Dissenting Report: The Australian Greens

Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014

Introduction

1.1 The Senate inquiry into the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 heard from thousands of human rights lawyers, refugee advocates, academics, and community members, all of whom rejected the amendments proposed in the Bill.

1.2 Despite the overwhelming evidence from experts and the community, who have said that this Bill should not proceed, the majority report has recommended that the Bill be passed. This committee has arrogantly rejected the evidence of thousands of Australians and has chosen to favour politics and punishment over protection and the rule of law.

1.3 This Bill is by far one of the most regressive pieces of legislation this Parliament has seen when it comes to the treatment of asylum seekers and refugees. There is no doubt that this Bill is an attempt by the government to dramatically reduce the number of refugees Australia takes each year and to legitimise their actions at sea when intercepting and turning back asylum seeker boats.

1.4 This Bill seeks to legalise the Government's actions at sea, limit Parliamentary and judicial oversight, disregard Australia's international and human rights obligations, reintroduce Temporary Protection Visas for boat arrivals, introduce a new temporary visa called the Special Humanitarian Enterprise Visa, introduce rapid processing with the sole aim of reducing the number of people Australia finds to be in need of protection, remove the Refugee Convention from the statute books, and deem babies born to asylum seekers parents as 'Unauthorised Maritime Arrivals'.

1.5 The Bill is an attack on Australia's generous heart and will result in Australia wrongly refusing protection to genuine refugees and returning them to persecution or significant harm.

1.6 The Australian Greens agree with the majority of submitters that this Bill is a radical deviation from Australia's longstanding commitment to international and human rights law. If passed this Bill will seriously endanger the lives of thousands of asylum seekers. The Australian Greens strongly recommend that this Bill be rejected by the Senate.

Amending the Maritime Powers Act

1.7 The amendments proposed in Schedule 1 of the Bill seek to give the Minister for Immigration and Border Protection unprecedented power over operations at sea and limit Parliamentary and judicial oversight. The amendments would give the Minister of the day the power to detain asylum seekers at sea for an unlimited timeframe, send them to other countries against their will and the will of the

destination country. The Parliament would have no say in these actions nor would the judiciary. The amendments proposed would circumvent the courts by making such powers and decisions immune from legal challenge.

1.8 Whilst the Government has continued to tout that their actions at sea are consistent with international law, attempts to amend the law in this way suggest otherwise. This is quite clearly a power grab by the Minister for Immigration and Border Protection and an attempt to place the Government above both the Parliament and the judiciary.

1.9 The amendments proposed will mean that the Australian Government would not need to comply with, or even consider, international law when exercising maritime powers.[1] In practice, this means that any operation at sea that is inconsistent with Australia's international obligations, fails to consider Australia's international obligations or fails to consider international law or the domestic laws of another country cannot be invalidated.

1.10 There is no doubt that these changes come in direct response to a case currently before the High Court[2] which is challenging the extent of the Government's maritime enforcement powers under the Maritime Powers Act and its power to intercept and detain asylum seekers and then take them to a place outside Australia. Essentially these amendments would nullify this challenge and any future challenges to the Government's operations at sea. Any attempt to decrease independent oversight or Parliamentary scrutiny is extremely concerning in light of the continuing secrecy surrounding Operation Sovereign Borders and the Government's actions at sea.

1.11 The Bill also removes any requirement for maritime powers to be exercised in accordance with the rules of natural justice. These amendments will effectively enable the Government to detain and transfer people without considering their individual circumstances or giving them a fair hearing.[3] Australia has an obligation under the Refugee Convention not to return people to a place where they will face persecution or suffer serious harm; these amendments will compromise Australia's ability to uphold these obligations and individuals will not be given the opportunity to receive a fair and thorough assessment of their protection claims.

1.12 As argued by the Refugee and Immigration Legal Centre:

> Australian officials, who intercept, detain and/or transport people at sea have 'effective control' over those persons as a matter of jurisdiction under international law. Australia's duty not to refoule persons to serious harm is engaged at that point. Australian officials who fail to investigate whether the persons they detain at sea are seeking asylum, fail to hear claims, and who remove persons to their home country or to third countries, which may

1 Human Rights Law Centre, *Submission 166*, p. 3.

2 *CPCF v. Minister for Immigration and Border Protection & Anor*.

3 Human Rights Law Centre, *Submission 166*, p. 4.

> return those people to their home country, will be responsible for direct or indirect refoulement to persecution or other human rights abuses.[4]

1.13 Further to this, under these amendments the Minister's powers are extended to enable him or her to give directions about the detention and movement of vessels and people provided that it is in the 'national interest'. This is an unprecedented power that will have devastating consequences for asylum seekers and refugees and will result in Australia breaching its non-refoulement obligations by sending people back to persecution or serious harm.

1.14 In addition to the overwhelming opposition to these amendments which was raised by witnesses and submitters to the inquiry, the Parliamentary Joint Committee on Human Rights has stated that the amendments outlined in schedule 1 breach a number of human rights obligations and will allow Australia to undertake actions at sea that are inconsistent with Australia's international obligations.

Temporary Protection Visas and Safe Haven Enterprise Visas

1.15 Schedule 2 of the Bill seeks to reintroduce Temporary Protection Visas (TPVs) and create a new visa named the Safe Haven Enterprise Visa (SHEV). These two visas classes will be the only visas that will be available to asylum seekers who have arrived in Australia by boat and are found to be in genuine need of protection. The legislation will be applied retrospectively to all individuals who have applied for Permanent Protection Visas.

1.16 The Government continues to promote TPVs as an effective deterrent against boat arrivals; however, evidence suggests that this is not the case. In 1999 following the introduction of TPVs by the Howard Government the number of boat arrivals grew ten-fold, including a significant increase in the number of women and children making the perilous journey to Australia by boat, as TPVs denied family reunification. The Government cannot continue to argue that the reintroduction of TPVs will act as a deterrent as they will only apply to those who are currently in Australia.

1.17 TPV holders will live in a constant state of limbo as they will face the very real prospect that their visas will not be reissued after 3 years. Hanging over their head will be the constant fear of being returned to the danger they once fled. As was the case previously, TPV holders will be unable to sponsor family members, will be precluded from re-entering Australia should they need to travel and will be barred from applying for any other visa in Australia. History has shown that those who were previously granted TPVs suffered from high levels of anxiety, depression, post-traumatic stress disorder and other psychiatric illness.[5] As stated by Amnesty International in their evidence, 'TPVs, far from offering the protection refugees have been found to require, in fact create prolonged uncertainty, separation, frustration, fear and mental ill-health'.[6]

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4 Refugee and Immigration Legal Centre, *Submission 165*, p. 24.

5 Uniting Justice Australia, *Submission 124*, p. 4.

6 Amnesty International Australia, *Submission 170*, p. 4.

1.18 In addition to the reintroduction of TPVs this legislation creates a new visa, the Safe Haven Enterprise Visa (SHEV). Whilst the legislation clearly amends the Migration Act to include TPVs, it does not do the same for the SHEV. The Bill names the visa type but fails to detail the criteria and conditions. Regulations will be required to establish the SHEV, however the Minister cannot be compelled to designate the regulation.

1.19 As detailed by the Minister for Immigration and Border Protection in correspondence with the Palmer United Party, the SHEV will be a valid visa for five years and like the TPV will not include the right to family reunion or the right to re-enter Australia. SHEV holders will be required to work in regional areas, after having worked in regional Australia for three and half years without accessing welfare and if they meet the eligibility criteria they may be able to apply for other onshore visa types, such as skilled or family visas.

1.20 As argued by the Refugee and Immigration Legal Centre:

> …the criteria will be unattainable for the overwhelming majority and for these the prospect of a permanent visa through the proposed SHEV scheme will be merely illusory.[7]

1.21 The Minister himself has admitted that it will be extremely difficult for SHEV holders to obtain permanency in Australia and that there is an extremely high bar to pass. It is evident that the pathway to permanency will be long and hard for genuine refugees.

1.22 The introduction of this visa subclass is being viewed by many as necessary in order to 'deal' with the 30,000 asylum seekers currently living in the community. It is important to note that the Department of Immigration and Border Protection have stated that it will take three years to process the backlog.[8] Those who are currently in the community have already been waiting years for their claims to be processed, the reintroduction of temporary visa will not 'fix' the backlog, instead it will condemn thousands of refugees to a life of uncertainty.

Rapid processing of asylum claims

1.23 Schedule 4 of the Bill creates a rapid assessment process for asylum seekers who have arrived in Australia by irregular means. Whilst enforcing strict timeframes and requirements these amendments also deny persons the right to appeal the decision.

1.24 It is clear that the amendments proposed are about the Government trying to make it as hard as possible for a person to be found to be a refugee and in turn be eligible for any type of permanent visa in Australia. Under these changes Australia will make incorrect determinations and will risk sending people back to danger and serious harm, breaching Australia's non-refoulement obligations.

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7 Refugee and Immigration Legal Centre, *Submission 165*, p. 20.

8 Ms Alison Larkins, First Assistant Secretary, Refugee, Humanitarian and International Policy Division, *Estimates Hansard*, Senate Legal and Constitutional Affairs Committee, 27 May 2014, p. 78.

1.25 Under these amendments asylum seekers will have their applications assessed initially by the Department of Immigration and Border Protection. If they are unsuccessful in their application only some will be eligible for an expedited and limited review process through the newly established Immigration Assessment Authority (IAA), an authority of the Department of Immigration and Border Protection. All applicants will be precluded from applying to the Refugee Review Tribunal (RRT).

1.26 As per the amendments the IAA will have limited review powers, will have no obligation to ever interview applicants or consider any new information should it arise unless 'exceptional circumstances' exist.

1.27 Further to this, not all asylum seekers will get access to this limited review. The amendments proposed in this Bill seeks to exclude people who may have provided false documentation, who may already have been denied refugee status by the UNHCR in another country, have 'manifestly unfounded claims', or if they fall within a class of persons the Minister for Immigration and Border Protection prescribes. These amendments are unjust, fail to recognise the realities of seeking asylum and hand unprecedented power to the Minister to determine the future of vulnerable asylum seekers.

1.28 Further to this, it is important to note that those who are found under this process not to be owed protection will become unlawful citizens leaving open the possibility of people being returned to detention. The effects of this amendment will be that a larger number of asylum seekers will be denied protection and therefore be mandatorily detained or returned to danger.

1.29 Australia has an obligation to protect people fleeing human rights abuses and to uphold the standards of procedural fairness. If due process fails, there is an increased likelihood that people will be wrongly refused protection and removed to the very real prospect of persecution or serious harm in their country of origin. Under these amendments, Australia will risk breaching its obligations under the Refugee Convention, most namely the principle of non-refoulement.

Removing references to the Refugee Convention

1.30 The amendments outlined in Schedule 5 of the Bill removes most references to the Refugee Convention from the Migration Act and replaces it with the Government's own interpretation of Australia's protection obligations. The amendment goes so far as to redefine what it means to be a refugee. The changes will also make it possible for the Government to remove asylum seekers without considering the risk of refoulement.

1.31 The proposed amendments are in contradiction with Australia's obligations under international and human rights law and will result in the very real risk of Australia returning genuine refugees to danger.

1.32 The Refugee Convention remains at the cornerstone of international refugee protection. The government is arrogantly attempting to impose its own interpretation of what has been an internationally understood treaty. As stated by the Human Rights

Law Centre, the Convention 'cannot be unilaterally redefined by Australia more than 60 years after it was signed'.[9]

1.33 Further to this, the amendments outlined in this schedule also seek to remove Australia's obligation to consider refoulement when removing a person from the country. This amendment is regressive and completely flies in the face of Australia's commitment to international law. As argued by the Refugee and Immigration Legal Centre, these amendments are:

> …entirely inappropriate and would further limit Australia's capacity to comply with its international obligations, and consequently increasing the risk of it breaching those obligations.[10]

1.34 There are a number of concerning aspects regarding the government's redefinition of the Refugee Convention. Currently, under Australian and International law, a person is not eligible for protection if he or she can safely access another location and it is 'reasonable' for him or her to move there. This Bill seeks to remove the reasonableness criteria and instead introduce a blanket clause stating that an individual must show that there is a real chance of persecution in all areas of their country, regardless of the practicalities of moving and living there. The UNHCR stated in its submission that decision makers are required to assess whether internal relocation 'is a reasonable consideration, both subjectively and objectively, given the circumstances of the asylum seeker'.[11] Protection should not be contingent on the persecuted trying to avoid their persecutors.

1.35 When determining a person's refugee status these amendments will deny a person protection if the government believes that if they change their behaviour they will no longer be in fear of persecution or serious harm. As stated by the Asylum Seeker Resource Centre in their evidence:

> This is an affront to the rule of law, supports actions of oppressive regimes and undermines the purpose of the Refugee Convention. It is not and should not be question for an Australian decision maker to consider what aspects of a person's belief should be modified to suit the extremist group's ideology.[12]

1.36 Protection should not be contingent on the persecuted having to modify their own behaviour so as not to agitate their persecutors.

1.37 Further to this, the Bill proposes to change and codify the test of defining a particular social group. The Bill seeks to add an additional requirement which states that the defining characteristic of the particular social group must be either innate or immutable or so fundamental to the member's identity or conscience, the person

9 Human Rights Law Centre, *Submission 166*, p. 10.

10 Refugee and Immigration Legal Centre, *Submission 165*, p. 12.

11 United Nations High Commissioner for Refugees, *Submission 138*, p. 5.

12 Asylum Seeker Resource Centre, *Submission 131*, p. 19.

should not be forced to renounce it.[13] As noted previously, protection should not be contingent on the persecuted having to modify their behaviour to avoid persecution.

1.38 The amendments proposed to this schedule are an affront to international law and Australia's long and proud history of offering protection to those in need.

New born babies

1.39 With retrospective effect, the Bill would also classify babies born in Australia to asylum seeker parents as 'Unauthorised Maritime Arrivals (UMAs)'. These children were born in Australian hospitals, yet the Bill seeks to classify them as if they arrived by boat.

1.40 Should this Bill pass it will significantly impact a current case before the Federal Court of Australia, in which Maurice Blackburn Lawyers are representing a baby named Ferouz, who was born in Brisbane's Mater Hospital, holds a Queensland birth certificate and is eligible to apply for Australian citizenship.[14] These amendments represent another attempt by the government to overrule court proceedings and circumvent the law.

1.41 The consequences of such changes will be devastating for these Australian born babies as the amendments will leave them liable to transfer offshore, subject to arbitrary and indefinite detention, and effectively deemed stateless.

1.42 As was raised by ChilOut in their submission to the inquiry, this amendment, which will result in the indefinite detention of children, is at odd with the concluding observations of the UN Committee on the Rights of the Child, where it was stated that children should only be held in detention as a last resort and for the shortest possible period of time.[15]

1.43 Putting aside the absurdity of the claim that babies born in Australian hospitals in fact arrived by boat, these amendments seriously compromise Australia's obligations under the Convention on the Rights of the Child and Article 24 of the International Covenant on Civil and Political Rights (the right to acquire nationality).

1.44 These amendments would effectively render these children stateless due to their inability to acquire nationality and would result in Australian born babies being subject to offshore indefinite detention.

Statutory limit on Permanent Protection Visas

1.45 The amendments outlined in schedule 7 introduce a statutory limit on the number of Permanent Protection Visas which can be issued within a particular financial year and removes the 90 day processing requirement for the Department and the RRT and related Parliamentary reporting requirements.

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13 Asylum Seeker Resource Centre, *Submission 131*, p. 22.

14 Maurice Blackburn Lawyers, *Submission 43*, p. 1.

15 ChilOut, *Submission 96*, p. 2.

1.46 These amendments come in response to the decisions of the High Court in *Plaintiff S297 of 2013* and *Plaintiff M150 of 2013* and to ensure that 'the onshore component of the Humanitarian Programme is appropriately managed'.[16]

1.47 Australia is obliged to provide protection to those who arrive in Australia and are found to be in genuine need of protection. A cap on protection visa applications for people who have been found to be genuine refugees abrogates this important responsibility and places Australia at considerable risk of inflicting harm on people by leaving them languishing for long periods of time should the cap be reached.

1.48 As stated by the Refugee Council of Australia, 'Protection Visa grants should be guided, first and foremost, by the protection needs of individual applicants'.[17]

Conclusion

1.49 This Bill is by far one of the most regressive pieces of legislation this Parliament has seen when it comes to the treatment of asylum seekers and refugees. There is no doubt that this Bill is an attempt by the government to reduce the number of refugees Australia takes each year.

1.50 The Government's arrogant approach to those seeking protection in Australia is an attack on the nation's generous heart and proud history of resettlement of the world's most vulnerable.

1.51 The committee heard unprecedented evidence from experts around the country stating that this Bill should not be passed. The Australian Greens agree and strongly recommend that the Bill be rejected by the Senate.

Recommendations

1.52 Recommendation 1: The Australian Greens recommend that the Bill be rejected by the Senate.

1.53 Recommendation 2: The Australian Greens recommend that the Government reinstate legal funding for IAAAS for all protection visa applicants and make migration assistance available to all those considered part of the 'legacy caseload'.

1.54 Recommendation 3: The Australian Greens recommend that Australia's humanitarian intake be increased immediately to a minimum of 20,000 places per annum.

1.55 Recommendation 4: The Australian Greens recommend that the Government immediately begin processing claims under the current Refugee Status Determination System and make available Permanent Protection Visas to people found to be owed protection.

1.56 Recommendation 5: The Australian Greens recommend that the Government pass the Australian Greens' Guardian for Unaccompanied Children

16 Refugee Immigration and Legal Centre, *Submission 165*, p. 20.

17 Refugee Council of Australia, *Submission 136*, p. 13.

Bill 2014 to ensure that unaccompanied minors have a truly independent guardian acting in their best interest.

Senator Sarah Hanson-Young
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