties to APASS due to Australia's wealth, established visa processes and social security system.

36. Subclause 12(2) refers to the intention that all parties to APASS will determine the recommended quota for each state to ensure shared responsibility between all.

#### **Clause 13: Determination of transfer arrangements of APASS applicants**

37. This clause addresses the principle that the primary responsibility for providing protection to asylum seekers and refugees rests with the country in which asylum is sought. As outlined in paragraph 34 of this Explanatory Memorandum, due to the geographical location of Australia and the need to prevent asylum seekers and refugees from risking their lives by travelling to Australia by boat, it is important that Australia's responsibility to provide protection is established through APASS centres located in other member countries.

38. Subclause 13(1) sets a time frame of 60 working days for the Secretary to determine whether the APASS applicant is to be transferred to Australia for the duration of time it takes for the APASS applicant's claim for asylum is to be processed. This is to ensure that applicants are not subject to arbitrary or mandatory detention in offshore facilities or remain unassisted for long periods of time.

39. Subclause 13(2) ensures that groups or categories of people, such as "illegal maritime arrivals", are not subjected to different rules or discrimination. Each person's application and circumstances will be individually assessed and a decision will be made according to the merits of their case as well as the factors listed under section 13(4) of the Act.

40. Subclause 13(4) reiterates Australia's responsibilities under refugee and international human rights law and provides that the Secretary must take these into consideration when determining transfer arrangements.

41. Subclause 13(4)(c) states that the capacity of individual APASS centres must be taken into account when registering applicants in order to avoid situations of overcrowding and inadequate conditions and services.

42. Subclause 13(4) (g) reinforces the need to ensure that Australia is sharing the responsibility of asylum seeker and refugee protection under APASS and not burden shifting to other countries.

43. Subclause 13(6) provides for procedural and legal safeguards to protect APASS applicants when being transferred to Australia. The provision of documentation to ensure the legal status of a refugee is a minimum standard of the Refugees Convention. It also prevents an APASS applicant from being transferred to Australia only to be returned to the transit or source country, which would add to trauma and incur unnecessary cost.

44. Subclause 13(6)(b) protects the health of the APASS applicant.

45. Subclause 13(6)(c) allows for regulations which can be made to ensure refugee and international human rights law is fully adhered to throughout the transfer process.

#### **Clause 14 – APASS case officers**

46. Clause 14 sets out the role of an APASS case officer, which is to both advocate for the APASS applicant and provide them with information on an ongoing basis. The purpose of this role is to prevent the visa process from stagnating and to protect the legal rights and mental health of APASS applicants. The APASS case officer will work with their assigned APASS applicant to ensure that the applicant is supported while waiting for visa approval, including the provision of immediate humanitarian needs. This will involve coordinating and communicating with APASS services both in the host country and immigration services within Australia. The deterioration of asylum seeker and refugees mental and physical health when faced with uncertainty and reduced control over their future, as well as limited access to legal resources, is well documented.

47. Subclause 14(1) specifies seven days as the time frame which an APASS applicant is to be assigned an APASS case officer. This occurs once an APASS applicant is Australia's responsibility as determined under section 11 of this Act.

48. Subclause 14(2) sets out that APASS applicants are to be given information on their legal rights and processing conditions, as well as free and independent legal advice. The aim is to ensure that the APASS applicants understand their situation, their legal rights and the APASS and immigration procedures and are assisted to dispute decisions through merits and judicial review.

49. Subclause 14(2)(a) refers to processing conditions, which is defined under section 5 of this Act to include: the timeframe and details of any visa application; specific rights regarding freedom of movement; the APASS applicant's rights such as work rights, income, health care and housing; and any specific protection concerns such as women at risk, victims of trauma or other vulnerable groups such as children.

50. Subclause 14(3) reiterates the role of the APASS officer as an advocate for APASS applicants. It is intended that the APASS officer would have direct contact with Australian migration on behalf of APASS applicants.

51. Subclause 14(3)(b) gives the timeframe of 180 days. It is recognised that processing complex cases

within this timeframe may be difficult but it is important that applications are completed in a tight time frame.

52. Subclause 14(4) aims to support the mental health of APASS applicants by ensuring they are regularly updated on the progress of their application.

### **PART 3 – IMMIGRATION DETENTION**

53. This part dismantles Australia’s current offshore immigration detention policies as they are abhorrent, cruel and in clear breach of refugee and international human rights law.

54. This part inserts into domestic law the fundamental principle that people have a legal right to seek asylum and any restriction on liberty imposed on persons exercising this right need to be provided for in law, carefully circumscribed, and subject to independent oversight and prompt review.

55. This part specifies that, under certain conditions, APASS applicants can live in the community while being processed.

#### **Clause 16 – Immigration detention**

56. This clause outlines the Parliament’s objective that this section on immigration detention will adhere to the fundamental human right of liberty and security, the right to freedom of movement and the international prohibition on arbitrary detention.

57. Subclause 16(1) prescribes that detention must be in Australia and can only be applied where it pursues a legitimate purpose and has been determined to be both necessary and proportionate in each individual case.<sup>6</sup>

58. Subclause 16(2) specifies that it is the intention of Parliament that alternatives to immigration is the preferred option for APASS applicants.

#### **Clause 17 – Alternatives to immigration detention**

59. This clause outlines the alternatives to immigration detention that take various forms depending on the particular circumstances of the individual. All alternatives are based on the APASS applicant living in the community with various restrictions imposed.

60. Subclause 17(1) specifies that if a reason for immigration detention, as listed under clause 21, cannot be found then the Secretary must determine alternatives to immigration detention. This is done by legislative instrument and is specific to individual cases.

61. Subclause 17(2) lists restrictions that may be determined by the Secretary and applied to an APASS applicant who is living in the community rather than in immigration detention. The listed restrictions have

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<sup>6</sup> See UNHCR *Detention Guidelines: Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, Guideline 4.2 at <http://www.unhcr.org/en-au/publications/legal/505b10ee9/unhcr-detention-guidelines.html>.

been taken from the UNHCR detention guidelines and it is expected that the intent of these guidelines are taken into consideration by the Secretary when making a determination.<sup>7</sup>

62. Subclause 17(3) ensures that an APASS applicant remains in Australia legally and is easily identified by authorities when necessary.

63. Subclause 17(4) specifies a written determination must be given to the APASS applicant to ensure transparency and accountability.

#### **Clause 18 – Access to assistance in alternatives to immigration detention**

64. This clause outlines the assistance that is to be made available to an APASS applicant living in the community while being processed. These are consistent with international refugee and human rights law.

65. Subclause 18(1) incorporates Article 24 of the Refugee Convention, which states that Government should provide social security to refugees in a similar manner that is accorded to its citizens. This subclause also includes the provision of housing as specified under Article 21 of the Refugees Convention.<sup>8</sup>

66. Subclause 18(1)(b) confirms the right for APASS applicants to work as specified under Article 17 of the Refugees Convention.<sup>9</sup>

67. Subclause 18(1)(c) specifies that an APASS applicant in alternative detention should have the same access to services that they would if in immigration detention under this Act. This includes health and mental health services, education, counselling, government services and legal services.

#### **Clause 19 – Timeframes for the determination of alternatives to immigration detention**

68. This clause sets out the timeframe of six months for a determination to be made for an APASS applicant's alternative to detention. This is to ensure that APASS applicants are not given restrictions within the community for an indefinite time frame.

69. Subclause 19(b) ensures that any time frame outside of the 6 month period must be decided by the Federal Circuit Court and is not left to the discretion of the Minister or Secretary.

#### **Clause 20 – Revocation or variation of restrictions**

70. This clause sets out that if an APASS applicant breaches the condition of their determination specified under subclause 17(1) then the Secretary can revoke or change the conditions. It is intended that such a decision would follow the principles of international human rights law.

71. A decision under this clause can be reviewed by the Administrative Appeals Tribunal as outlined under subclause 29(b) of this bill.

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<sup>7</sup> Ibid, Annex A at <http://www.unhcr.org/en-au/publications/legal/505b10ee9/unhcr-detention-guidelines.html>

<sup>8</sup> See The 1951 Convention relating to the Status of Refugees, Resolution 2198 (XXI) adopted by the United Nations General Assembly at <http://www.unhcr.org/en-au/3b66c2aa10>

<sup>9</sup> Ibid.

## **Clause 21 – Reasons for immigration detention**

72. Subclause 21(1) sets out that detention must not be arbitrary, and any decision to detain a person must be based on an assessment of the individual's particular circumstances as outlined in subclauses 21(1)(a) to (h). Detention is an exceptional measure and can only be identified for a legitimate purpose. These conditions for detention have been taken from UNHCR detention guidelines or when detention is considered necessary.<sup>10</sup>

73. Subclause 21(2) ensures that detention can only be resorted to when it is determined to be necessary, reasonable in all circumstances, and proportionate.

74. Subclause 21(2)(a) sets out that detention must not be discriminatory based on the mode of a person's arrival.

75. Subclause 21(2)(b) recognises that seeking asylum is not unlawful. Article 31 of the Refugee Convention specifically provides for the non-penalisation of asylum seekers and refugees having entered or stayed irregularly if they present themselves without delay and show good cause for their entry or stay.

76. Subclause 21(2)(c) aims to ensure that the Secretary's power is restricted and that all decision-making is subject to independent review.

77. Subclause 21(3) outlines that people who have committed a crime should not be held in immigration detention facilities. If they pose a risk to public safety they should be prosecuted under the relevant Act and dealt with through the courts in the same way as Australian residents/citizens.

78. Subclause 21(4) prevents the arbitrary or mandatory detention of asylum seekers. Such detention policy is in clear breach of international law and has a catastrophic impact on a person's physical and mental health.

## **Clause 22 – Time frames for immigration detention**

79. This clause sets out timeframes for immigration detention with the intention of ensuring that an individual's detention period is regularly reviewed.

80. Subclause 22(1) outlines the preferred time frame. Any extension of that time frame must be decided by the Federal Circuit Court and is not left to the discretion of the Secretary.

81. Subclause 22(1)(b) ensures that following the initial review of detention, regular periodic reviews of the necessity for the continuation of detention must go before a court.

82. Subclause 22(2) outlines what the Federal Circuit Court must take into consideration if it is to lawfully extend an asylum seeker or refugee's immigration detention. Explicitly identifying the grounds for detention in legislation gives both the public and asylum seekers legal certainty in regards to the reasons and time

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<sup>10</sup> See UNHCR *Detention Guidelines: Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, Guideline 4.2 at <http://www.unhcr.org/en-au/publications/legal/505b10ee9/unhcr-detention-guidelines.html>.

frames for migration detention.

83. Subclause 22(3)(a) sets out the fundamental right to liberty as outlined in all major international and human rights instruments meaning that the detention of asylum seekers should be a measure of last resort, with liberty being the default position.

84. Subclause 22(3)(b) refers to alternatives to detention that would allow APASS applicants to reside in the community subject to a number of conditions or restriction on their freedom of movements, which would still be subject to refugee and international human rights law as outlined in clause 6.

85. Subclause 22(3)(c) outlines that the Federal Circuit Court, if considering alternatives to detention, must balance the appropriateness of placement in the community with any risks to the public. Matching an individual and family to the appropriate community should also be part of any assessment, including the level of support services needed and available.

#### **Clause 23 – Information provided to detainees**

86. Clause 23 sets out that if a decision is made that an APASS applicant is to be detained then they must be informed of the reasons for their detention, and their right in connection with the order, including review procedures, in a language and in terms which they understand.

#### **Clause 24 – Access to services in detention**

87. Clause 24 outlines that if a person is detained then subclause 24(1) (a) to (g) are the services to which they are entitled while detained. This is in accordance with accepted international standards and it is intended that, under the regulations, specific needs are identified and met.

88. Subsection 24(1)(a) lists health and mental health services. Detainees needing medical attention should be transferred to appropriate facilities or treated on site where such facilities exist. A medical and mental health examination should be offered to detainees immediately upon arrival, and conducted by medical practitioners. While in detention, detainees would receive periodic assessment of their physical and mental well-being. Many asylum seekers suffer psychological and physical effects as a result of their detention, and thus a regular assessment should also be undertaken regardless of whether they presented symptoms upon arrival. All detainees need to be provided with appropriate medical care and treatment.

89. Subclause 24(1)(b) sets out that counselling and trauma services are to be provided by qualified medical professionals. An initial trauma assessment should be made upon entering the facility and periodic assessment should be made during the period of detention. Victims of torture and other serious physical, psychological or sexual violence need special attention and services.

90. Subclause 24(1)(c) sets out that detainees should be able to make regular contact with friends, relatives, international and non-government organisations at all times.

91. Subclause 24(1)(d) lists education. This includes vocational training and should be offered as appropriate for the length of detention. Children have the right to access primary or secondary education, which would be offered off-site at local schools when possible.

92. Subclauses 24(1)(e) to (g) set out that detainees should be allowed to receive visits from families and friends, government and non-government services and legal services when they desire.

**Clause 25 – Communication for the purpose of obtaining immigration assistance and immigration legal assistance.**

93. Clause 25 sets out that a person in immigration detention is entitled to seek immigration assistance and immigration legal assistance whenever they need to during business hours.

94. Subclauses 25(3) and (4) provide that appropriate space and privacy must be available to detainees for the purpose of such meetings and/or phone conversations.

**Clause 26 – Children in detention**

95. This clause sets out the fundamental principle that children should not be detained, as outlined in the United Nations Convention on the Rights of the Child (CRC). This clause sets out the very specific conditions and time frames for when a child can be detained.

96. Subclause 26(1) paraphrases Article 37 of the CRC which requires that the detention of children be used as a measure of last resort and for the shortest appropriate time.

97. Subclause 26(2) paraphrases Article 22 of the CRC which is that the best interests of the child shall be a primary consideration in all decisions made under this Act.

98. Subclause 26(4) paraphrases Article 22 of the CRC which requires that appropriate measures are taken to ensure that children who are seeking refugee status, whether accompanied by a parent or guardian or not, receive appropriate protection and assistance. As a general rule, unaccompanied children should not be detained and this subclause ensures that the matter goes before the Federal court as a priority and in the shortest time frame possible.

**Clause 27 – Independent monitoring**

99. This clause sets out the need to ensure that detention centres comply with international human rights law, as well as the provisions of this Act, through scrutiny and monitoring by an independent body. It is recognised that Australia recently ratified the Optional Protocol to the Convention against Torture (OPCAT) and this will require Australia to create a regime of independent inspections for all places of detention, including immigration detention. The details of how this will work in Australia are still being determined but it is expected that this process will be incorporated for the purpose of this Act.

100. Subclause 27(1) specifies an external inspection by an independent body every six months. Such regular inspections are necessary to ensure compliance and transparency.

101. Subsection 27(3) outlines the scrutiny and monitoring, as identified by the UNHCR Detention Guidelines, necessary to ensure compliance with international principles.

102. Subclause 27(4) sets out that Clause 27 does not impact on other visitation rights set out in this Act under subclause 24 and 25.

#### **PART 4 – ADVERSE SECURITY ASSESSMENTS**

103. This Part allows judicial review of adverse security assessments for APASS applicants. As directed under international law, all decision making in regards to an APASS applicant must be reviewable.

##### **Clause 28 – Adverse security assessments**

104. Clause 28 confirms the primacy of this Act over contrary legislation.

105. Subclause 28(2) identifies the Inspector-General of Intelligence and Security as an independent body that can investigate complaints concerning security assessments. The IGIS can investigate a matter pertaining to the legality or propriety of all assessments made in regards to APASS applicants.

106. Subclause 28(3) specifies the need to consider alternatives to detention if an adverse security assessment is made. It is the intention that all decisions would be made with the Australian public safety a priority. However, alternatives to detention as suggested by UNHCR guidelines, include the deposit or surrender of documentation; reporting conditions; directed residence; provision of a guarantor; community supervision arrangements or release on bail/bond.

107. Subclause 28(4) refers to the general principles relating to the detention of children and to the United National Convention on the Rights of the Child, primarily in the best interest of the child.

#### **PART 5 – REVIEW OF DECISIONS**

##### **Clause 29 – Review of decisions**

108. Subclause 29(a) ensures merits review of adverse decisions regarding the transfer of an APASS applicant under subclause 13(1) in accordance with principles of procedural fairness, transparency and accountability.

109. Subclause 29(b) ensures merits review of a decision by the Secretary to revoke a determination of alternative detention under subclause 17(1) if an APASS applicant is seen to breach a requirement of the determination.

110. Subclause 29(c) ensures merits review of a decision by the Secretary to vary the restrictions specified in a determination under clause 20.

#### **PART 6 – JURISDICTION OF COURTS**

111. This Part affords APASS applicants with judicial review of adverse decision in accordance with principles of procedural fairness, transparency and accountability.

## **STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS**

Prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*

### **Refugee Protection Bill 2018**

This bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

#### **Overview of the bill**

This bill enables the establishment of a network of centres, located in and run by Asia Pacific countries including Australia, where asylum seekers can go to be registered, have their immediate humanitarian needs met and lodge a preference for country of re-settlement. If the asylum seeker selects Australia, and is within the specified quota, this bill establishes a process for assessing their claim in Australia with appropriate oversight, limited timeframes and judicial review. The bill does not allow mandatory detention and prioritises the applicant's immediate needs and refugee and international human rights law.

#### **Human rights implications**

The bill is necessary to ensure that Australian law is compliant with refugee and international law. It implements into domestic law components of: Convention and Protocol relating to the Status of Refugees; International Covenant on Civil and Political Rights; Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment; International Covenant on Economic, Social and Cultural Rights; Convention on the Rights of the Child; Convention on the Elimination of all Forms of Discrimination against Women; and Convention on the Rights of Persons with Disabilities.

#### **Conclusion**

This bill is compatible with the human rights and freedoms recognised in the international instruments listed above. It provides asylum seeker and refugee protection through a regional framework that complies with refugee and international human rights law and the guidelines of the UNHCR. It provides a long term solution to refugee protection and it protects and strengthens human rights for asylum seekers and refugees while ensuring that Australia upholds its responsibilities under international law.

**Andrew Wilkie MP**