SUBMISSION TO THE SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS:

INQUIRY INTO THE MIGRATION AND MARITIME POWERS LEGISLATION AMENDMENT (RESOLVING THE LEGACY CASELOAD) BILL 2014

31 October 2014

SUMMARY:

CASE for Refugees has significant concerns about aspects of the Bill. This submission outlines the most serious of these.

Firstly, the Bill is inconsistent with Australia's obligations under the international human rights treaties in that it empowers the detention of persons and ships on the high seas, authorises the Executive to remove unlawful non-citizens without determining whether they are refugees, and even if they are refugees. It also purports to codify the refugee definition but actually alters it. In any case, codification is inadvisable because flexibility rather than rigid legality is needed in order to respond to fluctuations in patterns of forced migration and global crises.

Secondly, the Bill compounds inequality under the law by providing for different classes of visa, different forms of refugee status assessment and different forms of merits review according to time and mode of arrival - factors which have no relevance to a person's protection needs. Notwithstanding this, CASE supports the SHEV in principle and recommends that both SHEV and TPV holders be permitted to obtain visas for their immediate family. We oppose the introduction of Fast Track Processing, which we predict will lead to poorer decisions, increased rates of judicial review and the 'inadvertent' return of refugees to persecution. We also do not support the establishment of the IAA, given that the RRT already has the expertise, experience and resources to perform merits review in this area.

The Bill unfairly impacts on authorised air arrivals by allowing the imposition of a cap on protection visas and the capacity to cease processing. We oppose such changes.

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CASE FOR REFUGEES

1. CASE (Centre for Advocacy, Support and Education) for Refugees (**CASE**) is a not for profit community legal centre that provides free legal advice, representation and advocacy to refugees, offshore humanitarian entrants and people from culturally and linguistically diverse backgrounds who live in Western Australia. Since its inception in 2002, CASE has grown to be a primary provider of specialist legal services to refugees and asylum seekers in Western Australia. In 2013/14, we assisted over 1000 clients from 58 countries.

2. This submission reflects the experience and expertise of CASE, as outlined.

BACKGROUND

3. The *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014* (**the Bill**) was introduced to the House of Representatives on 25 September 2014 and was referred by the Senate to the Legal and Constitutional Affairs Committee for inquiry and report.

IMPACT ON INTERNATIONAL TREATY OBLIGATIONS

4. Australia has a tradition of respect for, and advocacy of, fundamental rights and freedoms. This tradition has enabled our clients to find safety here, whether they have come directly from their country of persecution or indirectly through UNCHR resettlement. We are therefore concerned that, in a number of respects, the Bill authorises or permits the Executive to disregard Australia's international human rights obligations under the *Convention Relating to the Status of Refugees* (**Refugee Convention**), the *International Covenant on Civil and Political Rights* (**ICCPR**) and the *Convention on the Rights of the Child* (**CRC**).

5. Schedule 1 empowers maritime officers to detain people on the High Seas. If this was to be done, it is very likely that Australia would breach Article 9 of the ICCPR, which prohibits arbitrary detention. We may also breach Article 97 of the *UN Convention on the Law of the Sea* which prevents the arrest or detention of a ship on the high seas, other than by the state whose flag the ship flies.

Removal of Non-Citizens

6. Schedule 5, Part 1 establishes that unlawful non-citizens must be removed from Australia under s 198 of the *Migration Act 1958*, regardless of whether they have been assessed to engage Australia's protection obligations. In other words, Australia does not need to conduct a refugee status assessment before removing asylum-seekers, and if it

has conducted an assessment, the outcome of that assessment has no bearing on whether or not they may be removed.

7. In this way, Schedule 5, Part 1 authorises the Executive to disregard Australia's most basic international obligation, that of *non-refoulement*. This obligation has been described by international refugee law scholar, Professor James Hathaway as 'the primary response of the international community to the need of refugees to enter and remain in an asylum country.[1] It was placed in the *Refugee Convention* to ensure that 'those states in which summary removal or denial of access was authorised by law not be allowed to rely on such provisions', replacing them with a general obligation on all states to allow access and prevent the expulsion or return of people to countries where their life or freedom was threatened.[2]

8. The fact that other powers in the *Migration Act*, including ss 46A and 417 make it *possible* for Australia to assess a person's refugee status, does not ensure compliance with our obligations, because it does not prevent *refoulement* from occurring. This is particularly so given that the Executive is empowered under the Bill to disregard a refugee status assessment when removing someone.

9. CASE supports the timely removal from Australia of people who do not have a right to remain in Australia and do not engage Australia's protection obligations. However, we consider that Schedule 5, Part 1 is inconsistent with the most fundamental international obligation toward refugees and as such, cannot support it.

Codification of the Refugee Definition

10. Schedule 5 Part 2 removes from the *Migration Act* most references to the *Refugee Convention* and replaces it with the current government's interpretation of its protection obligations under the *Refugee Convention*. The Explanatory Memorandum to the Bill states that the government's intention is to codify these obligations and not to resile from them, however, in at least two respects the law is amended and not merely codified. The new s 5J(1)(c) introduces a new requirement that a person's risk of persecution must extend throughout their entire country and the new s 5J(3) introduces an expectation on refugees to 'take reasonable steps to modify their behaviour so as to avoid a real chance of persecution'.

11. CASE is concerned that attempting to codify treaty obligations in this manner reduces the effectiveness of the treaty. Having heard the life stories of refugees from over 50 countries, we appreciate that the circumstances and needs of refugees across the world vary immensely. Differences arise according to political systems, cultural, social and economic factors, age and gender, as well as personal and national histories. Accurate

[1] James C. Hathaway, *The Rights of Refugees Under International Law* (Cambridge, 2005) 300.
[2] Ibid, 315-6.

assessments of refugee status require a degree of flexibility because what amounts to a real chance of serious harm is not the same throughout the world, and for all asylum-seekers. A broadly worded refugee definition such as that found in the *Refugee Convention*, is for this reason, preferable to a legalistic statutory definition.

12. Similarly, it is important that our refugee determination system is able to adapt and respond to changing trends in refugee movements caused by global events. Our view is that codifying protection obligations will make it more difficult for Australia to do that. This is particularly so, given the relative difficulty that governments experience in amending migration legislation.

Recommendations

13. Following from the Bill's impact on Australia's international treaty obligations, CASE recommends:

- Maritime powers of detention at sea be stated as subject to international law including the ICCPR and Law of the Sea;
- Powers under the *Migration Act 1958* relating to the removal of unlawful non-citizens be subject to (1) the conducting of a refugee status assessment according to law; and (2) a statement that non-citizens to whom Australia has protection obligations must not be removed to a place where, directly or indirectly, they are at risk of persecution;
- Schedule 5, Part 2 be removed from the Bill.

THE EQUALITY OF ASYLUM-SEEKERS UNDER THE LAW

14. Article 31 of the *Refugee Convention* prohibits states from penalising refugees on account of their mode of arrival or unlawful entry. In spite of this, for some time the *Migration Act 1958* has distinguished between two classes of asylum-seekers. In recent years, however, this distinction narrowed in practice as all asylum-seekers were given access to the same refugee status determination and merits review system. CASE viewed this as a positive development because in our experience, there is no correlation between an asylum-seeker's mode of arrival and their need of international protection or their vulnerability.

15. Unfortunately, in our view the Bill compounds inequality between asylum-seekers by providing access to different classes of protection visas, and different forms of refugee status assessment and merits review.

TPVs and SHEVs

16. Schedules 2 and 3 allow for the reintroduction of Temporary Protection Visas (**TPVs**) and the creation of a new Safe Haven Enterprise Visa (**SHEV**). We note that the Bill

provides no detail on the criteria for and conditions of SHEVs. CASE supports, in principle, the provision of a 5 year visa that enables refugees to work in regional areas and provides real pathways to permanency. Given the potential vulnerability to workplace exploitation of people on SHEVs, we would expect to see safeguards and protections included in the Regulations**.**

17. In relation to both TPVs and SHEVs, CASE is concerned that denying access to visas for immediate family members will have negative consequences, both for refugees and the community at large. We recall that this feature of TPVs when they were in force previously led to an increase in the forced migration of women and children, and delayed settlement outcomes for TPV holders. Given that other medium-term temporary visas, such as the Subclass 457 Temporary Work Visa, allow holders to 'add' partners and children to their visas after they have been granted, we suggest that it would be consistent and beneficial to allow TPV and SHEV holders to do the same.

Fast Track Processing

18. Schedule 4 defines certain asylum seekers as 'fast track applicants'.[3] This distinction is not made on the basis of people's protection or other needs, but rather on their mode of travel and date of entry to Australia. The effect of this classification is that the person is afforded less time to present information to the Department in relation to their protection needs.

19. CASE supports the timely processing of refugee claims for UMAs who arrived after 13 August 2013. However, we are aware that most of these applicants have not yet had access to legal advice and no funding is available for them to do so. Most speak little or no English and many are illiterate in any language. It can be expected, based on past cohorts, that a significant number are suffering the effects of torture and trauma. As a result, many of these applicants have little understanding of what they are required to demonstrate, what evidence would assist them, and an impaired capacity to present their claims to decision-makers. They rely largely on rumours and anecdotes of friends who have been through a process. In these circumstances, we consider that the expectation of the Bill,[4] that applicants present all relevant information for the assessment of their claim, at the beginning of the process, is unrealistic. If assessments proceed on the assumption that applicants are able to comply with this, we fear it will very likely to result in incorrect assessments with serious consequences.

20. Schedule 4 also creates a new statutory body, the Immigration Assessment Authority (**IAA**), which will conduct a form of merits review, replacing the Refugee Review

[3] Schedule 4, item 1
[4] Schedule 4, Part 1, Division 3, Subdivision B

Tribunal (**RRT**) for fast track applicants. Unlike the RRT, the IAA will not usually speak to the applicants and is not required to be 'fair'.[5]

21. CASE supports the provision of merits review for fast track applicants but suggests that the provision of a new body to do this is unnecessary. The RRT already has the resources, experience and expertise to conduct fair, efficient and quick merits review of protection claims. We recall that during the period when between 2009 and 2011 when UMAs did not have access to the RRT, review decisions were noticeably poorer than they were under the RRT. At CASE, we observed the effect of this in our judicial review caseload, which was many times larger during that period than it is now. We are concerned that replacing the RRT with the IAA for fast-track applicants, will again lead to an increased case load for the Federal Circuit Court and/or High Court.

Recommendations

22. Following from the Bill's impact on equality among asylum-seekers, CASE recommends:

- If SHEVs are to be introduced, the inclusion of safeguards and protections to prevent exploitation in employment**;**
- If TPVs and SHEVs are to be introduced, the capacity to add immediate family members to a visa, in line with other medium-term temporary visas; and
- That Schedule 4 not be passed, maintaining a single refugee assessment system for all applicants, regardless of their mode or time of arrival.

IMPACT ON AUTHORISED ARRIVALS

23. Schedule 7 of the Bill allows the Minister to place a cap on the number of protection visas that may be granted each year by removing the requirement currently in s 65A and 414A of the *Migration Act 1958*, that applications be determined within 90 days. It also allows processing to be suspended and removes current provisions in the *Migration Act 1958* that require reports to be made to Parliament when the 90 day time limit is exceeded.

24. CASE does not support the imposition of a cap or the provision for suspension of processing. The current processing backlog, referred to by the government as a 'legacy caseload' is, in large part, the consequence of past decisions to cease processing for various groups. In the experience of CASE, it has had detrimental effects on the mental and physical health of asylum-seekers. Poor mental and physical health restricts their capacity to present their claims when required to do so.

[5] Schedule 4, item 21

26. We note that no explanation has been provide for the imposition of a power to cap protection visas for asylum-seekers who have entered Australia lawfully, with valid visas, and are fully compliant with immigration processes. Many of our clients in this position already wait well over a year for the grant of a protection visa, and for some the period is approaching 3 years. We therefore envisage that the imposition of a gap will result in a very protracted process for them.

27. It is the experience of CASE, that when asylum-seekers are required to wait very long periods for an outcome, the stress and uncertainty has far-reaching negative effects on their wellbeing. This, in turn, reduces their capacity to integrate into the community and increases their long term need for support and services.

Recommendations:

28. Following from the impact of a cap on authorised arrivals, CASE recommends:

- Schedule 7 not be passed;
- If a cap is to be imposed, that applicants be informed that their claim has been accepted and their application queued, and that they be given access to employment, education, health and settlement services while they wait for a visa grant.

SUMMARY OF RECOMMENDATIONS

- Maritime powers of detention at sea be stated as subject to international law including the ICCPR and Law of the Sea.
- Powers under the *Migration Act 1958* relating to the removal of unlawful non-citizens be subject to (1) the conducting of a refugee status assessment according to law; and (2) a statement that non-citizens to whom Australia has protection obligations must not be removed to a place where, directly or indirectly, they are at risk of persecution.
- Schedule 5, Part 2 be removed from the Bill.
- If SHEVs are to be introduced, the inclusion of safeguards and protections to prevent exploitation in employment**.**
- If TPVs and SHEVs are to be introduced, the capacity to add immediate family members to a visa, in line with other medium-term temporary visas.
- That Schedule 4 not be passed, maintaining a single refugee assessment system for all applicants, regardless of their mode or time of arrival.
- Schedule 7 not be passed.
- If a cap is to be imposed, that applicants be informed that their claim has been accepted and their application queued, and that they be given access to employment, education, health and settlement services while they wait for a visa grant.