

PATHWAYS TO A JUST MIGRATION ACT

Wednesday, 20 October 2021 (6:00-7:00PM)

Speakers: Julian Burnside AO QC
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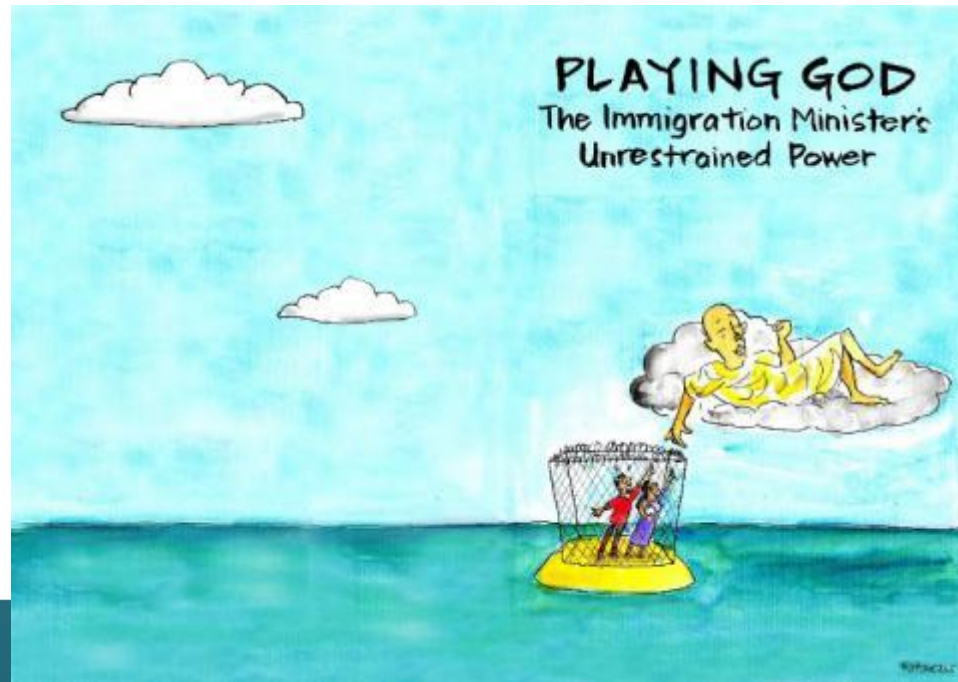
Briefing

An overview of key aspects of the *Migration Act 1958* that, in our opinion, are in most need of legislative reform to strengthen the protection of fundamental rights.

Migration Act 1958

1. Personal powers of the Minister
2. Immigration detention
3. Character related decisions
4. Refugee visas
5. Bridging visas
6. Advocating for change

1. Personal powers of the Minister



Personal powers of the Minister

Personal ministerial powers under the Migration Act include:

- a) Exempt a person from a statutory bar stopping them apply for a visa
- b) Override a Administrative Appeals Tribunal decision
- c) Grant a visa to a person in immigration detention or make a residence determination (community detention)
- d) Prevent transfer to a regional processing country

Personal powers of the Minister

- Personal powers of the Minister are:
 - *non-compellable* – i.e., you can't force the Minister to make a decision or ever consider the case.
 - *Non-delegable* – i.e., only one of the Home Affairs portfolio ministers can make the decision

a) Statutory bar on applying for visas for boat arrivals

- MV *Tampa* (Tampa Affair)



Spooner, *The Age*, 12 October 2001

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a) Statutory bar on applying for visas for boat arrivals cont*

- What is a statutory bar on applying for a visa?
- Why have successive governments used statutory bars?
- Personal powers of the Minister to lift bar (exempt person)
- Public interest

b) Override positive decisions

- Personal power of the Minister to cancel/override a positive decision of a delegate or the Administrative Appeals Tribunal if the Minister does not personally agree with it
- In the national interest

c) Grant a visa to a person in immigration detention or make a residence determination

- Personal power of the Minister to end locked detention by:
 - granting a visa to a detainee – section 195A of the Act; or
 - making a residence determination
- In the public interest
- Ministerial Guidelines



d) Prevent transfer to a regional processing country

- From 1 July 2013 all persons who arrive in Australia by boat seeking asylum *must* be transferred to a regional processing country to have their protection claims processed under that country's laws.
- Minister has a personal power to exempt a person from being transferred if it is in the public interest.

Possible reforms

- Abolish all Ministerial personal powers other than those that can be used to positively intervene in exceptional cases.
- Shift these decision-making responsibilities from the Minister to public officials and make them open, transparent, compellable and reviewable.

2. Immigration detention



Mandatory detention regime

- Mandatory detention regime
- Person who is not an Australian citizen can have one of two status' under the Migration Act:
 - Lawful non-citizen (with a visa)
 - Unlawful non-citizen (without a visa)
- If unlawful non-citizen the person **MUST** be detained – no discretion not to do so – no exceptions.
- Average time in immigration detention: 696 days

Purposes of detention

- High Court has held that a person can only be held in immigration detention for one of the following 3 x purposes:
 1. removing that person from Australia;
 2. processing an application for a visa lodged by the person; or
 3. For the Minister to personally determine whether to lift a statutory bar to permit the person to apply for a visa
- But what if they are a refugee and/or cannot be removed?

Indefinite detention

- Indefinite and prolonged immigration detention - refugees and other persons unable to be removed
- Entrenchment of indefinite detention in Australian law:
 - Recent High Court decision in *AJL20*
 - Recent enactment of the *Migration Amendment (Clarifying International Obligations for Removal) Act 2021*
- Minister's personal powers only avenue to end detention – or be removed from Australia

Minister personal powers

- Mandatory detention regime combined with the statutory bars on applying for visas means many held in detention without ability to apply for a visa – and are entirely dependent on the Minister personal non-compellable powers
- Can't force the Minister to consider personal powers – non-compellable

Possible reforms

- Place a cap on time in immigration detention
- Remove statutory bars on applying for bridging visas for people in detention
- Provide for people who cannot be removed from Australia to be released from detention
- Statutory prohibition on children in detention

3. Character related decisions



Visa cancellation

- Many different ways in which a visa can be cancelled or refused on character related grounds:
 - Criminal offending ('s 501')
 - Criminal charges (no conviction required)
 - Providing false information
 - Bad behaviour (bridging visas)
 - National security
- When a visa is cancelled that person is generally legally prohibited from applying for another visa other than a protection visa – stuck in immigration detention

Mandatory cancellation regime

- Mandatory cancellation regime introduced in 2014 by the Abbott government
- Led to significant increase in numbers in detention due to:
 - visas being automatically cancelled and the person being detained at the *beginning* of the process (rather the end).
 - Extensive delays in processing requests for revocation of cancellation

Mandatory cancellation regime

- Many people who are ultimately successful in having their visas restored are unnecessarily held in immigration detention for very long periods while waiting for the decision.
- Average time in immigration detention: 696 days
- Migration Amendment (Strengthening the Character Test) Bill 2021 seeking to significantly lower the threshold for automatic cancellation.

Intervention by the Minister

- Not uncommon for the Minister to use his/her personal powers to override positive character decisions.
- Pressure on Administrative Appeals Tribunal and Department of Home Affairs staff to make decisions that confirm to the Minister's personal beliefs.

Protection visa character criteria

- Being found to be a refugee does not mean the person will be granted a protection visa to live in the Australian community
- Criteria to apply for and be granted a protection visa:
 - Found to be a refugee or otherwise engage Australia's international non-refoulement obligations
 - Not be a danger to the Australian community
 - s 501 not used to refuse if don't meet the character test

Possible reforms

- Greater emphasis in cancellation on:
 - refugee status
 - fact a person cannot be removed from Australia so will face indefinite immigration detention
 - Genuine attempts to rehabilitate
 - Best interests of minor children
 - Family and time spent in Australia
- Repeal mandatory cancellation regime
- Less political interference in decision-making
- Merit-based appointments to the Administrative Appeals Tribunal

4. Refugee processing and visas



Key features

- Temporary protection visas for boat arrivals and people who arrived by plane but not immigration cleared
- Despite Safe Haven Enterprise visa option, no realistic pathway to permanent residence
- Bar on reunification with family
- Adoption of narrower Australian definition of 'refugee' and removal of Refugee Convention definition from the Act
- Refugee intake cap/ceiling rather than quote

Key features cont*

- Extensive delays in protection visa processing – often taking a number of years to be completed.
- Mandatory transfer to regional processing countries of *all* people who arrive in Australia by boat seeking asylum (beginning mid 2013)
 - Note: Minister has personal non-compellable power to exempt a person from mandatory transfer
- Tow backs to international waters for vessels carrying people seeking asylum

Possible reforms

- Repeal the changes introduced by the Abbot Government in 2014 through the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014*.
- Restore refugee intake quota and increase number
- Regional Cooperation Framework – Bali process

4. Bridging visas



Bridging visas


- ‘bridges’ the holder’s lawfulness status while the person waits for a visa process to be finalised (so that they do not have to be held in immigration detention)
- statutory bars on applying for bridging visas – boat arrivals, medical transferees and some who have had visas cancelled
- Arbitrary denial of the right to work and access to Medicare
- Denial of bridging visa leads to:
 - Immigration detention if come into contact with authorities
 - Exploitation
 - Destitution

Further reading

- Liberty Victoria's Rights Advocacy Project:
 - *Playing God: The Immigration Minister's Unrestrained Power* (May 2017)
 - *Bridging the Department's Visa Blindspot* (Dec 2020).



5. Advocating for change



Q&A