18 November 2014

Law Council
OF AUSTRALIA

Ms Sophie Dunstone
Committee Secretary
Senate Legal and Constitutional Affairs Legislation Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

By email: legcon.sen@aph.gov.au

Dear Ms Dunstone

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

Thank you for the opportunity to provide a written submission to the Senate Standing Committee on Legal and Constitutional Affairs's (the Committee) inquiry into the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (the Bill). The Law Council also welcomed the invitation to speak to its submission at the Committee's hearing on the Bill last Friday.

During the remainder of the hearing, the Committee raised certain questions which the Law Council would like to address in the following material.

Why can't we just trust the Executive to do their job properly – why do we need the courts involved?

- The Department of Foreign Affairs in its overview of Democratic Rights and Freedoms, notes that an independent judiciary forms one of the bulwarks against abuses of power and denials of fundamental freedoms in Australia.[1]
- An independent, impartial and competent judiciary serves as a necessary check upon Executive power.
- The Law Council considers that the rule of law requires:
    - Executive powers to be carefully defined by law, so that it is not up to the Executive to determine what powers it has, and how they should be used; and
    - Executive decision-making to comply with the principles of natural justice and be subject to meaningful judicial review.
- The judiciary therefore has a legitimate role in ensuring the Executive's accountability to the Australian people.
- Features of the Bill which are not consistent with the principles expressed above include:
    - Schedule 1 – which: removes the possibility of court challenges in relation to the exercise of maritime powers which do not accord with Australia's international obligations; removes judicial review of Ministerial decisions

[1] http://www.dfat.gov.au/facts/democratic_rights_freedoms.html.

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which are based on broad criteria, and removes the obligation of the Executive to comply with the usual natural justice principles;
    - Schedule 4 – which provides for a diluted form of merits review, and removes this form of review altogether for a potentially broad group of applicants, including a category to be determined by the Minister with no applicable criteria; and
    - Schedule 5 – which: precludes legal challenges aimed at preventing the removal of individuals without consideration of Australia's non-refoulement obligations; and removes or curtails the ability of the courts to determine the refugee status of an individual by reference to Australia's obligations under the Refugee Convention.

Don't we need the Bill to deal with the existing caseload? How can we make the process more streamlined?

- The Law Council agrees with comments made during the hearings that people can be processed using existing legislation, and that there is no need for this Bill to deal with the existing backlog of unprocessed protection claims.
- During the inquiry, Committee members referred to the likelihood that processing the existing asylum seeker caseload of around 30,000 applicants would take up to seven years. The Law Council is unfamiliar with this timeframe as it does not appear in either the Explanatory Memorandum or the Department of Immigration and Border Protection's (the Department's) submission to the inquiry.
- Currently, the Department appears to be able to handle large numbers of applications adeptly. Its annual report notes that the Department's 2013-14 Migration Programme delivered 190,000 places, and that it dealt with 67.7% of the relevant applications within the Department's service standards.[2] It has also been able to cope with the lodgement of 78,345 student visa applications lodged between 1 April 2014 to 30 June 2014 and grant 73,288 during the same period.[3] These figures suggest that the outstanding caseload can be processed efficiently within the existing processes.
- The proposed reintroduction of Temporary Protection Visas (TPVs) may place a heavy ongoing administrative burden on the Department which appears to be at odds with the increased efficiency objective of the Bill.
- The Law Council agrees with comments made that ensuring applicants have access to independent legal advice helps to achieve a more streamlined process. This is a preferred approach than one that diminishes elements of procedural fairness – such as merits review.

There is nothing to prevent asylum seekers from getting legal advice is there? Is it a good use of taxpayers funding to pay for legal advice for asylum seekers? Can't people approach their local MP for help?

- While there may be no official barriers to obtaining legal advice, the Law Council is concerned that many applicants will not be in a position to access it, given:
    - the withdrawal of the Immigration Advice and Application Assistance Scheme (IAAAS) earlier this year;
    - the fact that many applicants in the existing asylum seeker caseload remain in detention; and

[2] Department of Immigration and Border Protection, Annual Report 2013-2014, Part 3, p. 48.
[3] BR0097 Student visa and Temporary Graduate visa programme quarterly report, 30 June 2014, p. 9.

    - many applicants do not have the funds to access paid legal assistance where free assistance is not available.
- The Law Council submits that access to independent legal advice early in the application process will lead to more comprehensive, informed and accurate applications. This improves administrative efficiency by reducing applications which are poorly prepared and incomplete.
- Legal advice is a safeguard against the possibility that a person with a genuine protection claim may be erroneously returned to a place of possible persecution or harm in contravention of Australia's *non-refoulement* obligations.
- For these reasons, the Law Council considers that publicly funded legal advice to asylum seekers is of great public value. It further considers that means-testing is an appropriate way to ensure that publicly funded legal advice is provided only to asylum seekers who lack sufficient means to engage a lawyer.
- The Law Council appreciates that many Members of Parliament go to great lengths to assist individuals in their electorate, including asylum seekers. However, it does not consider this to be a practical solution given that asylum seeker claims rely on knowledge of particularly complex legislation, and the volume of assistance required may be too great a burden to place on so few elected representatives.
- While the legal profession has always demonstrated great generosity in providing pro bono services to those most in need, it cannot underwrite the totality of the need for assistance. This is best addressed by the Australian Government.

Does the Bill just codify the Refugee Convention or actually change its meaning? What exactly in the Bill is inconsistent with the Refugee Convention?

- The Law Council encourages the Committee to have regard to the United Nations High Commissioner for Refugees (UNHCR) submission on this issue.
- In the summary of its concerns regarding the codification of Australia's interpretation of the refugee definition at Schedule 5, and the narrowing of the personal scope as established by Article 1A(2) of the Refugee Convention, the UNHCR refers to a number of issues including:
    - disregarding consideration of the "reasonableness" of the proposed area of internal flight or relocation;
    - concluding that a person does not have a well-founded fear of persecution if the receiving country has an appropriate criminal law system, a reasonably effective police force and an impartial judicial system provided by the relevant State, without an assessment of the effectiveness, accessibility and adequacy of State protection in the individual case;
    - concluding that a person does not have a well-founded fear of persecution if "adequate and effective protection measures" are provided by a source other than the relevant State;
    - concluding that a person does not have a well-founded fear of persecution if the person could take reasonable steps to modify his or her behaviour relating to certain characteristics; and
    - limiting the interpretation of a "particular social group" by requiring a cumulative, rather than alternative, application of the protected characteristics and the "social perception" approaches.[4]

[4] United Nations High Commissioner for Refugees submission, p. 2.

- The Schedule further removes most references to the Refugee Convention. The UNHCR emphasises that these combined proposals would not alter Australia's international obligations to refugees. In this respect, the Law Council notes that:
    - the *Vienna Convention on the Law of Treaties* requires States to implement their obligations in good faith and stipulates that a State may not invoke the provisions of internal law as a justification of its failure to perform its obligations under a treaty; and
    - Article 42 of the Refugee Convention stipulates that States *cannot* make reservations to certain articles, including Article 1 (which includes the definition of a refugee).[5]
- The Law Council considers that the above proposals could, however, increase the likelihood that Australia will fail to meet its obligations under the Refugee Convention, with the possibility that people with legitimate claims under the Convention will be returned to possible harm.
- Other changes which increase this likelihood include:
    - proposed section 197C at Schedule 1, which provides that an officer must remove an unlawful non-citizen pursuant to section 198, irrespective of Australia's *non-refoulement* obligations; and
    - amendments in Schedule 1 which remove the need for those exercising or authorising of certain maritime powers, including those to detain and transfer people at sea, to ensure that the exercise or authorisation complies with Australia's international obligations.[6]

Is there an obligation of family unity towards people who are accepted as refugees?

- As the UNHCR has stated in its submission to the Committee, the right to family unity is a fundamental human right that is applicable to refugees.[7] This is also explicitly recognised by the Australian Government in the Bill's Statement of Compatibility with Human Rights in the Explanatory Memorandum.[8]
- The following provisions set out the human rights regarding the family unit:
    - Article 17 of the *International Covenant on Civil and Political Rights* (ICCPR): no one shall be subjected to arbitrary or unlawful interference with his or her family;
    - Article 23 of the ICCPR: the family is the natural and fundamental group unit of society and is entitled to protection by society and the State …;
    - Article 7 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR): the right to just and favourable conditions of work which ensure, including a decent living for themselves and their families in accordance with the provisions of the present Covenant;
    - Article 10 of the ICESCR: the family is the natural and fundamental group unit of society and should be accorded the widest possible protection and assistance;

[5] Article 1A(2) of the Refugee Convention provides that a "refugee" is a person who: *… owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.* The Refugee Convention does not further define the term "refugee".
[6] Proposed sections 22A and 75A, Schedule 1 of the Bill.
[7] Ibid, p. 14.
[8] Explanatory Memorandum, pp. 30-31 at Attachment A.

- Article 11 of the ICESCR: everyone has the right to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions;
- Articles 9(1) and 16(1) of the *Convention on the Rights of the Child* (CROC): children have a right to remain with their parents (unless contrary to their best interests), and to have their family protected from arbitrary or unlawful interference;
- Article 20(1) of the CROC: children who are without their family have a right to special protection and assistance; and
- Article 22 of the CROC: a child that is considered a refugee, whether accompanied or unaccompanied, shall receive appropriate protection and assistance, including in regard to family tracing and reunification.

- It is also in the spirit of the Refugee Convention to ensure family unification. The Conference that completed the drafting and signing of the Refugee Convention, held 2-25 July 1951, unanimously passed a recommendation on the "principle of unity of the family". There were two elements to this recommendation:
  (1) Ensuring that the unity of the refugee's family is maintained particularly in cases where the head of the family has fulfilled the necessary conditions for admission to a particular country; and
  (2) The protection of refugees who are minors, in particular unaccompanied children and girls, with special reference to guardianship and adoption.
- Further, the Refugee Convention expressly provides that Australia cannot return a person, including an unaccompanied minor, who has been found to be a refugee to his or her country of origin or former habitual residence. To do so would be a breach of Australia's *non-refoulement* obligations, as it would return a person to a place where they have a well-founded fear of persecution.

The Law Council would be pleased to provide any additional information that the Committee requires.

Yours faithfully

MARTYN HAGAN
SECRETARY-GENERAL