



# Refugee Council of Australia

26 September 2014

## **New legislation strips away checks on Ministerial powers**

The Federal Government's new legislation to change asylum and maritime powers laws is a comprehensive assault on Australia's obligations to protect victims of persecution, giving the Immigration Minister greater power than ever before to act as he wishes, the Refugee Council of Australia (RCOA) says.

RCOA chief executive officer Paul Power said the 118-page *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014* was the most significant set of changes to Australian asylum laws in a generation with nearly all of the changes aimed at stripping away the already limited safeguards for people seeking asylum.

"This legislation has been presented to the public as a humane political compromise between the Government and the Palmer United Party (PUP), focused on getting children out of detention on Christmas Island and providing refugees who reached Australia with a pathway to a permanent visa," Mr Power said. "While we appreciate PUP's efforts to bring some much-needed humanity to the government's destructive agenda, unfortunately the legislation includes a vast array of changes designed to strip away fairness for people seeking refugee protection and reduce the likelihood that anyone could question the Immigration Minister's capacity to do largely as he pleases.

"Many of the changes are designed to prevent the courts from intervening to ensure that the Minister acts in accordance with the rule of law and in line with Australia's treaty obligations.

"If passed, the Bill would increase Ministerial powers to take a vessel or person to a place outside of Australia regardless of whether there is an agreement with the particular country and prevent the courts from acting if this action does not comply with Australia's international obligations or the laws or obligations of another country.

"Among many other measures, the legislation introduces a fast track asylum process which limits access to independent merits review, removes the possibility that children born in Australia to asylum seeker parents could seek Australian citizenship, replaces the Refugee Convention's definitions with the Government's own interpretation of Australia's obligations and makes it possible for the Government to remove asylum seekers without considering the risk of refoulement."

Mr Power also said amendments promoted by PUP to allow asylum seekers who arrived between July and December 2013 to be released from detention and into the community were significant and positive but he expressed concerns about the ability of people to access permanent protection.

"People found to be in need of refugee protection have no pathway to permanent protection unless, after working in a designated regional area for three and a half years and satisfying a number of requirements, they may be able to apply for another migration visa. Unless the rules which apply to these visas are significantly changed, it is not likely that many refugees will meet the highly restrictive criteria which apply to other migration visas.

"Unless there is some pathway to permanency, we will again face the situation where large numbers of refugees struggle to survive in Australia with no security, no possibility with reuniting with separated family members and little hope."

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# **MIGRATION AND MARITIME POWERS LEGISLATION AMENDMENT (RESOLVING THE ASYLUM LEGACY CASELOAD) BILL 2014**

The Government has tabled new legislation called the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014*. Given the size and complexity of this Bill (the Bill is 118 pages and the Explanatory Memorandum is 251 pages), the full impact of the changes proposed in this legislation will take some time to assess fully. In the interim, the Refugee Council of Australia (RCOA) has developed a preliminary list of the key aspects of the legislation and the Government's announcements.

If passed, this Bill would amend several pieces of legislation. It seeks to:

- **Extend the Government's powers to stop asylum seeker boats at sea** – The Bill would give the Minister responsible for the Maritime Powers Act greater power to direct the movement of vessels and people at sea, including the taking of a vessel or person to a place outside of Australia regardless of whether there is an agreement with the particular country.
- **Restrict the courts' capacity to invalidate government actions at sea** – The rules of natural justice would not apply to a range of powers in the Maritime Powers Act and a court would not be able to invalidate a government action at sea due to a failure to consider or comply with Australia's international obligations or the domestic law or international obligations of any other country.
- **Make consideration of non-*refoulement* obligations irrelevant when removing a person** – The Bill would clarify that the removal power is available even if an assessment of Australia's international obligations and consideration of the risk of *refoulement* has not occurred.
- **Remove most references to the Refugee Convention in the Migration Act** – The Bill would replace Refugee Convention definitions with the Government's interpretation of Australia's obligations. As part of this interpretation:
  - Options for **internal relocation** within the country of origin would have to be considered but consideration of this question would not encompass a "reasonableness" test.
  - Decision makers would be required to consider the **extent to which a person could modify his or her behaviour** in order to avoid persecution.
  - **The definition of membership of a particular social group** as grounds for a determining a well-founded fear of persecution would be restricted.
  - There would be an expanded interpretation of **who can be excluded** under the definition of "refugee".
  - Australia would designate a statutory formulation of its interpretation of **what constitutes effective state or non-state protection** in considering whether a person has a well-founded fear.
- **Clarify the legal status of children born to asylum seekers in Australia and offshore processing countries** – The legislation would ensure that children born to parents who arrived by sea after 13 August 2012 are subject to transfer to an offshore processing country like their parents, as the children would have the same designation under the Migration Act as their parents. Children of parents who arrived before 13 August 2012 are not subject to offshore processing arrangements. The measures would be applied retrospectively.
- **Create a fast track assessment process** – People who arrived by sea on or after 13 August 2012 and seek asylum would be subject to a new fast track asylum process. There are provisions to expand the process to people who seek asylum after arriving by plane without a prior visa. People subject to fast track assessment would be expected to provide all claims and supporting evidence at the beginning of the process. The production of new material later in the process would be allowed only if there were compelling reasons. While the timeframes are not yet clear for fast track processing, it is clear that most asylum seekers would not have access to funded legal advice and support to put forward their claims.
- **Limit independent merits review** – Asylum applicants deemed to be making manifestly unfounded claims, to have been owed protection in another country, to have presented fraudulent documents or previously rejected by a refugee status determination body in another country would be excluded from

independent merits review while others would receive limited review via the Immigration Assessment Authority. Those denied merits review would have access to judicial review.

- **Create the Immigration Assessment Authority (IAA)** – The IAA would conduct limited reviews for people who are not otherwise excluded. The IAA would sit within the Refugee Review Tribunal (RRT) and the Principal Member of the RRT would be responsible for the overall operation and administration of the IAA. The IAA’s statutory objective would be to provide a mechanism of limited review that is “efficient and quick” unlike the RRT’s objective to be “independent, *fair, just, economical, informal and quick*”. Applicants would have no right to apply, as only the Minister can make referrals to the IAA. The IAA would be under no duty to accept or request new information or interview an applicant and would be allowed to consider new information only in exceptional circumstances. IAA reviews would be conducted primarily on the available application rather than through a personal interview or hearing.
- **Allow the Minister to cap the number of Protection visas issued** – The legislation would allow the Minister to place a statutory limit on the number of permanent Protection visas granted in a program year. Only asylum seekers who entered Australia on a valid visa would be eligible for permanent protection.
- **Create new classes of Protection visas** – The Temporary Protection Visa (TPV) and the Safe Haven Enterprise Visa (SHEV) would become the only Protection visas available to people found to be owed protection who arrived without a prior visa by sea or air, as well as for people those who arrived with a valid visa but were refused immigration clearance (including because they sought asylum on arrival). People on TPVs or SHEVs would not have the right to depart and re-enter Australia, access to family reunion or the option to apply for permanent protection. However, they would have access to work rights, employment services, Medicare and income support, torture and trauma counselling, translating and interpreting services, complex case support and access to education for school aged children and would be subject to mutual obligation arrangements.
  - Under these arrangements, people found to be owed protection would be offered a TPV for up to three years. Each person granted a TPV would have the option of choosing to take up a SHEV, which would be valid for five years and would require the visa holder to work in a designated regional area without requiring income support for 3½ years of the visa period. However, accessing government assistance to study for a degree, diploma or trade certificate in a designated regional area would not be classified as accessing benefits and would be counted as being part of the 3½ years for which no support was received.
  - Any SHEV holder completing 3½ years of work in a designated area without income support would be eligible to apply for any onshore visa (other than a permanent Protection Visa) if they meet the visa criteria.
- **Facilitate the possible release of people in detention** – Once the legislation is passed, asylum seekers detained on Christmas Island and on the Australian mainland who arrived between 19 July and 31 December 2013 may be eligible for release from detention and may be able to apply for a TPV or SHEV. People who arrived in the same period but have already been transferred to Nauru or to Manus Island would remain subject to the offshore processing arrangements and not allowed to apply for a TPV or SHEV. All future boat arrivals will be subject to offshore processing.

The above points reflect our best understanding of the legislation at this point.