WHERE NEXT FOR LAW REFORM?

SIMPLIFICATION OF THE MIGRATION ACT 1958 (CTH)

Associate Professor Peter Billings[*]

Purpose: This document is a response to the Australian Law Reform Commission's request for submissions on future law reform priorities in Australia. It identifies particular areas of the Commonwealth's *Migration Act 1958* that need improvement and development because of stakeholders'[1] concerns about: (i) the complexity of certain existing legal provisions and procedures; (ii) defects in the law that are referable to particular cases and case-studies; and (iii) barriers denying effective access to justice.

Key issues, opinions and recommendations for a future inquiry into the Migration Act

Introduction: The *Migration Act* is overdue for a comprehensive review and reform because frequent legislative changes for over half a century have resulted in a statute that is elaborate, intersecting, often opaque and sometimes disjointed. In 1958 the *Migration Act* comprised about 67 sections, today it is over 500 sections long, supplemented by extensive regulations and detailed policy within legislative instruments.

Visas: Visa classes are governed under specific provisions within Part 2, Subdivision 3A of the *Migration Act* and prescribed by regulation (Sch 1 to the Migration Regs). There is stakeholder support for the government's current initiative to reform and simplify the number of visa subclasses (while advocating for the retention of flexibility and responsiveness to humanitarian settlement streams). Additionally there is stakeholder support for ensuring that eligibility criteria for visa subclasses (Sch 2 to the Regs) are more clearly defined.

---

[*] School of Law, The University of Queensland.

[1] This submission has been informed by a consultation process initiated by the author which has taken into account the views of certain legal practitioners and legal academics with experience and expertise in immigration and refugee law who volunteered ideas about the law's substance, operation and impacts on non-citizens and their families: specifically, Dr Louise Boon-Kuo, Lecturer in Law, University of Sydney; Matt Black, Barrister-at-law, Quay 11 Chambers, Brisbane; Khanh Hoang, Affiliate, Kaldor Centre for International Refugee Law, UNSW; and, the Refugee and Immigration Legal Service, Brisbane.

There is stakeholder support for reviewing the **'codified' protection visa regimes**: the substantive refugee protection criterion in s 36(2)(a) read in conjunction with s 5H – 5M of the *Migration Act* (applicable since 16 Dec. 2014, following the *Migration Amendment* … (*Resolving the Asylum Legacy Caseload) Act 2014*) and the 'complementary' protection criterion in s 36(2)(aa). The refugee protection and complementary and protection regimes are not defined by reference to international refugee law or international human rights law respectively, and stakeholders opined that the codified regimes were complex by reason of the introduction of new, idiosyncratic, legal tests and definitions. The courts have referred to this disconnect between domestic and international law (and attendant opacity in the law) in several cases; such as, *MZYYL* and *SZTAL*.[2]

There was strong stakeholder support for reviewing the operation and impacts of **temporary protection visa subclasses** (785 (TPV) and 790 SHEV). Stakeholders pointed to (inter alia) the administrative (justice) inefficiencies and costs to the taxpayer of requiring protection visa holders to re-apply for protection visas after three and five years respectively. Therefore, stakeholders advocated for re-introducing pathways to permanent protection visas for maritime arrivals currently holding TPVs or SHEVs.

Visa cancellation powers: Section 116 (power to cancel) that is often administered in conjunction with related regulations gave rise to stakeholder concerns that correlate to judicial observations about the broad nature of that cancellation power. For example, in the case of *Cheryala* the Federal Court of Australia pointed out flaws with s 116(1)(g) due to the width of conduct captured by the cancellation provision and lack of operative temporal constraint.[3]

Concern in relation to the mandatory visa cancellation provisions on character test grounds in ss 501(3A) and 501CA prompted many submissions to a 2018 Parliamentary review. The Australian Human Rights Commission recommended their repeal on the basis that almost half of all mandatory visa cancellations in the period December 2014-March 2016 had been revoked, suggesting that had decision-makers held discretion that the cancellation (and accompanying long periods of detention) would not have occurred.[4]

---

[2] *Minister for Immigration and Citizenship v MZYYL* (2012) 207 FCR 211 [18]-[20]; *SZTAL v Minister for Immigration and Border Protection* (2017) 91 ALJR 936 [76]-[78].

[3] *Cheryala v Minister for Immigration and Border Protection* [2018] FCAFC 43.

[4] Australian Human Rights Commission, 'Review Processes associated with visa cancellations made on criminal grounds', Submission to the Joint Standing Committee on Migration (27 April 2018).

Merits Review: There are several distinct merits review schemes that cater to different cohorts of non-citizen.

AAT (MRD) review: Stakeholders opined that the, aspirationally, exhaustive statement of the requirements of natural justice ('procedural codes') governing appeals at the Administrative Appeals Tribunal, notably Part 5 (s 357A-) and Part 7 (s 422B-) should be carefully reviewed and, arguably, repealed because the codes have added an unnecessary layer of complexity and resulted in extensive and costly litigation over time. These views are consistent with the recommendation of the recently published *Review of the Tribunals Amalgamation Act 2015 (Cth)* ('Callinan Report').[5] As noted in that report, the codes of procedure are unnecessary and a distraction for the AAT (MRD) members, producing formulaic decisions.

Fast track review process in relation to certain protection visa decisions: Stakeholders suggested that a fast track procedure was suitable for 'manifestly unfounded' claims (consistent with practices in cognate jurisdictions). However, there was broad agreement that the current, ostensibly, fast track process in Part 7AA (introduced in 2014) for the so-called 'legacy caseload' was both procedurally suspect and inefficient; generating complexity and, consequently, a large volume of applications for judicial review before the courts.

Under fast track procedures the Immigration Assessment Authority's (IAA) review of protection visa applications is markedly different from the task of the AAT in coming to the 'correct or preferable' decision, and the statutory limitations on its powers means a denial of procedural fairness may go uncorrected.[6] To date, there has been one HCA decision regarding the functioning of the IAA,[7] with another matter on foot at the time of writing. Stakeholders opined that the inefficiencies and deficiencies associated with the fast track process meant a comprehensive review was clearly warranted.

Stakeholders advocated for a review of access to merits review (under Part 5) in relation to offshore visa applicants due to inconsistencies compared with onshore applicants. Offshore applicants cannot access the AAT for merits review purposes by contrast with onshore applicants. The case study below illustrates, what certain stakeholders perceive is, an inequitable deficiency in the law.

---

[5] See, I D F Callinan AC, *Review: section 4 of the Tribunals Amalgamation Act 2015* (Cth), 17-18 para 1.23 (Measure 22); and, see p 162, para 10.9.

[6] E.g. see *DVO16 v Minister for Immigration & Border Protection* [2019] FCAFC 157 [5].

[7] *Plaintiff M174/2016 v Minister for Immigration and Border Protection* [2018] HCA 16.

> *David was the holder of a Subclass 309 visa. When his relationship broke down with his wife and sponsor, Lisa, the couple fulfilled their obligation to inform the Department. Before David left for a short trip to his home country in Europe, he and Lisa reconciled their differences and recommenced their relationship. While David was overseas, Lisa informed the Department of their reconciliation, but David's application for a permanent visa was refused. Since David was not onshore at the time of the decision, he had no rights to merits review. If David had held a Subclass 820 visa instead, he would have been able to return to Australia and seek a full merits review at the AAT.*

Judicial review: Broad issues of complexity and uncertainty characterise the discrete judicial review scheme under the *Migration Act*. It defies comprehension by ordinary community members and is intelligible to only a niche cadre of lawyers. This complexity stems from legislative choices and constitutional principles and compromises access to justice. In *ARJ17* Kerr J stated:

> a number of the key provisions of the *Migration Act* have become impenetrably dense. Definitions have been built on definitions. Core concepts such as what is meant by a purported privative clause decision defy the understanding of any ordinary reader. I respectfully endorse Flick J's concerns regarding the problems that that must present for unrepresented litigants.[8]

Judicial review over certain migration decisions has, since 2001, been progressively restricted by a series of legislative amendments to Part 8 of the *Migration Act*.[9] These restrictions on access to justice have stemmed from political misgivings about escalating financial costs and frequency of unmeritorious migration litigation. However, access to judicial oversight is guaranteed via s 75 of the *Constitution*, and this enables applicants to obtain relief via the 'constitutional writs' if they can establish a 'jurisdictional error' – a concept that embraces at least eight categories of error but which has eluded exhaustive definition.[10] Presently judicial review proceedings can, generally, be instituted in the Federal Circuit Court, which has, effectively, the same entrenched jurisdiction as the High Court of Australia, subject to some exceptions.[11]

---

[8] *Minister for Immigration and Border Protection v ARJ17* (2017) 250 FCR 474.

[9] Sections 474 and 474A are particularly difficult to navigate.

[10] *Kirk v Industrial Relations Commission of NSW* (2010) 239 CLR 531, 573 [71], the High Court declined "to attempt to mark the metes and bounds of" jurisdictional error.

[11] S 476–476A *Migration Act* 1958.

Stakeholders maintain that the restrictions on judicial review have not met policy objectives of lessening the number of applications for review. There is ambiguity (and little understanding among many non-citizens) about the available grounds of judicial review. Stakeholders have submitted that non-citizens ought to have the same access and rights to judicial review as other applicants challenging the legality of administrative decisions.

Accordingly, it is suggested that the ALRC is the appropriate body to task with inquiring into root and branch reform of judicial review over migration matters. This should include examining the merits of repealing the privative clause provisions and restoring statutory review process – specifically, the application of the *Administrative Decisions (Judicial Review) Act 1977*, thereby simplifying judicial review and promoting access to justice.[12]

Additionally, stakeholders have suggested that there is scope to promote efficiency by simplifying and streamlining procedures in the Federal Circuit Court of Australia through the adoption of standardised Practice Directions (which are presently missing).

Extending access to the family violence provisions: The 'Family Violence Provisions' refer to a Division of the Migration Regulations 1994 (Cth) that allow certain persons, who have previously applied for a permanent visa, to make a claim with the Department of Home Affairs to remain in Australia if they have been the subject of family violence. The benefit of these provisions is not equally accessible to all visa subclass holders and partner visa applicants, respectively. Stakeholders identified this as a critical deficiency in the law that warrants rectification, and this is consistent with serious issues identified by the ALRC in a previous report.[13]

For example, if a partner visa (*onshore*) is lodged the non-citizen can access the family violence provisions after the visa application is lodged. A non-citizen can be on a bridging visa and still able to access these provisions, they do not need to hold the temporary partner visa to be eligible. However, if a partner visa is lodged *offshore* then there is not the same access to the family violence provisions until a non-citizen is granted a temporary partner visa. It can take 18 months – 2 years to be granted that (Subclass 309) visa. The case study below illustrates the defect in the law.

---

[12] The *Migration Amendment (Clarification of Jurisdiction) Bill 2018* (Cth) attempted to clarify certain jurisdictional issues around judicial review (not a broad overhaul), but the Bill lapsed at dissolution on 11 April 2019.

[13] ALRC, Family Violence and Commonwealth Laws – Improving Legal Frameworks (ALRC Report 117) at 20.16-20.61.

A client had applied for a partner visa from overseas. She was married to the sponsor and had travelled to Australia to visit her husband and sponsor on a visitor visa. The applicant was pregnant and while in Australia had the baby. Soon after the baby was born she needed to leave the family home with the baby because of severe family violence and moved into a women's refuge with the baby. The mother was unable to rely on the 'child of the relationship' provisions in the Migration Regulations because she had not been granted the 309 visa. In the same circumstances if she had applied for a partner visa onshore, and was on a bridging visa waiting for the grant of a temporary partner visa, she would have been able to access the child of the relationship provisions.

End.