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Executive Summary

Australia's onshore protection system is currently facing significant backlogs. The resulting delays are undermining the integrity of the asylum system, eroding public confidence and causing significant harm and distress to people seeking asylum. This policy brief examines how

Embracing Data and Evaluations

3.

Ensuring Adequate and Effective Decision-Making Capacity

12. The Australian Government should take a data-driven approach to calculating the decision-making capacity and legal assistance needs required for timely decision-making and for meeting target processing times at Home Affairs ART and the Federal Circuit and Family Court. This approach should take into account the number and complexity of existing cases and the future anticipated caseloads. It should include a plan for the rapid increase of decision-

representatives from the Confederation, the Cantons and local cities and communities in 2013 and 2014.⁴¹ It also included regular consultations with civil society in different formats public campaign for the new asylum procedure in the context of the national referendum on the new law in 2016.⁴² The referendum was initiated by the populist Swiss People's Party, which has dominated the migration discourse for more than a decade in Switzerland. In June 2016, 81 per cent of participating Swiss voters favoured the new asylum model. This large-scale political and societal agreement was a major success and served as a solid basis for the rollout of the new procedure. After the approval of the legislative basis, the broad consultation process continued for the preparatory and initial implementation phase. This included the design of the necessary changes to the ordinances related to the revised Asylum Act 1998 (Switzerland) the identification of suitable facilities for accommodation and procedures and the determination of the exact division of competencies in the new system.

In contrast, recent reforms to Australia's asylum procedures have been made without meaningful opportunities for engagement, consultation or consensus building with the refugee sector and other stakeholders. This includes the recent reforms to the onshore protection system. While it is noted that these reforms did reflect various proposals and concerns raised by the refugee sector, no public or sector-wide consultations were carried out in relation to the details of the changes prior to their announcement.

Recommendation

1. The Australian Government should take a long-term, inclusive and consultative approach to reforming the asylum system. Consultation needs to take place at the early design stage rather than after policies are announced. Early and ongoing consultations should be carried out with the refugee sector, refugee-led organisations reflecting a diversity of experiences, refugee lawyers, the Administrative Review Tribunal (ART) and federal courts. This will ensure that reforms are guided by a thorough understanding of diverse community needs and experiences and will enhance the quality and legitimacy of reforms.

3.2 Learning from Comparative Practices

3.3 Data and Evaluation

The Australian Government could also draw lessons from Switzerland in terms of data collection, transparency and robust evaluations in informing the design of the asylum system and ongoing reform.

The Swiss reforms introduced in 2019 were preceded by two test phases. The first test phase was launched in Zurich on 6 January 2014. The test phase was subject to an evaluation mandated by the Federal Department of Justice and Police. The first interim report was published in February 2015. The evaluation found that the new procedures were economical, faster and qualitatively better and that they enjoyed greater acceptance among participants. This was followed by a second pilot in the French-speaking part of Switzerland in 2018, split across the Cantons of Neuchatel and Fribourg to gain insights on inter-cantonal cooperation in the new system.

Recommendation

3. Home Affairs should consider trialling proposed reforms to the asylum procedures using a pilot or test phase model, where innovations are tested for a defined period and then subjected to independent evaluation to inform whether they are retained, expanded or refined.

The SEM issues monthly asylum statistics about decision-making and provides data on returns, numbers of people in the system and cooperation between the Federation and the Cantons. It also publishes a yearly report with detailed asylum statistics which explains the main figures and puts the numbers into context. Statistics are also collected and published in relation to a variety of indicators reflecting the quality and consistency of decision-making, including the number and outcome of review applications. This is complemented by ongoing internal data collection and reporting related to the key features of the new procedures.

Developing robust data collection and transparency is essential to the success of any asylum reforms in Australia and would build public confidence in how the asylum process is operating. Public access to detailed data is required to facilitate ongoing evaluation of the quality and efficiency of decision-making, to provide an evidence base to evaluate the effectiveness of any new reforms and to identify areas in need of improvement or reform. This data collection would also help Home Affairs, the ART and the Federal Circuit and Family Court to anticipate and address increases in workload and identify areas in need of additional resources. It is essential that data is collected at a systemic level, tracking and connecting the life cycle of cases through each stage.

conducted by specialised external actors and published by the respective ministry and the SEM on their websites.

Recommendation

5. The Australian Government should periodically engage independent external experts to undertake evaluations of how the asylum process is operating and should make their reports

deadlines, this must be accompanied by reforms ensuring that all applicants have access to full legal representation from specialist free refugee legal advice providers.

Timelines and procedural deadlines need to be developed in consultation with the Australian refugee sector, applicants, legal service providers, refugee organisations reflecting a diversity of experiences, the ART and federal courts. The very short timelines in Switzerland have been criticised as being overly onerous, and reflect the efficiency gains that come from housing applicants in Federal Asylum Centres where legal representatives are located. Through a consultation process, the Australian Government could identify what timelines would be fair and appropriate for the Australian context.

A key lesson from the first few years of the new Swiss asylum procedures is the need for adequate guidance to be provided to decision makers as to which cases to refer to the extended procedure. The 2021 evaluation of the procedures identified a certain degree of inconsistency in the way cases were being streamed in the different regions and found that not all cases where further investigation was necessary were being referred to the extended procedures. The situation improved with the development of further guidance, including a formal checklist for decision makers.

Recommendation

8. Home Affairs should carry out robust consultations with the refugee sector, refugee organisations reflecting a diversity of experiences, refugee lawyers, the ART and federal courts to identify fair and appropriate timelines for both the prioritised and extended procedures, as well as to develop criteria for a detailed checklist to guide decision makers in identifying cases that should be transferred to the extended procedures.

3.6 System -Wide Perspective

Another hallmark of the Swiss asylum reforms is the focus on a system perspective and coordination between the SEM and the Federal Administrative Court. The court was consulted regularly during the reform process. Key to the success of the reform was the court's willingness to prioritise the review of cases refused through the accelerated procedures. Equally important was the fact that the court's independence was respected. For example, during regular consultations between the court and the SEM are limited to a technical exchange on issues like prioritisation, access to files and administrative adaptations of the system.

In Australia, streaming cases for faster decision making at Home Affairs will be futile if those cases get held up in backlogs at the new ART or Federal Circuit and F 3.1 (e i)-8.9 (f)-1.1 (t)-1.913.2 (ut)-1.1-12.

for representation at the ART and Federal Circuit and Family Court, unless the representative determines that the case has no reasonable prospect of success.

Legal service providers in the Swiss system are selected for each asylum region following a public tender and are awarded a contract for five years with the possibility of a further one-year extension. The long duration of the contracts was deemed crucial for establishing functioning working relations between government officials and legal practitioners. It also facilitates long-term recruiting of experienced lawyers. The funding also covers interpreting costs, in recognition of the fact that high-quality interpreting services are essential for legal representatives to carry out their functions.

The Swiss model of financing legal service providers is based on a per-case model. This model has been criticised by some NGOs working in the sector for creating incentives for lawyers hired by the legal service providers to avoid lodging appeals. This concern was partly addressed by the tender process, which made clear that the case fee must be calculated in a way that covers administrative costs as well as all expenses for possible appeals procedures. However, as the tender process was competitive, there has been an incentive to reduce the number of appeals procedures incorporated in the calculation.

Recommendation

11. The Australian Government should ensure that funding for specialist free refugee legal advice providers is provided on a long-term basis and is aimed at increasing the overall capacity of organisations (rather than being provided on a fee-per-case model). The funding agreements should include interpreting costs, where these are covered by the relevant state or territory government.

3.8 Ensuring Adequate and Effective Decision-Making Capacity

An important component of the Swiss system is the ongoing effort to quantify projected demand on the asylum system and adjust capacity if the number of asylum applications increases. This includes provisions to deal with the regular variations of application numbers, as well as a plan for a fast rise in decision-making capacity in emergency scenarios. Where additional decision-makers are appointed at the primary decision-making level in the SEM, this triggers a quasi-automatic increase in funding to increase the capacity of legal service providers and informs separate parliamentary procedures for the appointment of additional judges to the Federal Administrative Court. This is accompanied by robust training for new as well as experienced decision-makers. Similarly, the funding agreement between the Swiss Government and legal service providers includes an allocation for the training of legal representatives.

Recommendation

12. The Australian Government should take a data-driven approach to calculating the decision-making capacity and legal assistance needs required for timely decision-making and for meeting target processing times at Home Affairs, the ART and the Federal Circuit and Family Court. This approach should take into account the number and complexity of existing cases and the future anticipated caseload. It should include a plan for the rapid increase of decision-making capacity across the system and for increased legal assistance to deal with potential future sudden surges in asylum claims. This should be accompanied with robust training for both new and experienced decision-makers, as well as legal representatives, so they can effectively carry out their duties and functions.

Conclusion

This policy brief has examined how Australia can draw on lessons from Switzerland in designing asylum procedures that are both fast and fair. The foundational principle underpinning the

recommendations is that fairness enhances efficiency. Attempts to limit procedural safeguards and

Endnotes

¹ Department of Home Affairs (Sth) Monthly Update: Onshore Protection (Subclass 866) Visa Processing: May 2024 (Report, 2024) <<https://www.homeaffairs.gov.au/research-stats/files/monthlyupdateonshoreprotection866visa-processingmay-2024.pdf>>.

² Administrative Appeals Tribunal Migration and Refugee Division Caseload Report: Financial Year to 31 May 2024 (Report, 2024), 6 <<https://www.aat.gov.au/AAT/media/AAT/Files/Statistics/MRD-detailedcaseload-statistics202324.pdf>>.

³ Evidence to Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, 25 March 2022, Question AE22137 (Permanent Protection Visa Applicants: Judicial Reviews) 1 <<https://www.aph.gov.au/api/qon/downloadattachment?attachmentId=3027502-463ba825e76c9dddf0bd>>.

⁴ Christine Nixon, Rapid Review into the Exploitation of Australia's Visa System (Report, 31 March 2023) 24 (Nixon Review), citing Evidence to Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, 16 December 2022, Question AE22137 (Permanent Protection Visa Processing: Permanent Protection Visa) 1 <<https://www.aph.gov.au/api/qon/downloadattachment?attachmentId=828794b6fb8a3-0df32a9760f77>>. Note that this figure predates the reforms introduced in October 2023 that were aimed at speeding up processing times below 15 and accompanying text. While updated median processing times are unavailable, Home Affairs states that [m]ost new applications are now decided almost 8 times faster compared to recent years. Department of Home Affairs (Sth) Protection Visas Are for Genuine Asylum Seekers (Web Page, 13 August 2024) <<https://immi.homeaffairs.gov.au/protection/visas/subsite/Pages/protection-visas-are-for-genuine-asylum-seekers.aspx>>.

²¹ An independent evaluation from non-government organisations working in the sector during the first year of the application of the new system raised particular concerns around the funding model for legal assistance, overly accelerated timelines and conditions in Federal Asylum Centres where applicants are held for the duration of the accelerated procedure. Bundes Unabhangiger Rechtsarbeit im Asylbereich Zur Neustrukturierung des Asylbereichs Bilanz zu Einem Jahr der Umsetzung (Report, 2020) 613 <https://www.bundnisrechtsarbeit.asyl-vsc.ch/wp-content/uploads/2020/09/DOSSIER_Rechtsarbeit_DE.pdf>.

²² It also draws on additional written information and documents provided by the interview subjects before and after the interviews. All protocols relating to these interviews were approved by the UNSW Human Research Ethics Committee see Approval No HC230007, 20 March 2023.

²³ Daniel Ghezelbash, FastTrack, Accelerated, and Expedited Asylum Procedures as Tool of Exclusion in Catherine Dauvergne (ed) Research Handbook on the Law and Politics of Migration (Edward Elgar Publishing 2021) 248.

²⁴ This timeframe includes appeal and removal procedures.

²⁵ This is a simplified overview that does not include the Dublin procedures implemented under the Dublin III regulation, which establishes the criteria and mechanisms for determining the European Union Member State responsible for examining an asylum application lodged in a Member State by a third country national. Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Application for International Protection Lodged in one of the Member States by a Third Country National or a Stateless Person [2013] OJ L 180/31.

²⁶ Asylum Act 1998 (Switzerland) art 26 (Asylum Act). At this stage, a triage is also carried out to decide whether or not a Dublin procedure will be initiated.

²⁷ An application can be cancelled without a formal decision if (a) application cannot be considered an asylum claim according to the Asylum Act, (b) the application is not sufficiently justifiable and/or the applicant withdraws it, (c) the applicant fails to cooperate without a valid reason, or (d) the applicant fails to make themselves available to the authorities for more than 20 days or for more than 5 days if the person is accommodated in a Federal Asylum Centre see generally Swiss Refugee Council Country Report: Switzerland (Report, 2023) 55 <https://asylumineurope.org/wp-content/uploads/2023/06/ACIA_2022_Update.pdf>.

²⁸ Asylum Act (n 26) art 37 provides that there is some flexibility to add several days if it is clear that this will make it possible to render a decision in the accelerated procedures.

²⁹ This feedback is provided in a legal representative statement the purpose of which is to identify whether the facts are properly established and the decision will be correct and comprehensible in terms of formality and the merits.

Declaration, 28 March 2014) <<https://www.sem.admin.ch/dam/data/sem/aktuell/news/2014/2014-03-28/erklaerung.pdf>>.

⁴²For the explanations and material provided by the Federal Council in relation to the public vote, see Federal Council (Switzerland) Votation Populaire du 5 Juin 2016 (Web Page) <<https://www.admin.ch/gov/fr/start/dokumentation/abstimmungen/20160605.html>>

⁴³See Federal Chancellery of Switzerland (n 20).

⁴⁴See nn 15-16 and accompanying text.

⁴⁵See Federal Department of Justice and Police (Switzerland) (FDJP), Bericht über Beschleunigungsmassnahmen im Asylbereich (Report, March 2011) 33 <<https://www.sem.admin.ch/dam/sem/de/data/aktuell/gesetzgebung/abgeschlossen/asylg-aug/ersatznee/berbeschleunigasyl-d.pdf.download.pdf/berbeschleunigasyl-d.pdf>>.

⁴⁶Jo Fahy, Express Asyl-Verfahren (em.wmP-0.001 Tc -0.001 TtS(i)34ap)-6.3 (l)d [(V)g12.3 (e

