

This legislative brief sets out the key features of the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014. This Act passed Parliament on 5 December 2014. The Andrew & Renata Kaldor Centre for International Refugee Law has serious concerns about the Act, in particular its implications for international law and the rule of law.

These comments focus on the aspects of the Act that the Andrew & Renata Kaldor Centre for International Refugee Law is best placed to comment on, based on our expertise in international refugee and human rights law. This does not imply endorsement of aspects of the Act not expressly considered. This legislative brief has been updated to include key amendments made during the passage of the Act.

Overview

The Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014 will make a number of significant changes to the current system of determining refugee status in Australia, including:

- granting the Minister of Immigration and Border Protection extraordinary powers to detain people on the seas, including the high seas, and to transfer them to any country (or a vessel of another country) that the Minister chooses, without any scrutiny by Parliament and with very limited possibilities for judicial review;
- re-introducing Temporary Protection Visas (TPVs) and the creation of a new Safe Haven Enterprise Visa (SHEV);
- limiting, and in some circumstances excluding, access to merits review of refugee status determinations;
- introducing a requirement that officers remove asylum seekers even where this could breach Australia's *non-refoulement* obligations;
- removing most references to the Refugee Convention from the *Migration Act 1958* (Cth) and instead creating a 'new, independent and self-contained statutory framework' which sets out Australia's own interpretation of its protection obligations under the Refugee Convention;
- retrospectively establishing the legal status of newborn children as 'transitory persons' and 'unauthorised maritime arrivals'; and
- placing a 'cap' on the number of protection visas that can be issued in any year, allowing the Minister to suspend processing of protection visas once the 'cap' is reached.

The Act was considered by the [Parliamentary Joint Committee on Human Rights](#) and the [Senate Standing Committee for the Scrutiny of Bills](#). It was also referred to the [Senate Legal and Constitutional Affairs Committee](#). It was passed by Parliament on 5 December 2014.

Powers to detain and transfer on the seas

What the Act will change

Schedule 1 gives the Minister extraordinary power to detain people on the seas, including the high seas, and to transfer them to any country (or a vessel of another country) that the Minister chooses, without any scrutiny by Parliament and with very limited possibilities for judicial review. The Schedule clearly seeks to authorise actions similar to those undertaken by the Australian Government with respect to two boats of Sri Lankan asylum seekers in July 2014, including the transfer of one of the boats to the Sri Lankan navy and the attempted transfer of the other boat to India. No amendments were made to this Schedule during the passage of the Act.

Comment

This Schedule:

- empowers the Minister to detain and transfer people on the seas even if the Minister fails to consider Australia's international legal obligations, including the principle of *non-refoulement* and the prohibition on arbitrary detention under article 9 of the International Covenant on Civil and Political Rights (ICCPR);
- gives the Minister powers to detain and transfer people on the high seas, despite the fact that the Australian government does not have these powers under international law, including under the law of the sea, human rights law, and refugee law;
- potentially violates the sovereignty of other States by authorising Australia to send asylum seekers to another country, even without the consent of that country; and raises serious constitutional concerns, as it envisages potentially prolonged detention by the Minister without any scrutiny by Parliament or the courts.

Temporary Protection Visas

What the Act will change

Schedules 2 and 3 allow for the reintroduction of Temporary Protection Visas (TPVs), and the creation of a new Safe Haven Enterprise Visa (SHEV). TPVs do not provide a sustainable solution for refugees.¹ They risk exacerbating (and creating) psychological problems for refugees because of the legal limbo in which they leave people, and they violate article 1C of the Refugee Convention by requiring a new protection application to be made each time a TPV expires, rather than the onus falling on the government to explain (in accordance with article 1C) that there has been a fundamental change to the circumstances in the country of origin that removes the risk of persecution for the individual concerned.

Such visas may additionally:

- breach article 31 of the Refugee Convention, by penalising irregular arrivals;
- breach the principle of non-discrimination, by creating two classes of asylum seekers;
- infringe the right to family and the freedom from arbitrary interference with family life; and

- constitute cruel, inhuman or degrading treatment in breach of article 7 of the International Covenant on Civil and Political Rights, as a result of the cumulative effect of these factors together with what is known about the adverse mental health impacts of temporary protection.

Comment

The details of the proposed SHEV were not set out when the legislation was introduced into Parliament. However, during the passage of the Act, amendments were made setting out the conditions of the SHEVs, as well as listing the other visas that would be available to SHEV holders. These reflect the public remarks earlier made that TPV holders will have the opportunity to transition to a five-year SHEV if they agree to move to a regional area (to be defined in the Regulations) and engage in study at an approved institution (to be defined in the Regulations), or undertake work that means they are not reliant on income support for more than 18 months in the five-year period. At the end of the five years, they will be eligible to apply for a standard onshore migration visa giving rise to permanent residence.

However, statements by the Minister suggest that the SHEV is not intended as a solution for many people. He has indicated that the threshold for applying for a migration visa will be very high, and has said of those who may wish to apply for one, ‘good luck to them’. No analysis has been undertaken as to the likelihood of a refugee qualifying for an existing onshore migration visa. Our primary concern is that the SHEV pathway attempts to turn humanitarian protection (based on treaty obligations) into a discretionary skilled migration program, through which Australia can pick and choose the refugees who can remain permanently.

Limiting or excluding access to merits review

What the Act will change

Schedule 4 limits asylum seekers’ access to merits review of decisions about their protection status. Asylum seekers who arrived irregularly by boat (or air) on or after 13 August 2012 are identified as ‘fast track applicants’, who will no longer have access to the Refugee Review Tribunal (RRT).

The Schedule instead creates a new statutory body, called the Immigration Assessment Authority (IAA), which will be constituted by members of the RRT. Fast track applicants will only be entitled to a review on the papers—that is, without a hearing—by the IAA. The reviewer is not permitted to take into account new evidence or claims other than in compelling circumstances.

A subset of this group, defined as ‘excluded fast review track applicants’, will not have access even to this very curtailed form of review. Instead, they will only have access to an internal review by the Immigration Department (which is not guaranteed by the legislation, although we understand this is the intention). Those that will fall into this category include asylum seekers:

- considered to have arrived on a ‘bogus’ document ‘without reasonable explanation’;

- considered to have made a ‘manifestly unfounded claim for protection’;
- who were previously refused protection in Australia or elsewhere by UNHCR or another country; or
- who are considered to have come from a ‘safe third country’ or have access to ‘effective protection’ in another country.

Some amendments were made during the passage of the Act to this Schedule. This includes limiting the class of people subject to the fast-track process; removing the Minister’s power to include new classes of people who can be excluded from merits review; clarifying the definition of ‘manifestly unfounded’; extending the ability of the IAA to consider new information; and expanding on the statutory object of the IAA to require it to be ‘free of bias and consistent with Division 3 (conduct of review)’.

Comment

These amendments will:

- create a significant risk of Australia breaching its *non-refoulement* obligations, given the inadequacy of the proposed review processes² and in light of increasingly limited access to legal advice and representation;
- unlawfully discriminate against irregular arrivals, in contravention of articles 3 and 31 of the Refugee Convention; and
- unlawfully discriminate against asylum seekers, especially irregular arrivals, in their access to justice, in breach of the fundamental principle of equality before the law.

Non-refoulement obligations and removal

What the Act will change

Part 1 of Schedule 5 amends the Migration Act so that an officer must remove an unlawful non-citizen under section 198, even if removal will violate Australia’s *non-refoulement* obligations.

The Part is intended to overturn two court decisions: the decision of the High Court in *Plaintiff M70/2011 v Minister for Immigration and Citizenship* [2011] HCA 32 and the decision of the Full Federal Court in *Minister for Immigration and Citizenship v SZQRB* [2013] FCAFC 33. No amendments were made to this Part during the passage of the Act.

Comment

The Statement of Compatibility with Human Rights attached to the Act claims that the introduction of this provision will not violate international law because ‘anyone who is found through visa or ministerial intervention processes to engage Australia’s *non-refoulement* obligations will not be removed in breach of these obligations’.

This statement is inaccurate. Section 198 empowers removals in a range of circumstances, including where people may not have applied for visas at all. It also relies upon the Minister exercising his personal, non-compellable and non-reviewable

discretion to grant a visa in the public interest if there is a risk that removal will breach Australia's *non-refoulement* obligations. A mere discretion to consider *non-refoulement* obligations is insufficient to comply with duties under international law.

This amendment:

- not only authorises possible violations of Australia's international obligations, but indeed requires that violations be committed in certain cases, because it requires removal *even if* the *non-refoulement* obligations have not been considered;
- create real risks of *refoulement* because, as discussed above, there are circumstances where such obligations will not have been previously considered; and
- fundamentally misunderstands the nature of international law and the domestic implementation of treaty obligations.

While States have some discretion in choosing how to implement their international obligations, they cannot introduce legislation that requires violations to be committed without any corresponding legal protection against such violations, and that relies solely on a political promise to comply with obligations as a matter of Executive discretion.

Removing references to the Refugee Convention

What the Act will change

Part 2 of Schedule 5 removes most references to the Refugee Convention from the Migration Act and instead creates a 'new, independent and self-contained statutory framework' which sets out Australia's own interpretation of its protection obligations under the Refugee Convention. The Minister has stated that the intention of these amendments is to ensure that the Australian Parliament defines Australia's international obligations, rather than international courts and 'someone sitting out of Australia commenting and interpreting international conventions'.

Comment

This amendment:

- fundamentally misunderstands the system of international law in general, and treaty interpretation in particular, and amounts to an isolationist approach which is fundamentally at odds with the purpose of international law;
- excludes Australian courts from their role in interpreting Australia's obligations under the Refugee Convention; and
- alters the definition of a refugee in a way which may not be consistent with international refugee law and therefore creates risks of violating our obligations under the Refugee Convention.

In relation to international law generally and treaty interpretation specifically, we note the following principles:

- treaties are to be interpreted ‘in **good faith** in accordance with the **ordinary meaning** to be given to the terms of the treaty in their context and in the light of its **object and purpose**’: article 31(1) of the Vienna Convention on the Law of Treaties;
- ‘the Refugee Convention must be given an independent meaning ... without taking colour from distinctive features of the legal system of any individual contracting state. In principle therefore **there can only be one true interpretation of a treaty** [and national courts] must search ... for the true autonomous and international meaning of the treaty’: [UK House of Lords, *R v Secretary of State for the Home Department, ex parte Adan* \[2000\] 2 AC 477, 516–17](#);
- While the ‘literal meaning of the words used must be the starting point ... the words must be construed in context, and an instrument such as the **Refugee Convention must be given a purposive construction consistent with its humanitarian terms**’: House of Lords, [Asfaw \[2008\] 1 AC 1061](#), paragraph 11; and
- ‘the Convention must be seen as a living instrument in the sense that while its meaning does not change over times its application will’: UK House of Lords, [Sepet v Secretary of State for the Home Department \[2003\] 1 WLR 856](#), paragraph 6.

Some specific examples of changes that violate Australia’s obligations under the Refugee Convention include:

- codifying the exception to the principle of *non-refoulement* in article 33 of the Refugee Convention as a formal exclusion clause, notwithstanding the fact that the exclusion clauses contained in the Refugee Convention are absolute and cannot be added to in this way;
- envisaging that protection may be provided in another country by a non-State actor, which does not have international legal obligations towards asylum seekers or refugees. A similar proposal in the European Union was rejected on these grounds.

Some amendments were made during the passage of the Act to the definition of a ‘well-founded fear of persecution’. These amendments included adding to the list of behaviours that an asylum seeker could not be expected to modify to mitigate the risk of persecution; and changes to the definition of a membership of a particular social group and the definition of effective protection.

Retrospective application to newborn children

What the Act will change

Schedule 6 provides that children born to asylum seeker parents, either in Australia or in an offshore processing country, have the same legal status as their parents. As a result of being classified as ‘unauthorised maritime arrivals’ (UMA) or as ‘transitory persons’, newborn children can be detained, processed offshore and denied permanent protection in Australia in the same way as their parents.

In relation to transitory persons and their children born in Australia, s198(1C) provides that ‘an officer must remove the non-citizen and child as soon as reasonably practicable after the non-citizen no longer needs to be in Australia for that purpose (whether or not that purpose has been achieved).’

Comment

- The Schedule: creates a real risk of violating Australia's obligations to ensure that all children are registered immediately after birth and have the right to acquire a nationality, as well as the general obligation to act in the best interests of a child;
- applies retrospectively, and therefore has implications for current litigation and tribunal matters; and
- allows the transfer of a child and his/her parent contrary to medical advice or their health needs.

Cap on protection visas

What the Act will change

Schedule 7 gives the Minister power to place a 'cap' on the number of protection visas that can be issued in any year. The Schedule overturns the High Court decision this year in *Plaintiff S297/2013 v MIBP* [2014] HCA 24, and allows the Minister to suspend processing of protection visas once the 'cap' is reached. An amendment was made during the passage of the Act to clarify that the cap would not apply to temporary protection visas.

Comment

The Schedule:

- creates real risks of arbitrary and prolonged detention, as those whose applications are 'suspended' are liable to be in detention until the 'cap' is lifted;
- is not a good faith implementation of Australia's international legal obligations under the Refugee Convention; and
- confers extraordinary power on the Minister to determine, in effect, the implementation of Australia's international legal obligations, with limited parliamentary or judicial scrutiny.

Finally, we would note that while the Explanatory Memorandum suggests that certain provisions are not intended to be interpreted in a particular way, such assurances are not contained in the Act itself. As such, there is no guarantee that the provisions will be interpreted in the way the Explanatory Memorandum suggests.

¹ As discussed further in our [factsheet on Temporary Protection Visas](http://www.kaldorcentre.unsw.edu.au/sites/kaldorcentre.unsw.edu.au/files/temporary_protection_visas_25.07.2014.pdf) (http://www.kaldorcentre.unsw.edu.au/sites/kaldorcentre.unsw.edu.au/files/temporary_protection_visas_25.07.2014.pdf)

² For instance, between 2009–13, between 66.5% and 87.5% of the Immigration Department's decisions relating to irregular boat arrivals were overturned, with rates for some countries ranging between 80–100% (see [Asylum Trends 2012–2013](#), p. 29).