MARCH 2015

ADVOCACY BRIEF

The Amendments to Migration and Maritime Powers Legislation

MIGRATION AND MARITIME POWERS LEGISLATION AMENDMENT (RESOLVING THE ASYLUM LEGACY CASELOAD) ACT 2014

Key Messages

The Act is incompatible with Australia's human rights obligations and should not be passed.

In removing all references to the Refugee Convention, it seeks to place Australia outside of international law.

Asylum seekers may be sent back into situations of danger ('refouled') because the Act increases the power to remove people without a proper assessment of their need for protection.

By significantly limiting the ability of the courts to examine the Government's treatment of asylum seekers and refugees, the Act threatens our robust and transparent democracy.

The re-introduction of temporary protection visas without the possibility of permanent protection means greater uncertainty, stress, anxiety and psychological illness for asylum seekers.

Classifying newborn children of unauthorised marine arrivals (UMA) as UMAs will allow for their removal to third country detention centres, specifically Nauru and Manus Island, Papua New Guinea, which is contrary to our obligations under the Convention on the Rights of the Child.

Newborn children of asylum seekers who arrived by boat could be rendered stateless, placing Australia in breach of international law.

FACTS & FIGURES Nº 1

Detention of people at sea is contrary to the intent of the *Universal Declaration of Human Rights,* (which stipulates in Article 9 that people should not be arbitrarily detained) and the *International Covenant on Civil and Political Rights* (which states in Article 9 (1) that people should not be arbitrarily detained).

Background

This legislation seeks to address a number of concerns and policy objectives for the Government.

The over 25,000 asylum seekers in Australia waiting for their claims to be processed are the 'Legacy Caseload' referred to in the Act's title. The Government refused to process the claims until temporary protection visas can be issued because it will not grant permanent protection to refugees who arrived by boat.

The Act is also partly a direct reaction to the case of the 157 Sri Lankan asylum seekers who were held on the Australian Navy ship the Ocean Protector for almost a month during July 2014.[1] These people were held without adequate access to communication with family, without their basic needs met, without legal advice and without transparent communication to the Australian people about the situation. In the case of CPCF v Minister for Immigration and Border Protection & Anor which relates to the same 157 asylum seekers, the plaintiff challenged the lawfulness of his detention outside of Australia and in international waters (Australia's contiguous zone) and sought damages for wrongful imprisonment. The case also challenged Australia's power to intercept and detain asylum seekers and take them to a place outside Australia, in this case India.[2] On 28 January 2015 the High Court found that the claim should be dismissed.

About the Act

On 5 December 2014 the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014* passed both houses of Parliament. It amends sections of the *Migration Act 1958* and the *Maritime Powers Act 2013*. This Act puts into domestic law the powers the Government wishes to exercise under its current refugee and asylum seeker policy entitled 'Operation Sovereign Borders'.

The legislation sets up a fast-track application review process to enable protection decisions to be made 'efficient, quick and free of bias'. We are concerned that the focus on 'efficient and quick' will undermine a 'fair and just' process. In the case of an unfavourable decision, only a limited merits review would be possible. Unsuccessful asylum seekers would be returned to their place of origin, irrespective of the danger they might face upon return. Those granted protection will only receive a Temporary Protection Visa (TPV) and would never be allowed to apply for permanent protection.

In numerous ways, this Act undermines human rights and threatens the accountability and transparency upon which our democratic government should operate.

Undermining human rights

This legislation absolves Australia of our obligations under international law to protect refugees and is a serious threat to Australia's commitments to uphold human rights under international law.

The legislation removes almost every reference to the Refugee Convention from the Migration Act and redefines 'refugee' and our obligations to protect refugees in ways that are incompatible with international law. The Parliamentary Joint Committee on Human Rights has determined that the proposed new definition of refugee is not compatible with international law. Its 14th report has condemned the legislation and the intention of the Government to circumvent international law:

> The committee notes... that it is not for a state to unilaterally determine its obligations under a treaty after ratification. Rather treaties such as the Refugee Convention have a meaning in international law which is separate from domestic law concepts. The committee is concerned that the unilateral interpretation of Australia's international obligations as proposed by the amendments is not in accordance with accepted standards of international human rights law.[3]

One of the most serious obligations we have under international law is 'non-refoulement', however there are a number of provisions in this legislation which would put people in grave danger of being refouled:

- the proposed new definition of refugee which sets a much lower bar for protection and conditions for removal;
- the 'fast-track' assessment process for those who have arrived on or after 13 August 2012 and their denial of access to appeal by the Refugee Review Tribunal; and
- the 'fast-track' review process by the newly established Immigration Assessment Authority (IAA) which will conduct only a limited merits review of decisions. IAA will be under no duty to accept or request new information or even to interview an applicant.

In another challenge to the exercise of the rule of law, the legislation allows for the Minister to ignore findings by the courts that the Government has breached our international obligations. A new section will be added to the *Maritime Powers Act 2013* to ensure that a decision of the Minister cannot be declared invalid by a court because there has been:

- a failure to consider international obligations;
- defective consideration of international obligations; or
- a decision is inconsistent with international obligations.

FACTS & FIGURES Nº 2

The obligation to not 'refoule' (return people to places where they are likely to face persecution, torture and other dangers) is one of the most important provisions of international law and cannot be limited by domestic law. People are protected against refoulement in a number of treaties and conventions including:

- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 3(1)
- International Covenant on Civil and Political Rights, Articles 6(1) and 7
- Refugee Convention, Article 31

FACTS & FIGURES Nº 3

The legislation adds a clause to ensure that decisions made by the Minister cannot be challenged on the grounds that "the rules of natural justice" were not upheld. 'Natural justice' is one of the foundational principles of law that refers to the right to have a fair trial or hearing and the right to be free from bias or prejudice in decision-making.

FACTS & FIGURES Nº 4

Article 23 of the Refugee Convention states that, "The Contracting States shall accord to refugees lawfully staying in their territory the same treatment with respect to public relief and assistance as is accorded to their nationals."

TPVs

The legislation enables the Government to re-introduce Temporary Protection Visas (TPVs) TPVS will be granted for three years and TPV holders will be given the right to work, and access to Medicare and social security benefits[4]. Despite these benefits, there are a number of reasons why TPVs are problematic[5].

TPVs do not provide refugees with the range of rights and entitlements that would allow them to begin to build a new life and make settlement in Australia easier. Under this legislation they will never be able to apply for permanent protection and will have to undergo a 're-assessment of status' process every time the visa expires. Refugees on TPVs are denied the right to family reunion.

People on TPVs have in the past been shown to experience higher levels of anxiety, depression, post-traumatic stress and other psychiatric illnesses than the rest of the population. For example, a study published in the *Medical Journal of Australia* found that temporary visa status was a significantly stronger predictor of anxiety, depression and post-traumatic stress disorder than permanent protection visa status.[6] A Senate inquiry in 2006 found that there was little real evidence of the deterrent value of TPVs and that TPVs imposed a significant cost in terms of human suffering.[7]

In addition to the psychological impacts of TPVs[8], there is some evidence to suggest that TPVs may increase rather than decrease the likelihood of people arriving in Australia by boat. Without the possibility of family reunion provisions that are available in permanent protection visas, the only way for family members to unite with a person on a temporary protection visa is to board a boat. Former Immigration Minister Chris Evans indicated that the numbers of women and children arriving in Australia by boat increased from 25 to 40 per cent in 2001, the year following the introduction of TPVs.[9] According to the Refugee Council of Australia, of the 353 people aboard the SIEV X when it sank in 2001, 142 were women and 146 were children hoping to reunite with husbands and fathers already in Australia on TPVs.[10]

TPVs used in this way are contrary to the spirit and intent of the Refugee Convention and are an infringement of people's basic rights and freedoms including the right to the protection of the family.[11]

Safe Haven Enterprise Visas

The legislation also introduces a new temporary visa called a Safe Haven Enterprise Visa (SHEV) which may be granted for five years. Refugees holding a TPV will be able to transition to a SHEV if they agree to move and work or study in a designated regional area where the state or local government has 'opted in' to this arrangement. At the end of this five year period, SHEV holders may be eligible to apply for other visas. However, it is unclear how many refugees will become eligible for another visa and the Minister has stressed that they will not be eligible for a Permanent Protection Visa (PPV).

Newborn children

The Act specifically addresses the situation of newborn children who would gain the same legal status as their parents, as an 'Unauthorised Maritime Arrival (UMA)' or a 'transitory person (someone who has been brought from Nauru, for example, for medical care at the time of giving birth). This exposes newborn babies to possible transfer to a regional processing country, long-term detention and the denial of protection in Australia.

We are concerned that this legislative amendment breaches the rights of newborn children in relation to Australia's international obligations. In 2005 the Migration Act was amended to indicate that children should only be detained as a matter of last resort, in keeping with Article 27 of the CRC[12] which states that children should not be held in detention. As the Human Rights Commission's National Inquiry into Children in Immigration Detention[13] report concluded, children in immigration detention for long periods of time are at high risk of serious mental harm. We maintain the conviction that newborn children should not be detained in immigration detention centres for any length of time or subjected to Australia's punitive refugee policies.

UNHCR has commented that, "overall the harsh and unsuitable environment at the closed RPC [Nauru Immigration Detention Centre] is particularly inappropriate for the care and support of child asylum seekers." [18]

In addition, newborn children have the right to acquire a nationality as contained in article 24(3) of the ICCPR[14] and article 7(1) of the CRC.[15] The right to a grant of nationality for individuals who would otherwise be stateless is contained in articles 1 and 2 of the 1961 Statelessness Convention[16]. There is a risk that the newborn child of non-citizen parents would be rendered stateless under this new legislation. The Convention on the Reduction of Statelessness 1961,[17] which Australia has signed, obliges states parties to "grant its nationality to a person born in its territory who would otherwise be stateless". *Australia's Citizenship Act 2007* affirms this obligation, stating that any child who was born in Australia, and who is not and has never been a citizen of another country and is not entitled to apply for citizenship elsewhere, is eligible for Australian citizenship.

Why is the Uniting Church concerned?

FACTS & FIGURES Nº 5

Article 3 of the Refugee Convention states that there should be no discrimination of asylum seekers for reasons of race, religion, country of origin or mode of arrival.

The Uniting Church in Australia believes that Australia must always legislate in a manner consistent with our obligations under the international treaties and conventions that Australia has signed including:

- the Refugee Convention and Protocol;
- the *Universal Declaration of Human Rights*;
- the *Convention on the Rights of the Child*; and
- the *International Covenant on Civil and Political Rights*.

Our domestic law with respect to refugees and asylum seekers should reflect the spirit and intent of the Refugee Convention, which is to offer protection and provide for the basic human needs of those fleeing persecution.

UnitingJustice Australia is concerned that this Act threatens the largely good history of Australia as a nation committed to upholding human rights and prepared to contribute in positive ways to help ease and solve the problems of violence and injustice in the world.

The Act also threatens the quality of our democracy by making it legal for the Government to ignore our human rights obligations and ignore any rulings of the courts which might declare its decisions invalid because they are contrary to our human rights obligations.

This Act legislates the policies and practices of the Government under 'Operation Sovereign Borders' (OSB). The Uniting Church has had long-standing concerns with OSB and policies of previous governments based on 'deterrence' rather than protection. These policies not only discriminate against asylum seekers who arrive by boat they punish them, causing physical, emotional and mental harm. In August 2014, in response to the treatment of the 157 Tamil asylum seekers on the Ocean Protector, the President of the Uniting Church, Rev. Prof Andrew Dutney said,

> In its single-minded efforts to 'stop the boats', this Government has lost its moral compass. What started badly enough as using asylum seekers for political point-scoring has degenerated into a callous disregard for the value of human life.[19]

The Australian response towards asylum seekers should be culturally sensitive and take into account the situations from which people have come. Upon arrival, asylum seekers should have access to the protections afforded them in international law as foreign nationals seeking protection from persecution. They also must be provided with adequate psychological, social and medical care and legal advice. Decisions about child asylum seekers should be made with the best interests of the child as the primary consideration. The Uniting Church believes that the immigration system should be accountable and transparent.

References

1. S. Whyte, 'Asylum Seekers detained on a customs vessel for a month suffered tortuous journey high court hears', *Sydney Morning Herald*, 14 Oct 2014 http://www.smh.com.au/federal-politics/political-news/asylum-seekers-detained-on-customs-vessel-for-a-month-suffered-torturous-journey-high-court-hears-20141014-115s89.html

2. High Court of Australia (HCA), 'CPCF v Minister for Immigration and Border Protection', HCA website, accessed 29 Oct 2014

3. Fourteenth Report of the 44th Parliament (28 October 2014), p. 78 http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Completed_inquiries/2014/Fourteenth_Report_of_the_44th_Paliament

4. The exact conditions attached to TPVs and SHEVs are not clearly described in the legislation but the Minister described the basic conditions in the Second Reading speech http://parlinfo.aph.gov.au/parlInfo/download/chamber/hansards/1ac032d4-0a55-4b0c-8cb6-d336dfbcbfb6/toc_pdf/Senate_2014_10_28_2995.pdf;fileType=application%2Fpdf

5. It is being argued that allowing TPVs will see people released from detention. The Government can allow for the release of asylum seekers at any time and should immediately move to release all people into the community on Bridging Visas with access to adequate support services and the right to work. It will take at least three years to process the claims of this 'legacy caseload'.

6. S. Momartin et al (2006) 'A comparison of the mental health of refugees with temporary vs permanent projection visas', *Medical Journal of Australia*, 185 (7): 357-361

7. http://www.aph.gov.au/~/media/wopapub/senate/committee/legcon_ctte/completed_inquiries/2004_07/migration/report/report_pdf.ashx

8. UNHCR Submission to the Expert Panel on Asylum Seekers, 27 July 2012 http://expertpanelonasylumseekers.dpmc.gov.au/sites/default/files/public-submissions/UNHCR.pdf

9. http://parlinfo.aph.gov.au/parlInfo/download/committees/estimate/11640/toc_pdf/6539-3.pdf;fileType=application%2Fpdf#search=%22committees/estimate/11640/0001%22

10. http://refugeecouncil.org.au/n/mr/1409_TPVs.pdf

11. International Covenant on Civil and Political Rights, Articles 17 and 23

12. 1989 United Nations Convention on the Rights of the Child http://www.ohchr.org/en/professionalinterest/pages/crc.aspx

13. HREOC, *A last resort? National Inquiry into Children in Immigration Detention 2004* https://www.humanrights.gov.au/last-resort-report-national-inquiry-children-immigration-detention-2004

14. International Covenant on Civil and Political Rights

15. 1989 United Nations Convention on the Rights of the Child

16. United Nations Convention on the Reduction of Statelessness http://www.unhcr.org/3bbb286d8.html

17. 1961 United Nations Convention on the Reduction of Statelessness http://www.unhcr.org/3bbb286d8.html

18. UNHCR Monitoring visit to the Republic of Nauru, 7-9 October 2013, http://unhcr.org.au/unhcr/images/2013-11-26%20Report%20of%20UNHCR%20Visit%20to%20Nauru%20of%207-9%20October%202013.pdf

19. 'Uniting Church condemns escalating abuse of asylum seekers', Media Release, 5 August 2014, http://www.unitingjustice.org.au/refugees-and-asylum-seekers/news/item/958-uniting-church-condemns-escalating-abuse-of-asylum-seekers

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