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The Fast Track Refugee Assessment Process and the Mental Health of Vulnerable Asylum Seekers

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On 5 December 2014, the Australian Senate passed the Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth). This article discusses the intersections between an aspect of the new law – the ‘fast track assessment’ Refugee Status Determination (RSD) procedure, mental ill health and vulnerability of asylum seekers. Insecure visa status, post-arrival stressors and living in constant uncertainty and fear of rejection and repatriation are known to compound existing pre-migration trauma for asylum seekers. The ‘fast track assessment’ procedure, in which a large number of asylum seekers’ claims for protection will be processed under the new law, suggests a likely worsening of mental distress, despair and deterioration. The combined nature of mental health and legal support are an increasing feature of a co-ordinated and much needed integrated response to assist vulnerable asylum seekers living in the community. It is suggested that asylum seekers with an existing mental health condition who receive negative outcomes during the RSD process are particularly vulnerable. All asylum seekers should have mental health support made available to them when visa decisions are handed down or shortly afterwards.

Key words: asylum seekers; mental health; refugee status determination; refugees; temporary protection visas.

Introduction

On 5 December 2014, the Australian Senate passed the Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth). One aspect of the new law, the ‘fast track assessment’ (FTA) procedure constitutes a radical shift in the manner in which a large number of asylum seekers’ claims for protection will be processed.

This procedure will apply to approximately 30,000 asylum seekers who arrived in Australia as ‘unauthorised maritime arrivals’\textsuperscript{1} between August 2012 and December 2013. As at the end of December 2014 over 28,000 of this group were living in the community on bridging visas or in community detention, and approximately 3000 were held in immigration detention facilities.\textsuperscript{2}

Asylum seekers have been exposed to threats, violence and separation and tend to be more vulnerable to mental ill health than others who had similar experiences.\textsuperscript{3} Asylum seekers experience post-arrival stressors that refugees settled in the community do not. They have insecure visa status and live in constant uncertainty and fear of refugee status determination rejection and repatriation.\textsuperscript{4} Asylum seekers in the current backlog have been waiting in limbo for almost two years to

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have their protection claims assessed. The refugee determination process and social factors such as the inability to work are closely associated with symptoms of post-traumatic stress disorder and major depressive disorder. The ongoing uncertainty of their future is associated with deepening mental deterioration. The opportunity to present their claims will be a welcome one for many; however, there are real concerns that the new FTA procedures carry real risks of privileging efficiency at the expense of fairness. This article outlines and explains the new procedures and explores what the potential impact may be on the already fragile mental health of asylum seekers in the community.

What is the FTA Procedure?

Australia is a state party to the Convention relating to the Status of Refugees 1951, the Protocol relating to the Status of Refugees 1967 (the Refugees Convention), the International Covenant on Civil and Political Rights (ICCPR) and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). As part of these international treaty obligations Australia has to make sure that there is a fair and effective refugee status determination (RSD) process in order to properly identify those individuals in need of protection.

The FTA procedure will allow asylum seekers to make an application for protection to the Department of Immigration and Border Protection (the Department). Time frames for the provision and assessment of claims will be short. Applications that are refused will be referred to a newly created Independent Assessment Authority (IAA). Reviews by the IAA will be conducted ‘on the papers’. Only in ‘exceptional circumstances’ will the IAA accept or request new information or interview the applicant. Exceptional circumstances are not defined in the legislation. The Explanatory Memorandum states that this could be where ‘there is a significant change of conditions in the applicant’s country of origin that means the applicant may now engage Australia’s protection obligations’.

Some cases will be excluded from accessing independent merits reviews altogether. This will include cases where the Department assess the claims to be ‘manifestly unfounded’ where the visa applicant relied upon a ‘bogus document’ or had access to effective protection in another country.

Prior to this change, those who had their protection applications refused by the Department were entitled to seek a full independent merits review of the decision by the Refugee Review Tribunal (RRT). The RRT is obliged to invite review applicants to a hearing and conduct a fresh examination of the case, and is able to accept and review new evidence.

After an assessment of claims, those that are found to be owed protection will be allowed to remain in Australia for up to three years on a ‘Temporary Protection Visa’ (TPV) or for up to five years on a ‘Safe Haven Enterprise Visa’ (SHEV). Claims will need to be assessed again before the visa expires to determine whether the person is still owed protection. If the person is found to engage Australia’s protection obligations they will be granted another temporary visa.

Holders of a TPV or a SHEV will have permission to work and study, and will be eligible to obtain welfare benefits. However, holders of temporary visas will not be able to sponsor family members to Australia.

Why was the FTA Introduced?

During Senate committee hearings in relation to the Bill, the Department stated that without the new FTA it would take up to seven years to process the backlog. The Department stated that changes were needed to ‘deter abuse of the review system through the late presentation of claims that could reasonably have been presented earlier’ and to ‘deliver the consistent message that it is extremely important to provide sufficient evidence and
information to establish protection claims upfront'.

The proposed FTA appears to be directed primarily at ensuring that the assessment and review processes are as brief as possible. Administratively efficient processes would be desirable for those that have been waiting for some years to have their cases assessed; however, it is unclear whether the FTA process will ensure that genuine claims for protection are identified and whether it is possible to arrive at a fair and true decision.

Refugee Status Determination, Credibility Assessments and Mental Health

The process of RSD is extremely difficult, complex and challenging. Decision makers are required to be aware of the legal framework and evidentiary issues and have to have sound knowledge and skill to be across complex law and evidentiary issues. As evaluation of credibility is central to the decision-making process, decision makers must also be aware of and assess the impact of trauma, gender, age and culture upon the ability of an asylum seeker to relay their story.

The current process stresses that the onus of proof lies with the asylum seeker, who must provide a complete statement of their claims for protection during their first interview with an officer of the Department. Asylum seekers are often not able to provide documentary evidence to support their claims, such as evidence of membership of political party, arrest warrants or prison certificates. The United Nations High Commissioner for Refugees (UNHCR) Handbook on Procedures and Criteria for Determining Refugee Status highlights this point:

Often ... an applicant may not be able to support his (sic) statements by documentary or other proof, and cases in which an applicant can provide evidence of all his statements will be the exception rather than the rule. In most cases a person fleeing from persecution will have arrived with the barest necessities and very frequently without personal documents.

The literature on RSD points to the fact that the credibility of an individual’s claim is crucial to the success of their claim for protection. Decision makers are often looking for consistency and clarity in the asylum seekers’ claims, and many refusals are on the basis that the asylum seeker’s credibility has been undermined by inconsistencies within their claims.

Research demonstrates that post-traumatic stress disorder (PTSD) and other related mental health disorders may seriously affect the ability of an applicant to construct and convey a consistent narrative. Of particular concern are asylum seekers in the sequelae of trauma. Survivors of trauma often have high levels of hyper-arousal and cognitive intrusions, and, in some instances, avoidance. Traumatic experiences coupled with memory difficulties can affect credibility judgements in asylum decisions. Other reasons may include a lack of knowledge about the legal process, lack of education or sufficient literacy in their own language or in English, lack of legal advice or mental illness:

[A]n applicant’s reticence, hesitancy, comportment and attitude are not objective indicators of credibility. They can be equally indicative of post traumatic stress. Behaviour is a poor determinant of truthfulness and accuracy, particularly if decision makers interpret it with inadequate regard for gendered or culturally specific assumptions, or where the disparity in educational grounding creates a mismatch of expectations and understandings. Refugee determinations raise heightened concerns regarding misunderstandings arising from linguistic, cultural or mental health issues.

A recent study of RSD by the Department found that many decisions were overturned at the merits review level on the basis of different credibility findings. There may be a number of reasons for this, including inexperienced primary decision makers, reviewers more skilled
at creating a dialogue with visa applicants, or late disclosure of information if a person has suffered torture or trauma (such as rape). The Federal Court has stated that before a decision maker can find that an applicant suffers from PTSD they must have proper medical evidence; once they have that evidence, a decision maker cannot make an adverse credibility finding without considering the impact of PTSD on the individual’s credibility and their capacity to participate in the hearing. Truncated timeframes involved in the FTA will present difficulties for applicants or their representatives to obtain relevant expert testimony.

The amendment allows for some flexibility for the IAA to consider new evidence of torture and trauma, however the hurdle remains that there still must be some ‘extraordinary circumstances’ as to why the information was not presented at first instance. Medical and legal practitioners will need to take care to frame their submissions and expert reports in a manner that clearly addresses this issue.

**International Comparisons**

Several countries use accelerated or expedited asylum procedures to deal with asylum claims which are considered to be ‘manifestly unfounded’ or where the asylum seeker is from one of a list of countries which are generally considered to be safe.

However, Australia has decided to use an FTA for a group which, historically, have statistically been found to be refugees. Departmental statistics indicate that over the 4 years prior to 2013, an average of about 70% of asylum seekers arriving by boat were determined (at first instance) to be refugees and, on average, 93% of those who had their applications reconsidered following independent review, were accepted as refugees.

Research on the use of the expedited procedures in the United States found that it led to an increase in the number of appeals to superior courts, which consequently increased costs and decreased efficiency. Similar findings have emerged in relation to the United Kingdom Detained Fast Track Procedure.

Lack of appropriate time to seek and obtain legal assistance recently led the United Kingdom High Court to find the DFT system unlawful as there was an ‘unacceptable risk of unfairness’. After an investigation into the DFT the United Kingdom Parliament’s Joint Committee on Human Rights raised particular concerns:

> It is self-evident that some asylum seekers – most obviously torture victims and those who have been sexually abused – are unlikely to reveal the full extent of experiences to the authorities in such a short-time period, and that this problem will be exacerbated where they are not able to access legal advice and representation, and the support of organisations able to help them come to terms with their experiences.
Australia is obligated to take positive steps towards adopting a fair and effective system for determining who is in need of protection.\textsuperscript{34} The problem is whether or not it is possible for accelerated procedures to be both fair \textit{and} efficient. Current government policy in Australia is that there will be no government-funded legal advice to the majority of the legacy caseload. Funding for legal assistance in preparing their claims for protection will only be available to those considered the ‘most vulnerable’.\textsuperscript{35} The nature, scope and consequences of asylum seeker vulnerability will require careful definition, monitoring and oversight. Current legal practice of RSD involves personal testimony by asylum seekers as a marker of credibility. Decision makers frequently synthesise various data sources and rely upon their own assumptions about human behaviour when making such judgements.\textsuperscript{36}

\textbf{The Need for an Integrated Mental Health and Legal Response}

In addition to evidence of traumatic experiences and asylum seeker processes being interlinked, suicide is known to be the leading cause of premature death for asylum seekers in Australia.\textsuperscript{37} People who have had firsthand experiences of self-harm and suicidal behaviour — either personally or as a witness — may find it difficult to engage with authorities for fear of further traumatic experiences. The forthcoming process will predictably be stressful, specifically in terms of mental distress, despair and deterioration, and is likely to exacerbate psychological distress. People working closely with asylum seekers will encounter stories of personal sadness and uncertainty. Self-harm and suicidal behaviour amongst asylum seekers is likely to be associated with previous trauma, having an uncertain future, fear of return, and a feeling of being ‘under intense pressure and scrutiny’ and ‘boxed in’.

Mental health needs and legal support are increasing features of a co-ordinated and much needed integrated response to assist asylum seekers in the community. Now more than ever there is a need to \textit{decrease uncertainty} and \textit{increase certainty} for asylum seekers. Denial of legal assistance will not meet the desired objective for asylum seekers to articulate their claims fully at the earliest stage of the process. It is important that there are safeguards such as legal advice, access, sufficient opportunities to prepare cases and a meaningful opportunity to appeal negative decisions.

For this reason, it is critical for the government to allow for adequate legal and mental health support during the processes attendant upon applications for refugee status. Systemic direct service provision can help increase mental health protective factors linked to personal coping, family support and practical day-to-day circumstances (health care, accommodation, meal preparation) and prevent further injury associated with the inevitable disruptiveness of ongoing traumatic experiences and uncertainty. Individual mental health assistance in some instances can be provided in conjunction with, during and after legal consultation. Culturally competent engagement during periods of excruciating vulnerability and uncertainty can provide an important backdrop for feelings to be received, lives revealed and cultural injunctions to advance mental health protective factors that asylum seekers perceive to be relevant and helpful. Asylum seekers with an existing mental health condition who receive negative outcomes during the application process are particularly vulnerable. All asylum seekers should have mental health support made available to them when decisions are handed down or shortly afterwards.

\textbf{Notes}

1. ‘Unauthorised maritime arrivals’ are defined as people who arrived in Australia by sea as an unlawful non-citizen; that is, without proper documentation (a valid passport and/or visa): Migration Act 1958 (Cth) s 5AA.


12. Migration Act 1958 (Cth), s 473DB.

13. Migration Act 1958 (Cth), s 473DD.


16. There are some limited circumstances where a person who is the holder of a SHEV can apply for a range of both temporary and permanent visas. The person must live and work or study in a designated regional area and not have received specified social security benefits for a period of 42 months.


25. Supplementary Explanatory Memorandum, Amendments to the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 [GH1118] (Cth) [27]–[31].
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Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 [GH118] (Cth) [31].


32. Detention Action v Secretary of State for the Home Department [2014] EWHC 2245, [220]–[221].


