

Committee Secretary
Senate Legal and Constitutional Affairs Legislation Committee
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600

BY ELECTRONIC SUBMISSION

7 August 2019

Dear Committee Secretary,

Migration Legislation Amendment (Regional Processing Cohort) Bill 2019 [Provisions]

We welcome the opportunity to provide a submission to the Committee's Inquiry into the Migration Legislation Amendment (Regional Processing Cohort) Bill 2019 [Provisions]. Our submission focuses on the international law dimensions of the Bill, although we also comment briefly on some of its other aspects.

The Bill proposes to ban permanently from Australia any person who entered Australia as an unauthorised maritime arrival after 19 July 2013, was transferred to the Republic of Nauru (Nauru) or Papua New Guinea (PNG) for 'regional processing', and was at least 18 years of age at the time of their first (or only) transfer. The Bill would apply to asylum seekers and refugees who are currently in Nauru or PNG, others who were transferred to those countries after July 2013 but are now back in Australia (including people receiving critical care for serious health conditions, and others currently living in the Australian community), and refugees who have been resettled in third countries such as the United States and Canada.

It is our view that the Bill serves no reasonably necessary policy goal, and that it is harsh, excessive, discriminatory and incompatible with Australia's international obligations. For these reasons, we strongly recommend that the Bill should **not** be passed. In summary, it is our assessment that the Bill:

- is unnecessary, because the Minister already has power to determine who can and cannot be granted a visa;
- interferes with the rights of children and families, including by unlawfully denying refugees their right to reunite with close family members and failing to take into account the best interests of refugee and non-refugee children;
- undermines basic principles of international human rights and refugee law (including the right to seek asylum), and unlawfully discriminates against and punishes refugees and asylum seekers for entering or seeking to enter Australia by boat, contrary to Article 2 of the 1948 Universal Declaration of Human Rights, Articles 2, 23(1) and 26 of the 1966 International Covenant on Civil and Political Rights, and Articles 3 and 31(1) of the 1951 Convention relating to the Status of Refugees;

- undermines the object and purpose of the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, which is to secure to refugees the enjoyment of ‘fundamental rights and freedoms without discrimination’; and
- undermines the international protection regime through its failure to ensure that those in need of international protection find a lasting solution to their plight that is consistent with international law, and by frustrating efforts to build regional cooperation based on fair and genuine responsibility-sharing, and erecting additional administrative barriers to protection, rather than seeking solutions for people subject to offshore processing.

If, despite the above, the Bill is to be passed, we would recommend at a minimum that amendments be made to ensure that:

- it contains safeguards that protect the fundamental rights of families and children, for example by excluding from its application families which would otherwise face the risk of being permanently divided between Australia and other countries; and
- it facilitates the search for solutions, rather than reinforcing situations of protracted limbo for people in Nauru and PNG, for example by excluding from its application any person who has no viable third-country resettlement option.

The Bill is unnecessary

The Bill is unnecessary because the Minister already has power to determine who can and cannot be granted a visa. People who are currently in Nauru or PNG, and those who have been brought back to Australia for medical or other purposes, are ‘transitory persons’ under the *Migration Act 1958 (Cth) (Act)*. Section 46B of the Act already prohibits them from making a valid visa application in Australia unless the Minister deems it ‘in the public interest’ to allow them to do so. People who have been or will be resettled elsewhere (including in the United States, Canada, and any other future resettlement countries) are also subject to Australia’s existing migration laws. They do not have an automatic right to enter and remain in Australia, and the Minister already has broad authority to exclude certain people. For example, under section 501 of the Act, the Minister may refuse to grant a visa to any person who does not satisfy the Minister that he or she passes the character test (including any person who has a substantial criminal record, would represent a danger to the Australian community, or is deemed generally to be ‘not of good character’). Even New Zealand citizens, who enjoy easier access to Australia through mutual arrangements between the two countries, can be excluded or deported from Australia if they are deemed to pose a safety or health risk to the Australian community.

The Bill unlawfully interferes with the rights of children and families

The Bill would violate Australia’s international human rights obligations to protect families and children. The world’s governments have agreed that ‘the family is the natural and fundamental group unit of society and is entitled to protection by society and the State’,¹ and

¹ Universal Declaration of Human Rights, art 16(3).

repeatedly reaffirmed the need to ensure that families are accorded the widest possible protection and assistance.² Governments have explicitly acknowledged that this protection extends to refugee families.³ These commitments require governments to allow close family members to live together.

Specifically, Australia has obligations under the UN Convention on the Rights of the Child (CRC) to ensure that children are not separated from their parents against their will, and that applications by children or their parents to enter or leave Australia for the purpose of family reunification be dealt with 'in a positive, humane and expeditious manner'.⁴

Australia also has an obligation under the CRC to ensure that the best interests of children are taken into account as a primary consideration in all matters concerning them, whether undertaken by public or private institutions, courts of law, administrative authorities or legislative bodies.⁵ This protection applies equally to all children, regardless of their legal status. As the UN Committee on the Rights of the Child has explained, the strong position given to the best interests of children is justified by their levels of dependency, maturity and voicelessness. Since children are less able than adults to make a strong case for their own interests, it falls to governments to ensure that their rights are adequately protected.⁶

The CRC is the most widely and rapidly ratified human rights treaty in history, reflecting universal acknowledgment of children's rights as an important and integral component of all societies. A concern to protect children's interests is certainly in line with Australian domestic law and values.

While the Bill does not target children directly, its application is likely to be inconsistent with Article 10(1) of the Convention on the Rights of the Child, and it could be used to exile their parents and other members of their immediate families. For any person subject to the Bill with family members already in Australia, a permanent ban would flagrantly violate the abovementioned provisions of international law. Australian law would entrench the division of families, which is already an issue of great concern, and could result in parents being permanently separated from their children.

² International Covenant on Civil and Political Rights, art 23(1); International Covenant on Economic, Social and Cultural Rights, art 10(1); Convention on the Rights of the Child, art 8(1).

³ Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, 1951, UN doc A/CONF.2/108/Rev.1 (26 November 1952), Recommendation B; Executive Committee of the High Commissioner's Programme, *Conclusion No 88(L) on Protection of the Refugee's Family* (8 October 1999).

⁴ Convention on the Rights of the Child, arts 9, 10.

⁵ Convention on the Rights of the Child, art 3(1).

⁶ UN Committee on the Rights of the Child, *General Comment No 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art 3, para 1)*, UN Doc CRC/C/GC/14 (29 May 2013), [37] <http://www2.ohchr.org/English/bodies/crc/docs/GC/CRC_C_GC_14_ENG.pdf>.

The Bill undermines basic principles of international human rights and refugee law

The Bill would punish refugees and asylum seekers for entering or seeking to enter Australia by boat in violation of Article 31(1) of the Refugee Convention, which requires Australia not to 'impose penalties, on account of... illegal entry' to Australia on refugees who have come 'directly' from a place of persecution, as long as they 'present themselves without delay to the authorities and show good cause for their illegal entry'.

Prevailing international legal authority supports our assessment that the Bill imposes an unlawful penalty.⁷ First, a 'penalty' is not limited to criminal sanctions but includes any serious unfavourable treatment. The proposed ban on entering Australia is punitive in this sense, particularly given its severity – a permanent ban on entry, for any purpose, and irrespective of the personal circumstances of individual refugees.

Secondly, the ban would only apply to refugees who sought to enter Australia 'illegally' under Australia's immigration law. It would not apply to refugees who entered 'legally' on any visa, including under Australia's refugee resettlement program. As such, the penalty of a lifetime ban would be imposed 'on account of' illegal entry. Article 31(1) prohibits punishing such refugees because even if entry is technically 'illegal' under Australian law, everyone has the right to seek asylum under international law – with or without a visa.

Thirdly, while Article 31(1) applies to refugees 'coming directly' from a country or territory in which their life or freedom were threatened, this does not mean that refugees are only protected from punishment if they travel immediately to Australia from their home country. Rather, the protection still applies to refugees who may transit through other countries on their way to Australia, so long as those other countries did not offer effective protection. Refugees cannot be expected to remain in transit countries which do not recognise refugee status or the Refugee Convention, and where they are classed as 'illegal' migrants and remain vulnerable to the risk of exploitation, including trafficking, if they remain, and to expulsion to the risk persecution at any time. Nor can refugees be expected to remain in countries which will not, or cannot, ensure they are safe from physical violence, or provide basic humanitarian needs such as adequate food, water, housing and health care.

Fourthly, situations like those above count as 'good reasons', under Article 31(1), for 'illegal' entry to Australia. There is no visa available for people travelling to Australia to seek asylum. Nor is there an orderly international queue for recognised refugees. For most refugees, the chances of being resettled are extremely low. Only where a refugee already has effective protection in another country would the Refugee Convention allow penalties to be imposed.

⁷ This legal authority includes UNHCR and ExCom standards, state practice, drafting history, and the jurisprudence of leading national courts; and is reflected in commentary in Andreas Zimmerman (ed), *The 1951 Convention relating to the Status of Refugees and its 1967 Protocol: A Commentary* (Oxford University Press, 2011), article 31; Guy S Goodwin-Gill, 'Article 31: Non-Penalization, Detention, and Protection' in Erika Feller, Volker Turk, and Frances Nicholson (eds), *Refugee Protection in International Law* (Cambridge University Press, 2003), 185; Cathryn Costello, Yulia Ioffe, and Teresa Büchsel, UNHCR Legal and Protection Policy Research Series, 'Article 31 of the 1951 Convention Relating to the Status of Refugees' (July 2017).

Fifthly, the proposed ban would constitute unlawful discrimination against refugees on the basis of their method of arrival, which international law clearly prohibits, as indicated above.⁸

Finally, the Bill is overbroad in its reach. If people have found permanent protection elsewhere – including as citizens of another country – and subsequently seek to travel to Australia, they would have no basis on which to remain here beyond the term of their visitor (or other) visa. Australia could remove someone who overstayed their visa, and it could cancel – or refuse at the outset to issue – a visa to someone considered to be of bad character. The Bill is therefore excessive and unnecessary.

The Bill undermines the international protection regime

Despite being called ‘regional processing’, Australia’s bilateral arrangements with Nauru and PNG for the transfer, holding and processing of asylum seekers has in fact undermined efforts to build true regional cooperation on refugee protection based on fair and genuine responsibility-sharing with Australia’s neighbours in the Asia-Pacific. Australia’s suite of asylum policies – including mandatory detention, maritime interceptions, ‘push backs’, and offshore processing in Nauru and PNG – have done significant damage to its moral standing and relationships with its neighbours in the region on this issue. Moreover, they have failed to deliver the promise of solutions to several hundreds of refugees. Apart from the humanitarian commitment of the United States under President Obama, and of New Zealand consistently over time, and despite Australia’s concerted diplomatic efforts with dozens of governments, no other State has been prepared to participate in what is perceived as an ill-conceived and highly injurious policy. Australia’s disrespect for basic principles of international human rights and refugee law, including the right to seek asylum, has also set a precedent for the erosion of these principles in the region.

If Australia is truly committed to enhancing regional cooperation on refugee protection, its priorities should be to rebuild goodwill and credibility, and to ensure that it has a positive impact on asylum policies and effective practices in the region. There are a range of ways in which these outcomes could be achieved, including by modelling best practice and repealing those aspects of Australian immigration law and policy that violate international law. The first step towards these goals would be a resolution of the untenable situations in Nauru and PNG. However, rather than move closer to a resolution of these situations, the Bill and its proposed ban would move Australia further away from it.

Offshore processing in Nauru and PNG in its present form is cruel, inhuman and degrading, particularly for those targeted, but also for those called upon to administer the policy at the front end; it has no discernible future, and should be brought to an end as soon as possible. Responsibility for resolving this situation lies primarily with Australia, and an exit strategy should be fundamentally about linking people to appropriate durable solutions. There may need to be a suite of options, rather than relocating everyone to the same place under the same conditions, but as international law and best practice demonstrate, these options should also include at least some solutions within Australia where appropriate or legally

⁸ International Covenant on Civil and Political Rights, arts 2(1), 26.

necessary (for example where families have been divided or where it would be in the best interests of refugee children). The focus should be on where people can go *to*, rather than where they excluded from.

Concluding comments on the Minister's discretionary power to lift the ban

The Bill gives a discretionary power to the Minister to lift the ban as an exceptional measure in individual cases, if she or he believes it is 'in the public interest' to do so. This power is inadequate to address the concerns outlined above. The Bill offers no guidance as to the meaning of the 'public interest', which is an amorphous and largely discretionary test that is not amenable to judicial scrutiny. The history of non-compellable, non-reviewable discretionary power is an affront to accountability in a democratic State committed to the rule of law. Moreover, the Bill includes no requirement for the Minister to take into account Australia's international human rights obligations as part of that assessment, which is particularly concerning given that the human rights outlined above, including the right to family unity, are indisputable and their effective protection requires that they be backed up by law, if arbitrariness is to be avoided.

Please do not hesitate to contact us at kaldorcentre@unsw.edu.au or on (02) 9385 4075 if we can provide any further information.

Yours sincerely,

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