Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

Phone: +61 2 6277 3560
Fax: +61 2 6277 5794
legcon.sen@aph.gov.au

31 October 2014

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

Submission

Introduction

Jesuit Social Services welcomes the opportunity to make a submission to the inquiry into the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 [Hereafter referred to as "the Bill"].

Our comments and concerns regarding the Bill draw from our experiences working directly with people seeking asylum and other people in our community in need of support.

Jesuit Social Services' work with people seeking asylum

For over 37 years, Jesuit Social Services has worked to build a just society by advocating for social change and promoting the health and wellbeing of disadvantaged young people, families and the community. This has included several decades working with refugee and newly arrived migrant communities as well as people seeking asylum. Since 2011, as part of a consortium with MacKillop Family Services and Catholic Care, Jesuit Social Services has provided accommodation and case management support to people placed in community detention while their immigration status is being determined. Support is provided to young people (under 18), vulnerable adults and families in need of a safe and caring living environment. Through a holistic and therapeutic approach we support people to improve their physical and mental health, wellbeing, reduce isolation and grow capacity to transition into independent community life.

Serious concerns about the Bill

Jesuit Social Services believes that this Bill denies people basic human rights and will place vulnerable people at serious risk of harm or death. Consequently we oppose the Bill, and urge the Senate to reject it.

We object to the Bill fundamentally undermining principles of natural justice that underpin the fairness and integrity of our Australian legal system; and to the effective denial of the critical right to family reunion for most applicants found to be refugees.

We note that the crisis of people displaced by war and conflict is a global one, and that Australia has an important role to play as a wealthy global citizen responding humanely to devastation wreaked on human lives and communities. That we live far away from many of these conflicts doesn't lessen our responsibility to respond to each person who claims our assistance with warmth, fairness and humanity.

People who come to Australia seeking asylum are extremely vulnerable. They have both a legal and moral claim to our protection and assistance. Respect for their human dignity and health and well being requires that their basic needs for food, shelter, safety, educational opportunities, and medical care are met; that their claims are adjudicated fairly within a reasonable timeframe; and that they are able to re-establish their family relationships and connections.

Although we have concerns with many provisions of the Bill, we have limited our submission to four main areas of serious concern:

1. **The removal of references/ adherence to the refugee convention**
2. **The limitations imposed on judicial reviews**
3. **The re-introduction of temporary protection visas**
4. **The cap on the number of protection visas**

1. The removal of references/ adherence to the refugee convention

The Bill removes most references to the Refugee Convention from the Migration Act and instead creates a new statutory framework setting out Australia's own interpretation of its protection obligations under the Convention.

The Bill asserts that:

- The Minister may detain and transfer people on the high seas even if the Minister fails to consider Australia's obligations, including the principle of *non-refoulement* and the prohibition of arbitrary detention under article 9 of the International Covenant on Civil and Political Rights (ICCPR)
- Part 1 of Schedule 5 authorises an officer to remove a person even if the *non-refoulement* obligation has not been considered
- Each time a person's TPV expires they must make a fresh application for a visa, contrary to article 1C of the Convention
- The removal of references to the Convention will result in replacement of Convention definitions with Australian interpretation of its obligations
- Australian courts will be excluded from their role of interpreting Australia's obligations under the Convention
- Options for internal relocation within the country of origin would have to be considered without any regard to a test of reasonableness

- Decision makers would be required to consider the extent to which a person could modify their behaviour in order to avoid persecution
- The definition of "membership of a particular social group" will be restricted
- There would be an expanded interpretation of who can be excluded as a refugee
- Australia would define what constituted effective protection

We oppose removal of reference to the United Nations Convention on Refugees because we believe the 1951 Refugee Convention and its 1967 Protocol enshrine fundamental principles including respect for human dignity and solidarity within and between people and nations. These make the flourishing of the weakest the concern of all, and Australia has a moral obligation to continue to uphold them. These global legal instruments have helped to protect millions of people worldwide. They effectively and explicitly cover important aspects of asylum seekers' rights and the responsibilities of signatory countries.

Further, Australia has a broader obligation as a citizen among nations to respect and uphold the ongoing international processes that sit around these instruments, including the interpretation of their meaning.

2. The limitations imposed on judicial reviews

The Bill **significantly limits the possibility of judicial review** of decisions made under extraordinary powers granted to the Minister to detain people at sea and transfer them to any country. The Bill also excludes access to merits review of some refugee status determinations.

The Bill asserts that:

- Asylum seekers who arrived irregularly on or after 13 August 2012 are "fast track applicants" who will no longer have access to the Refugee Review Tribunal (RRT)
- Such applicants will only be permitted a review on the papers to a new authority, the Immigration Assessment Authority. There will be no hearing and very limited rights to produce new evidence
- Some fast track applicants are excluded from even this form of review

We oppose the restrictions imposed on judicial review because the critical principle that should underpin our processes for assessing refugee applications should be ensuring as far as possible that genuine claimants of asylum are recognised and granted refugee status.

History has shown that the review processes in place in Australia are essential to correcting administrative oversights and incorrect rejections of genuine claims. By denying the right to review, these new processes risk denying asylum to genuine claimants. This will lead to their subsequent refoulement. This is a grave affront to natural justice and will result in people being returned to significant danger, torture or even death. The limits to or exclusion of merits review are substantial and the proposed "fast track" processing scheme was ruled unlawful by the United Kingdom High Court in July 2014 as it carried an "unacceptably high risk of unfairness."

3. The re-introduction of temporary protection visas

Schedules 2 and 4 of the Bill **allow the reintroduction of Temporary Protection Visas** (TPVs) and the creation of a new Safe Haven Enterprise Visa (SHEV).

The Bill asserts that:

- TPVs and SHEVs would become the only visas available to people owed protection. People granted these visas would not have the right to:
    - Access to family reunion
    - Apply for permanent protection
- Under a SHEV visa there would be no entitlement to government assistance to study for a degree, diploma or trade certificate
- Asylum seekers detained on Christmas Island and on the mainland who arrived between 19 July and 31 December 2013 may be eligible for release and to apply for a TPV or SHEV
- People who arrived in that period but have been transferred to Nauru or Manus Island would remain subject to offshore processing and not allowed to apply for a TPV or SHEV
- People found to be in need of refugee protection have no pathway to permanent protection unless, after working in a designated region for three and a half years and satisfying a number of requirements, they may only be able to apply for another visa subject to highly restrictive criteria
- All future boat arrivals will be subject to offshore processing

We oppose the introduction of Temporary Protection Visas (and the creation of a new Safe Haven Enterprise Visas) because people who are found to meet the definition of a refugee under the 1951 convention ought to be granted permanent protection and all of the entitlements that this affords. There is no justification for people found to be refugees to be left to live in uncertainty, with no prospect of resettlement in Australia. TPVs do not provide a sustainable solution for refugees, they risk exacerbating psychological problems and may infringe the right to family and freedom from arbitrary interference with family life.

4. The cap on the number of protection visas

The Bill places a cap on the number of protection visas that can be issued in any year, allowing the **Minister to suspend processing of the excess applications**.

The Bill asserts that:

- Extraordinary power will be conferred on the Minister to determine the fate of people's visa status following positive refugee determination with limited parliamentary or judicial scrutiny
- There will be no pathway to permanency for large numbers of refugees who will be found to be refugees but forced to live with no security and no possibility of reuniting with separated family members

- Arbitrary and prolonged detention may occur for people in detention whose applications are suspended until the cap is lifted

We oppose a cap on the number of protection visas issued as it will leave people found to be refugees in a state of protracted uncertainty, potentially waiting many years to receive the acknowledgement and entitlements that a protection visa provides. Unless there is some pathway to permanency, large numbers of refugees will struggle to survive. This is not a good faith implementation of Australia's international obligations and it is contrary to Catholic Social Teaching that sees unity of the family as the central social institution that must be supported and strengthened, not undermined.

Recommendations

Jesuit Social Services calls upon our Government to adhere to the following principles in all policy and legislation relating to people seeking asylum:

1. Australia should continue to work within the region and international context to lead a more humane, ordered response to processing the claims of people seeking asylum.
2. All asylum seekers who make a claim on Australia must be processed with respect for their human dignity demanded by the UNHCR Convention on the Status of Refugees. Their claims for protection should be processed promptly and fairly.
3. The principles of deterrence, by which the members of one group of people who have come to Australia to seek protection are treated harshly in order to modify the behaviour of others, should form no part of Australian policy.
4. People seeking asylum should not be referred to as "illegal" or in other derogatory terms.
5. People who come to Australia to seek protection should not be transferred from Australian territory to other nations for processing or protection unless there is a firm regional agreement assuring that they will have appropriate rights and support in the countries to which they are transferred, and that they will be promptly resettled if found to be refugees.
6. Arbitrary or indefinite detention at any stage of the refugee determination process is unacceptable.
7. People who seek asylum should live in the Australian community. Respect for their humanity demands that they have the right to work, access to basic services, and to some financial support if they cannot find work. The financial burden of their support should be accepted by the Government and not be shifted to the community sector.
8. Children should not be held in detention in Australia or in offshore detention centres, but housed in the Australian community with the full range of services necessary for their welfare. Young unaccompanied children and adults, families with children and those with mental and physical health issues should also be carefully supported when living in the community.
9. People should have the opportunity to be reunited with separated close family members promptly once they are found to be refugees.
10. Those who have exhausted all appeals against rejection of their claims but who cannot be returned to their countries should not be compelled by destitution to return in keeping with the principle of non-refoulement.

Conclusion

As an organisation with a commitment to social justice and upholding the human dignity of every person, we hold serious concerns about the impact of this Bill on the inherent dignity and wellbeing of people seeking asylum in Australia and call for it to not to be passed.