Dissenting Report of the Australian Labor Party

Introduction

1.1 Labor Senators have grave concerns about elements of this Bill and cannot support it in its current form.

1.2 In particular, Labor is concerned about:

(a) Schedule 1, which seeks to provide legal authority for the Government's policy of turning back asylum seeker boats on the high seas;

(b) The provisions in Schedule 2 which seek to reintroduce the failed Temporary Protection Visa;

(c) The Government's failure to honour its commitment to the Palmer United Party to create the Safe Haven Enterprise Visa, which was to provide a pathway to permanent residency;

(d) Schedule 4, which will deprive asylum seekers of the opportunity to have their applications for protection reviewed fairly;

(e) Schedule 5, which attempts to displace Australia's international obligations under the Refugee Convention and replace them with a codified version of the Government's preferred interpretation of those obligations; and

(f) The provisions in Schedule 7 which will abolish the requirement to decide protection visa applications within 90 days and to report on compliance with that requirement.

Amendments to Maritime Powers

1.3 The Government has argued that Schedule 1 of the Bill provides legal authority for its turn backs policy.

1.4 The Australian Labor Party maintains its longstanding concern about the secretive 'on water' operations carried out by the Government in relation to turning back asylum seeker vessels. The Government refuses to tell the Australian people precisely what is involved in turn backs. We have even witnessed the absurd situation on occasions where the Immigration Minister refuses to admit that a boat has been intercepted despite widespread reporting that this is the case.

1.5 Moreover, we maintain our concerns about the safety at sea of Australian Customs and Navy personnel involved in conducting these operations. In 2011 Admiral Ray Griggs stated before Senate Estimates that 'there are obviously risks involved in this process'. We are yet to hear an explanation from the Australian Government about what, if anything, has changed to now make these operations safe. The Australian Government should not lightly place our service personnel in harm's way.

1.6 The Australian Labor Party is also concerned that the Government's turn backs policy is harming Australia's vital relationship with Indonesia. We have seen turn backs result in incursions into Indonesian territorial waters on more than 6 occasions. The new Indonesian President, His Excellency Joko Widodo, has issued a stern warning to the Australian Prime Minister about his failure to respect Indonesian sovereignty.

1.7 That said, Schedule 1 is less about legislating for turn backs than it is about seeking to undermine a specific case before the High Court, namely *CPCF v Minister for Immigration and Border Protection* (CPCF case)). Schedule 1 seeks to address each of the points which have been raised in the CPCF Case.

1.8 Labor Senators believe that a pre-emptive strike on an existing High Court case is an inappropriate basis for legislative action. Indeed it is important that the High Court be allowed to do its job and apply the rule of law.

1.9 The High Court should be allowed to determine the legality of the Government's turn backs policy as implemented on the basis of existing law. If the turn backs policy is shown to be totally lawful that is important for public confidence in the Government and its actions. Equally if aspects of the turn backs policy are found to be unlawful it is important that this be a transparent part of the public record.

1.10 In the latter event the Government might then come to the Parliament and seek legislative remedial action in respect of those areas which might be found to be unlawful. The Parliament can then consider its position in light of this legal verdict.

1.11 However, the current scatter gun approach in Schedule 1, put before the Parliament on the assumption of a negative court ruling, but without the Parliament having the benefit of considering such a ruling, is deeply inappropriate.

1.12 Accordingly the Labor Senators oppose Schedule 1.

Temporary Protection Visa

1.13 Labor Senators oppose the provisions in Schedule 2 of the Bill which seek to reinstate the failed TPV. The Australian Labor Party has a well-established policy against TPVs.

1.14 Temporary Protection Visas suspend asylum seekers in a prolonged state of uncertainty that leads to fear, anxiety, financial hardship and an inability to move forward in building a new life in safety for themselves and their families in Australia and prevent them contributing to the community.

1.15 When the Parliament rejected Immigration Minister Scott Morrison's policy of bringing back Temporary Protection Visas in December of last year, Scott Morrison, in an act of petulance, stopped processing people. Labor believes the correct Government response should be to start processing people without delay and managing its detention facilities in a safe, humane and dignified manner.

1.16 Any claim that TPVs serve as a deterrent to people seeking to risk their life and come to Australia by sea is patently wrong. Australia was taken off the table with the Regional Resettlement Arrangement introduced by Labor in July of last year. This issue has absolutely nothing to do with any person that may seek to come here by

boat. It relates to people already in detention that arrived before 19 July last year. For that group of people, Labor believes we need to have a sensible policy that sees them processed, and if they are found to be genuine refugees then they should be allowed to settle in Australia. During the use of TPVs by the Howard Government more than 90 per cent of refugees initially granted TPVs under the Howard Government were eventually granted permanent protection because their situation in their country of origin had not changed. This underscores that the vast bulk of those seeking protection will not have their situation change.

Safe Haven Enterprise Visa

1.17 The Australian Labor Party has offered in-principle support for the Safe Haven Enterprise Visa (SHEV) and we are disappointed that the Government has failed to deliver the SHEV through this Bill.

1.18 The commitment to deliver the SHEV was a key component of Mr Morrison's agreement with the Leader of the Palmer United Party, Mr Clive Palmer, to support the reintroduction of TPVs.

1.19 The Minister for Immigration has repeatedly claimed that this Bill would give life to a new visa to be known as a Safe Haven Enterprise Visa. For example:

(a) In his letter to Mr Palmer of 24 September 2014, the Minister claimed –

> A new Safe Haven Enterprise Visa ***will be introduced*** which will be open to applications by those who have been processed under the legacy caseload, and are found to be refugees. (Emphasis added.)

(b) In a statement to the House of Representatives on 25 September 2014 the Minister contended –

> Consistent with this Government's principles of rewarding enterprise and its belief in a strong regional Australia, the Safe Haven Enterprise Visa ***will be created***. (Emphasis added.)

(c) In a media release of 25 September 2014 the Minister asserted –

> A further temporary visa, a Safe Haven Enterprise Visa (SHEV)—where holders work in a designated self-nominated regional area to encourage filling of job vacancies—***will be introduced*** as an alternative to a TPV. (Emphasis added.)

1.20 Unfortunately Mr Morrison has failed to deliver on this commitment. The text of the Bill reveals that the Minister has misled Mr Palmer, the Parliament and the Australian people.

1.21 The Bill does not in fact give legal effect to Safe Haven Enterprise Visas (SHEVs) as a new visa class. The most that the Division of the Bill called 'Safe Haven Enterprise Visas' does is to introduce a new subsection 35A(3) into the *Migration Act 1958*, which provides as follows:

(3A) There is a class of temporary visas to be known as safe haven enterprise visas.[1]

1.22 It provides no further details, let alone the criteria for the visa or the conditions that apply to it.

1.23 All it does is to name the class of visa that the Minister *may bring into effect in the future* by promulgating an appropriate regulation. 'Naming' the Safe Haven Enterprise Visa in the Bill has *no substantive legal effect*. The SHEV provisions which currently appear in the Bill are nothing more than legislative window dressing.

1.24 Extensive provisions are included in the legislation to make clear that, despite the SHEV being named in the Bill, no such substantive visa is actually brought into effect and nobody can apply to obtain a SHEV until and unless the Minister issues regulations to bring the SHEV to life.[2] There is nothing to compel the Minister to ever promulgate such regulations; accordingly the SHEV might never actually come into existence. This is because:

(a) despite being 'named' in the Bill, the Minister *is not required* to issue a regulation to prescribe criteria to give substantive effect to the Safe Haven Enterprise Visa;[3] and

(b) unless and until regulations are issued to prescribe criteria for the making of a valid application for a Safe Haven Enterprise Visa and for the granting of the Safe Haven Enterprise Visa, non-citizens *cannot make an application for a Safe Haven Enterprise Visa*.[4]

1.25 Further, the Government has failed to undertake the detailed policy development necessary to make the SHEV a reality. As the evidence given by the Department during the course of the public hearing made clear, the work that must be done to develop these criteria and conditions has not advanced much beyond the brief description of the SHEV contained in the Minister's media release and his remarks at the related press conference. The Department has 'attended a meeting' of public servants and conducted 'first consultations' with States and Territories, but these have been conducted only on the basis of the limited information that the Minister has made public.[5] There appears still to be high levels of doubt about many aspects of this visa, including:

- what pathway there will be to other visas (an issue that is discussed in more detail below);

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1 All other provisions in the Bill concerning safe haven enterprise visas are consequential to this proposed subsection.

2 Namely Schedule 3.

3 The Bill, Schedule 2, Item 15; Explanatory Memorandum, p. 51.

4 The Bill, Schedule 3, Item 7; Explanatory Memorandum, pp 52, 53.

5 Ms Karen Visser, Protection and Humanitarian Policy Section, Department of Immigration and Border Protection, *Committee Hansard*, 14 November 2014, p. 55.

- what 'regional Australia' means; and
- what social services will disqualify a holder of a SHEV from applying for other visas.[6]

1.26 In relation to the last point for example, the Department was unable to tell the committee whether receipt of family benefits—including by women with newborn children—would prevent them from applying for further visas to stay in Australia. This was because the Minister was yet to give that detail of information to the Department.[7]

1.27 Motivated by the paucity of publicly-available information about the criteria and conditions that will relate to the SHEV, the committee asked the Department to provide (on notice) 'more information about precisely what the government is looking at putting into the regulations'.[8] In response, the committee was provided with a fact sheet that provides no more information than was already publicly available.[9]

1.28 This confirms Labor's suspicions that nobody really knows, at this stage, what the SHEV will look like, if it comes into existence at all.

1.29 It is curious that the Government is progressing the policy development to support the SHEV at such an unusually slow pace. It could be inferred that the Government does not genuinely intend to create the SHEV, despite its commitment to Mr Palmer, and that once it has secured the votes necessary to reinstate the TPV it will quietly abandon its promise to create the SHEV.

1.30 The Parliament and the Australian people should not have to wait until April 2015, which is the earliest date the Government says it will produce the necessary regulations, to discover whether the Government will break its promise to Mr Palmer.

1.31 Even if the Government does introduce the SHEV, two of the known aspects of it are very concerning; namely that very few people will get them and that it will be very difficult for those people to establish themselves in the community.

1.32 Labor supports, in principle, the idea of SHEVs. Labor agrees with Mr Palmer that, if properly established, SHEVs would be 'a win for refugees', who would be able to 'protect themselves and work towards establishing themselves in an Australian community', and 'a win for regional Australia, which will benefit from the additional work resources in communities where there is a labour shortage, thereby increasing the viability of these areas'.[10]

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6 Ms Karen Visser, Protection and Humanitarian Policy Section, Department of Immigration and Border Protection, *Committee Hansard*, 14 November 2014, p. 56.

7 Ms Karen Visser, Protection and Humanitarian Policy Section, Department of Immigration and Border Protection, *Committee Hansard*, 14 November 2014, p. 56.

8 Senator the Hon Jacinta Collins, *Committee Hansard*, 14 November 2014, p. 57.

9 Department of Immigration and Border Protection, answer to questions on notice, 14 November 2014 (received 19 November 2014).

10 Mr Clive Palmer MP, Member for Fairfax, 'A solution to save Australia billions of dollars and place refugees into productive employment', Media release, 26 September 2014.

1.33 Labor is very concerned, however, about the public statements that Mr Morrison has made that suggest that:

(a) only a very small number of people will be granted SHEVs; and

(b) it will be nearly impossible for those who are granted SHEVs to gain access to other visas and thereby remain in Australia.

1.34 In relation to the first point: when a journalist suggested to Mr Morrison that it was possible that 'a very small number' of people would be granted SHEVs and would satisfy the conditions that would enable them to apply for other visas, Mr Morrison replied:

> It's very possible.[11]

1.35 In relation to the second point, Mr Morrison said that

> …these benchmarks [that will need to be met before people on safe haven enterprise visas can apply for other visas] are very high. Our experience on resettlement for people in this situation would mean that this is a very high bar to clear. Good luck to them if they choose to do that and if they achieve it…There is an opportunity here but I think it is a very limited opportunity and we will see how it works out. But at the end of the day, no-one is getting a permanent protection visa.[12]

1.36 If Mr Morrison only grants a SHEVs to 'a very small number' of refugees, and if Mr Morrison sets 'a very high bar' for those refugees to be able to stay in Australia, the safe haven enterprise visa will not create the 'win, win situation' envisaged by Mr Palmer and supported by the Australian Labor Party. The SHEV will not be the 'stepping stone for refugees to make a positive contribution to Australian society' that Mr Palmer agreed to.[13]

1.37 What is more likely is that—if it ever comes into existence—the SHEV will be a TPV in all but name because it will not provide a realistic pathway to permanency.

Limiting appeal rights in the refugee assessment process

1.38 The Australian Labor Party opposes Schedule 4 of the Bill, which seeks to deprive asylum seekers the opportunity to have their applications for protection assessed fairly and replace it with a bureaucratic agency subject to the direction of the Executive Government.

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11 The Hon Scott Morrison MP, Minister for Immigration and Border Protection, 'Reintroducing TPVs to resolve Labor's asylum legacy caseload, Cambodia', Transcript of press conference, 26 September 2014.

12 The Hon Scott Morrison MP, Minister for Immigration and Border Protection, 'Reintroducing TPVs to resolve Labor's asylum legacy caseload, Cambodia', Transcript of press conference, 26 September 2014.

13 Mr Clive Palmer MP, Member for Fairfax, 'A solution to save Australia billions of dollars and place refugees into productive employment', Media release, 26 September 2014.

1.39 Schedule 4 seeks to remove access to the Refugee Review Tribunal (RRT) for certain asylum seekers who the Government have given the Orwellian name 'Fast Track Applicants'. In lieu of the RRT, asylum seekers who have their application for protection denied will be directed to a new 'Immigration Assessment Authority' (IAA).

1.40 The IAA will conduct only a limited merits review of the decision to deny the application for protection 'on the papers', which fails to meet the basic standards of justice. Unsuccessful asylum seekers will not have an opportunity to appear before the IAA to argue their case; the review will be conducted by a bureaucrat in a closed office. Asylum seekers will not even have the opportunity to make written submissions. Asylum seekers will not have an opportunity to be notified of adverse findings about them or respond to those findings. They will be denied the right to legal representation. There are no prescribed grounds for the review conducted by the IAA; it is entirely at the discretion of the reviewer.

1.41 Furthermore, the IAA lacks the institutional independence from the Executive Government which is a touchstone of fair and credible merits review. IAA reviewers will not be employed by an independent statutory authority such as the RRT or the Administrative Appeals Tribunal. Rather, IAA reviewers will be regular public servants employed under the *Public Service Act 1999*. In addition, in performing reviews they will be required to comply with Practice Directions and Guidelines imposed by their superiors.

1.42 The proposed IAA is a pale imitation of the RRT which falls drastically short of the basic principles of fairness. Asylum seekers will not be afforded natural justice. The basic principles of fair and reasonable administrative decision-making will be abandoned. The open and transparent review process offered by the RRT will be replaced with a team of bureaucrats sitting in a closed office in the dark corners of a Government building. The institutional independence of the RRT will be substituted for a new bureaucratic agency obliged to act at the behest of the Executive Government.

1.43 Even more concerning is the fact that the Bill seeks to give the Government the unfettered and unreviewable power to use non-disallowable legislative instruments to subject *any person* to this atrocious system and, what is more, to exclude *any person* from it and leave them without any form of merits review whatsoever. This flies in the face of the time-honoured traditions of the rule of law.

1.44 The IAA is a truly Orwellian proposal. It amounts to a 'trust us, we're the Government' approach to justice. The rights and obligations of asylum seekers should not be at the mercy of the Executive Government. Rather, asylum seekers ought to be afforded a fair, independent, transparent and credible forum for merits review. Accordingly, Labor Senators oppose Schedule 4 of the Bill.

Displacing Australia's obligations under the Refugee Convention

1.45 The Australian Labor Party opposes the provisions in Schedule 5 which seeks to displace Australia's obligations under the Refugee Convention and replace them

with a codified version of the Abbott Government's subjective interpretation of those obligations.

1.46 This is an alarming proposal. The Refugee Convention provides a well-established framework for determining whether an asylum seeker is entitled to protection, consistent with international law. It is unnecessary to displace our international obligations with a codified version of the Government's subjective interpretation of what those obligations ought to be.

1.47 It is also strongly undesirable. The Abbott Government cannot be trusted to draft a Code which would faithfully implement Australia's obligations under the Refugee Convention. The majority report outlines *seven* ways in which submitters to this inquiry believe that the proposed definition violates the Refugee Convention. Even if the Government acted in good faith, there is a significant risk that the attempted codification would inadvertently omit elements of the Refugee Convention or fail to accurately transfer them from the Convention to the Code.

1.48 Even if the Abbott Government could be trusted to faithfully produce a codification of the Refugee Convention, it is doubtful that the attempt to displace our international obligations would be effective. Australia has an English common law legal system. It is an inherent component of the common law system that courts in one jurisdiction will apply precedents from courts in other jurisdictions when interpreting legislation. This comity is a great strength of the common law.

1.49 Accordingly, it is doubtful that Australian courts would cease to consider international precedents when interpreting the codification proposed by the Government in Schedule 5 of the Bill. The codification proposal is accordingly both an undesirable and futile exercise.

1.50 The dangers inherent in attempting to replace the Refugee Convention with the Abbott Government's preferred interpretation of the Convention obligations are demonstrated by the concerning 'modification' principle proposed by the Government.

1.51 Proposed section 5J(3) of the Bill will provide that an asylum seeker is not entitled to protection if they could 'modify' their behaviour so as to avoid persecution. The Opposition is concerned that the 'modification' principle could operate inhumanely.

1.52 For example:

(a) Should a person who has fled his or her country of origin after being charged with apostasy for converting to Christianity be expected to renounce his or her new religion, conceal it or cease to practise his or her new faith?

(b) Should an activist such as Nobel Peace Prize winner Malala Yousafzai, who fights against the Taliban for the right of girls to obtain an education 'modify her behaviour' and accept oppression on the basis of her gender?

(c) Should a person of a particular race, ethnicity or nationality conceal this characteristic and feign belonging to the dominant race, ethnicity or nationality in the area which they reside, so as to avoid persecution?

(d) Should LGBTI refugees adopt a heterosexual identity or conceal their true sexual orientation or gender identity? Note that some commentators continue to claim that homosexuality can be 'cured' and that it is not an innate, immutably personal characteristic?

1.53 The reasonableness of expecting a person to 'modify' his or her behaviour to avoid persecution in any particular circumstances is ambiguous. The Bill fails to expressly rule out expecting a person to 'modify' their behaviour to avoid persecution in the above circumstances. Labor Senators find this to be absolutely unacceptable.

Power to cap visas

1.54 Schedule 7 of the Bill addresses the decision in *Plaintiff S297/2013 v MIBP* [2014] HCA 24 to make clear that the Minister has the power to place a cap on the number of protection visas granted in a programme year.

1.55 The ability for the Minister to cap the number of visas issued within any visa category is an important mechanism in managing Australia's migration system. This applies equally to the management of protection visas.

1.56 However, the Abbott Government's attempt to prevent, by capping, almost the entirety of the last group of 6000 asylum seekers, for whom the bar was lifted under the former Labor Government, from being granted a protection visa was not about managing the business of the system but rather about preventing Permanent Protection Visas from ever being granted. This was an abuse of process which was struck down by the High Court.

1.57 The Australian Labor Party will not allow the provisions of Schedule 7 to allow the Government to undermine the High Court and prevent the relevant cohort of asylum seekers from pursuing their application for a Permanent Protection Visa.

90 day rule

1.58 Schedule 7 seeks to abolish the requirement to decide protection visa applications within 90 days and to report on the meeting of that requirement.

1.59 Reporting on the 90 day rule has been an important accountability measure in ensuring that the Government operates in a timely way in assessing protection applications.

1.60 At the end of Labor's period in office about half of all protection applications were decided within 90 days. However, the most recent report (1 March 2014–30 June 2014) indicated only 14 per cent of cases were now being determined within the 90 day period.

1.61 The Abbott Government is obsessed with secrecy. Labor Senators will not countenance the Government's efforts to further reduce transparency and accountability. We oppose any attempt to water down the 90-day rule.

Conclusion

1.62 The Australian Labor Party has serious concerns about elements of the proposed Bill. The Bill seeks to undermine a single High Court case, namely the CPCF Case. It seeks to resurrect the failed TPV, but fails to deliver on its promise to the Palmer United Party to establish the SHEV. The Bill is designed to deprive asylum seekers of the opportunity to have their applications for protection fairly reviewed, by replacing the RRT which a bureaucratic agency which fails to meet the basic standards of justice. It attempts to displace Australia's obligations under the Refugee Convention, and replace it with a flawed codification of the Abbott Government's preferred interpretation of those obligations. The Bill also makes questionable changes to the Minister's power to cap visas, and seeks to further entrench a culture of secrecy within Australia's migration framework by abolishing the 90 day rule. In these circumstances, Labor Senators cannot support the Bill in its current form.

Senator Jacinta Collins
Deputy Chair