THE UNIVERSITY of ADELAIDE

Public Law & Policy Research Unit

Submission to the Senate Legal and Constitutional Affairs Committee inquiry into the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014

The submission was written by Associate Professor Alexander Reilly, Director of the Public Law and Policy Research Unit at the University of Adelaide and Ms Libby Hogarth of Australian Migration Options

The Public Law & Policy Research Unit (PLPRU) at the University of Adelaide contributes an independent scholarly voice on issues of public law and policy vital to Australia's future. It provides expert analysis on government law and policy initiatives and judicial decisions and contributes to public debate through formulating its own law reform proposals.

Australian Migration Options (AMO) is a migration agent company based in Adelaide. The Director, Libby Hogarth has assisted asylum seekers for the past 22 years both in the community and in detention. Since 2005, AMO has been one of ten organisations receiving Government funding under the Immigration Advice and Assistance Scheme. Through this scheme, AMO has assisted thousands of asylum seekers in Australian detention centres and in the community.

This submission is endorsed by the following members of PLPRU and AMO:
Professor Amanda Nettelbeck; Dr Gabrielle Appleby; Associate Professor Anne Hewitt; Dr Peter Burdon; Nurmuhammad Majid (RMA); and Ruth Nowlan (RMA).

Overview

The explanatory memorandum for the Bill describes it as 'supporting the Government's key strategies for combatting people smuggling and managing asylum seekers both onshore and offshore'. It is important at the outset to distinguish between the policy goals of managing existing asylum seekers in Australia's jurisdiction and strategies for combatting people smuggling. It is possible and desirable to treat asylum seekers in Australia's jurisdiction and control according to law and due process without compromising the government's determination to combat people smuggling and deterring people from travelling to Australia by boat. Indeed, as the government has repeatedly pointed out, deterrence strategies already in place, including interception and pushback, amending the migration zone and implementing off shore processing, have led to the cessation of boats arriving in Australia since December 2013.

The additional strategies are not necessary to combat people smuggling, and should we submit, be assessed only in relation to their effect on asylum seekers already in Australia or under the control of the Australian government. There is a large group of asylum seekers in detention or living in the community who are awaiting the resolution of their claims for protection. These applications should be processed in good faith under existing legal arrangements.

In this submission, we consider the impact of the Bill against fundamental principles of the rule of law and assess its impact on the substantive and procedural rights of asylum seekers, and its consistency with Australia's international legal obligations.

1. The Rule of Law and Retrospectivity

1.1 Many provisions in the Bill apply retrospectively to asylum seekers who are present in Australia and have pursued applications for protection under existing legal arrangements. For example, Schedule 2 provides authority to the Minister to alter visa applications, including to deem a Permanent Protection Visa application as an application for a Temporary Protection Visa.

1.2 Asylum seekers who arrived in Australia prior to July 2013, had a reasonable belief that they would be able to make an application for a Permanent Protection Visa in Australia. Hundreds of these asylum seekers who arrived in Australia prior to August 2012 have been found to be refugees but still not granted visas because of delays with security clearances with some clients waiting more than 3 years for the clearance. Many others who arrived in 2010/2011 are in the process of having their claims re-assessed following the High Court decision *Minister for Immigration and Citizenship v SZQRB* [2013] FCAFC 33. In most of the post July 2012 arrivals, protection visa applications have been stalled as the Minister for Immigration determines whether to 'lift the bar' under s 48B of the Migration Act and allow their applications for a Permanent Protection Visa to be heard.

1.3 Asylum seekers currently in Australia have been in detention or living in the community on bridging visas, most without work rights, for extended periods of time. They have been waiting to lodge their applications for a Permanent Protection Visa, rightly understanding that this is the visa for which they may be eligible. They also rightly believe that if they are successful in their applications, they will have the opportunity to sponsor their immediate family to join them in Australia.

1.4 These Asylum seekers should be judged against the state of the Australian law at the time they arrived in Australia and make their applications. It offends a basic principle of the rule of law to alter the procedural and substantive rights of asylum seekers retrospectively. It is worth noting that recently arrived asylum seekers have already borne the brunt of the implementation of the new policies of deterrence since August 2012, with processing of claims being very slow since that time.

1.5 Treating the procedural rights of asylum seekers in Australia with such little regard risks tarnishing Australia's reputation as a nation governed by the rule of law and places a question mark over our trustworthiness in other areas of international relations.

2. Fast-tracking applications and abolishing appeals to the RRT

2.1 Schedule 4 of the Bill creates a 'fast track' assessment process.

2.2 Administrative review of executive decision making is a well-established principle of good governance in Australia. The principle has been entrenched in relation to refugee applications through the introduction of the RRT. Since 1993, the RRT has exercised full merits review of initial decisions on protection visa applications. Given the gravity of the consequences for applicants of being returned to countries where they face the risk of persecution if decisions on their application are incorrectly decided, there is a strong case for retaining full merits review of initial decisions for all applicants for protection.

2.3 The fast track process excludes applicants on grounds that require proper scrutiny. Although initial interviews may suggest that applicants are clearly not eligible to apply for protection, this information may prove to be unreliable. Applicants for asylum may not provide full and frank information at their first interview for a variety of reasons, including fear, ignorance of their rights or of the application process. It may take time for the true story to emerge. The risk of fundamental error in assessment is increased significantly through fast tracking, meaning Australia may be in breach of its *non-refoulement* obligations arising under the Refugee Convention, and the Convention Against Torture.

2.4 For non-fast track applicants, full merits review in the RRT is replaced by a limited merits review by the new Immigration Assessment Authority (IAA). This review process removes important safeguards such as the principles of natural justice and independence from the merits review process. It is clear from the explanatory memorandum that the introduction of the IAA is intended to compromise procedural rights in order to resolve claims more quickly. We submit that this reasoning is fundamentally misconceived. Furthermore, it is likely to be counter-productive as more applications will be made for judicial review to the Federal Court on the basis that decisions of the IAA contain jurisdictional errors. This is likely to lead to a slowing of the resolution of claims and increase the costs of the decision making process. We advocate maintaining the current RRT process.

2.5 Another reason for providing for a full review of initial decisions is to protect primary decision makers. It is unreasonable to expect Department of Immigration and Border Protection staff to make decisions with such grave potential consequences without the protection of a proper merits review process.

2.6 Introducing fast tracking and limited merits review in the IAA impacts on other services providers. Once the bar is lifted under s 48B, it is important to know how long each client will be given to lodge an application. It is important to note the limited services provided to asylum seekers. If the bar is lifted for all applicants at once or with only a short time span in which to lodge applications, migration agents, welfare workers and mental health providers will be unable to cope with the demand for their services.

2.7 The majority of asylum seekers on bridging visas do not have permission to work. Without the resources to employ a private migration agent or lawyer to assist with their claim, applicants will face a range of problems with completing application forms and drafting statements of claim. There is a real danger that worthy applicants will be unsuccessful as a result of not being able to put together a valid or accurate application.

2.8 For the above reasons, we recommend that the fast-tracking initiatives and removal of full merits review in the RRT be abandoned.

3. Time limits and capping the number of protection visas

3.1 Schedule 7 of the Bill removes time frames for resolving applications and allows the government to place a statutory limit on the number of protection visas granted in a programme year.

3.2 As a result of Australia's obligations under the Refugee Convention, it is not possible to cap the program in the same way as say the skilled migration or family reunion parts of the permanent migration program. Under the Refugee Convention, states have

immediate protection obligations. They cannot be deferred to the following calendar year as a matter of administrative convenience.

3.3 Capping the number of protection visas causes a great deal of uncertainty for asylum seekers and other stakeholders. The delay a cap causes on the processing of claims comes at a cost to the mental health of asylum seekers. Under the current law, asylum seekers who wait for their claims to be finalised are either in immigration detention or live in the community without work rights. There are considerable financial and psychological costs to extending the period of time asylum seekers remain in these transitional arrangements.

3.4 It is important to remember that many asylum seekers are victims of torture and other forms of persecution. Many suffer from post-traumatic stress. Uncertainty in the processing of claims exacerbates the effects of these experiences. As a class, asylum seekers should not be the subject of arbitrary administrative delays to the processing of their claims.

3.5 The humanitarian program is the smallest part of Australia's migration program, accounting for approximately 10% of the annual grant of permanent visas. Although there was a significant increase in asylum seekers arriving by boat in 2009, 2010 and 2011, numbers arriving since that time have fallen dramatically. Overall numbers remain manageable and are in no need of a cap.

4. Introduction of Temporary Protection Visas (TPVs)

4.1 Schedule 2 of the Bill replaces Permanent Protection Visas with Temporary Protection Visas. This is one of the most significance changes in the Bill.

4.2 If TPV holders leave Australia they lose their temporary protection visa and are unable to return to Australia. This effectively leaves them trapped in Australia with their family overseas.

4.3 TPV holders have no opportunity to sponsor family, including spouses and children, to join them in Australia while on the TPV. This means refugee families remain separated, despite the acknowledgement that TPV holders, and most likely their family members, are Convention refugees.

4.4 Under the first TPV regime, male refugees were commonly separated from their families for six to twelve years. There was huge pressure on mental health providers to assist TPV holders suffering from depression, despair and anxiety. These conditions led to work place accidents, car accidents, attempted suicides, actual suicides and family relationship breakdowns when the families finally arrived in Australia but could not reconnect after so many years of separation.

4.5 The visa conditions attached to TPVs are very similar to TPVs introduced by the Howard government in 1999, and abolished by the Rudd government in 2007. It is instructive, then, to examine the success or otherwise of the first TPV.

4.6 TPVs provide no certainty for the future. TPV holders are required to reapply for a further TPV when their TPV expires. Applicants must demonstrate that they continue to be in need of protection, which is much harder to establish after three years outside the country from which they fled persecution.

4.7 The experience under the Howard government TPV was that the Department of Immigration either removed people relying primarily on in country information which is inadequate for a rigorous refugee determination; or they granted permanent protection visas after having subjected genuine refugees to 3 years of uncertainty away from their families.

4.8 These enormous delays have also had tragic effects on family members. There are numerous examples of family members, usually wives and children, have been killed in suicide bombings, or died from ill health.

4.9 Given the potential negative impact of TPVs on the health and well-being of refugees, we submit that TPVs should not be reintroduced until a proper investigation has been completed on the well-being of TPV holders in the 1999 to 2007 period. What has been the incidence among TPV holders, for example, of work place accidents, car accidents, hospitalisation for mental health reasons? How many TPV holders remain dependent on Centrelink benefits, what is the incidence of family breakdown? How many TPV holders were returned to their countries of origin and what was their situation on return?

4.10 In our submission, given Australia has already trialled TPVs, it is imperative upon policy makers to properly investigate their human and economic cost before reintroducing them.

5. Safe Haven Enterprise Visas

5.1 The Bill introduces a new form of visa, the Safe Haven Enterprise Visa (SHEV).

5.2 SHEVs are designed to encourage refugees to work in regional areas in Australia with the prospect of applying for another visa at the end of 5 years as long as they have been working for 3.5 of those years.

5.3 SHEVs assume that Refugees on these visas will no longer be in need of protection at the conclusion of the visa, and will move into conventional migration pathways. This is an unwarranted assumption.

5.4 In our submission, inadequate thought has been given to the operation of the Safe Haven visa. Although there are recognised labour shortages in regional areas, they are industry specific, and there is no apparent assistance to SHEV holders to access industries with labour shortages. There will need to be an allocation of funds to local government and community organisations for provision of support to SHEV holders in country areas as existing service provision is already overstretched.

5.5 Much of the work in demand in regional areas, particularly in horticulture, is seasonal and casual. It will be difficult for a SHEV holder to sustain a work record of 3.5 out of 5 years in this type of employment.

5.6 SHEV holders are extremely vulnerable workers, being refugees, from non-English speaking backgrounds, isolated from family, and with a desperate desire to work in order to be eligible for an alternative visa pathway. There is considerable evidence of the exploitation of far less vulnerable migrant workers on 457 visas, international student visas and working holiday visas.

5.7 If the SHEV visa was to be introduced, it would need to be accompanied by considerable new resources in the Fair Work Ombudsman to ensure the fair treatment of refugees on these visas.

5.8 Despite the promise of receiving a further visa at the conclusion of the SHEV, under current migration pathways there are few, if any, visa pathways open to SHEV holders. SHEV holders may seek sponsorship from an employer in an industry which is eligible to employ skilled migrant workers on 457 visas or RSMS visas. But this requires SHEV holders to have the requisite skills, qualifications and English language for employment. The only other possibility is to move into the family migration stream as a result of having formed a relationship with Australian permanent residents or citizens. There is a danger that this will lead to abuse of the system with SHEVs marrying Australians in order to get a permanent visa, and then attempting to sponsor their real family from overseas.

6. Family Reunion

6.1 The reintroduction of TPVs means there is very little prospect for successful applicants for a protection visa to sponsor family to Australia through the Humanitarian program.

6.2 Prior to 2012, facilitating family reunion for refugees was a priority of the migration program. Once an applicant was granted a protection visa, they were able to fast track applications for family reunion. People who had been granted permanent visas were legally permitted (and advised) to propose their partner and dependent children under what was called the “Split family” program. Unaccompanied minors who were

granted permanent visas were also able to propose their parents and siblings under this program.

6.3 Changes to the law have made it progressively harder for refugees to be reunited with family. The first change came under the Labor Government in August 2012 when the split family program was closed to any person who arrived by boat after August 2012. The changes also retrospectively brought in requirements that the split family members must be found to be Convention refugees. Previously this was not a requirement in split family applications. As a result of these changes, applications that had already been under process for more than 12 months came to a halt.

6.4 Prior to July 2013, it cost around $2640 to sponsor a spouse and dependent children under the family migration program . From 1 July 2013, DIBP application fees increased and there was an application fee for every applicant included in the application. Thus for large families, the cost of reuniting with family increased dramatically. Fees for most families increased from $2640 to between $8000 and $14000. Ironically, fees of this magnitude are more than the fees people smugglers charge for passage to Australia by boat. The fees are beyond the reach of many families, and leave permanent Australian residents separated from family indefinitely.

6.5 In January 2014, the Minister announced that the applications for family reunion of unauthorised boat arrivals would not be processed until the sponsor became an Australian citizen. This has led to further delays in processing, thus contributing further to the dislocation of vulnerable families. We note that another Bill before the Parliament, the *Australian Citizenship and Other Legislation Amendment Bill 2014*, potentially extends the waiting period for citizenship which will further impact on the separation of husbands and wives and children. We submit that the requirement that sponsors be Australian citizens before an application for family reunion will be entertained needs to be removed.

6.6 The inability to reunite with one's partner and children (or in the case of unaccompanied minors –inability to reunite with their parents) impacts significantly on both the individual and the Australian community as discussed in relation to TPVs at 4.5 – 4.9 above.

6.7 We submit that the Bill makes a fundamental error in placing additional barriers to family reunion. Family reunion should be understood as a fundamental aspect of refugee protection offered in Australia, and efforts should be made to facilitate family reunion as expeditiously as possible.

7. Compliance with Australia's obligations under the Refugee Convention

7.1 The explanatory memorandum states that the Bill purports to 'codify in the Migration Act Australia's interpretation of its obligations under the [Refugee Convention]'. In our submission this is a misleading description of what the Bill does. The Bill severs a direct link between the *Migration Act 1958* and the Refugee Convention.

7.2 Prior to the introduction of the Bill, Australia's interpretation of the Convention was determined on a case by case basis by the Federal Court and the High Court. A complex jurisprudence developed that bore in mind the interpretation of the Convention developed in other signatory countries, and international agencies such as the UNHCR.

7.3 The Bill contradicts much of this jurisprudence, and replaces it with alternative rules for when a person can claim asylum under the Migration Act. This is not an interpretation of the Refugee Convention, but a rejection of the Convention when judicial interpretation of the Convention does not match the government's preparedness to offer protection.

7.4 There is a danger that through severing the connection between the *Migration Act 1958* and the Refugee Convention, Australia can no longer claim to be satisfying its obligations under the Convention. This is particularly the case when the Bill so blatantly contradicts the interpretation of many of the provisions of the Convention by Australian courts.

7.5 Australia was one of the first signatories to the Refugee Convention in 1954. It has a proud history of complying with Convention obligations and receiving refugees and asylum seekers under its auspices.

7.6 Australia continues to claim to be fully committed to the UN in other areas of our international relations. For example, in relation to Australia's role on the UN Security Council, the government states: 'Australia's commitment to the United Nations reflects the foundations on which our nation is built: equality, generosity, fairness and the belief that everyone should have equal access to opportunity. The values of the United Nations Charter are central to how Australia conducts itself globally. We strongly support the rules-based international order underpinned by the Charter.' (https://australia-unsc.gov.au/australia-and-the-unsc/)

7.7 We submit that Australia should not abandon, or risk being seen to abandon, its commitment to the Refugee Convention without a proper investigation of the consequences of taking this course of action.

8. Increased Maritime Powers

8.1 Schedule 1 of the Bill confers power on maritime officers and the Minister to detain people at sea and transfer them to any country (or a vessel of another country) that the Minister chooses.

8.2 States conducting interdiction and return operations generally fulfil the 'effective control test' with respect to vessels intercepted and, therefore, the international obligations of these States are triggered.

8.3 In intercepting asylum seeker boats, Australia assumes its obligations under the Refugee Convention, the ICCPR, the Convention Against Torture and other international conventions, in particular obligations in relation to *non-refoulement*, and the prohibition against arbitrary and indefinite detention.

8.4 The proposed new powers provides insufficient safeguards to ensure these international obligations are fulfilled, and leave asylum seekers at risk of grave breaches of their human rights.

31 October 2014