



7 August 2019

Committee Secretary
Legal and Constitutional Affairs Legislation Committee
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

By email: legcon.sen@aph.gov.au

Dear Committee Secretary,

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

We welcome the opportunity to comment on the Migration Legislation Amendment (Regional Processing Cohort) Bill 2019 [Provisions] and would be pleased to provide further detail to this submission at any Committee hearings.

The Asylum Seeker Resource Centre (**ASRC**) is an independent, not for profit organisation working to support and empower people seeking asylum in Australia and those subject to offshore processing in regional processing countries, Papua New Guinea (Manus Island) and Nauru.

The ASRC's submission is based on 18 years of experience working with and providing services to people seeking asylum. The ASRC works directly with people in Nauru and Papua New Guinea, providing casework services via our Detention Rights Advocacy Program and legal assistance via our Human Rights Law Program. The ASRC is also a member of the Medical Evacuation Response Group (MERG), established in 2018 to manage transfer requests as part of the 'Medevac Law'.

Executive Summary

The ASRC strongly opposes the passage of the Migration Legislation Amendment (Regional Processing Cohort) Bill 2019 [Provisions], (**the Bill**).

The Bill provides for a bar on valid visa applications by adults who were taken to a regional processing country after 19 July 2013. This includes 'transitory persons', meaning people living in Australia who have been transferred from Nauru or Papua New Guinea back to Australia, for medical or other reasons. It prevents onshore and offshore visa applications by both of these groups, including tourist, partner and skilled visas.

The ASRC strongly disagrees with the government's claims that the Bill is compatible with Australia's international human rights obligations, and opposes the passage of this Bill for the following reasons:

- The Bill will have the effect of splitting up families and preventing family reunion, in breach of Australia's international obligations under the *International Covenant on Civil and Political Rights (ICCPR)*, the *International Covenant on Economic, Social and Cultural Rights (ICESCR)*, and the *Convention on the Rights of the Child (CRC)*. This will severely impact upon Australian family units involving partners, children and siblings and undermine Australia's commitment to core provisions of human rights treaties.
- The lifetime ban on refugees within the regional processing cohort is a penalty against people seeking asylum because it unlawfully discriminates against people based on the time and mode of their arrival, in breach of Article 31 of the Convention Relating to the Status of Refugee (**'the Refugees Convention'**).

- The Bill is unnecessary and unjustified, as it does not meet a legitimate purpose.
- The power of the Minister to lift the bar on valid applications in the 'public interest' is broad and not subject to review and is an insufficient mechanism for complying with Australia's international human rights obligations.
- The Bill will have an extremely detrimental effect on the mental health of already vulnerable people.
- This Bill, which bars people resettled in third countries from applying for visas to Australia in the future, is an unnecessary and unhelpful distraction from the urgent need to provide a suitable solution for resettlement. We believe that this Bill must not be used to delay closing offshore detention centres and moving those people who remain in those centres, to safety and finding them durable protection while preserving family unity.

Overview of changes

The Bill amends the Migration Act 1958 (**the Migration Act**) and the Migration Regulations 1994 (**the Regulations**) to prevent certain unauthorised maritime arrivals (**UMAs**) and transitory persons from making valid temporary or permanent visa applications.

- 1 The Bill inserts a new definition in subsection 5(1) of the Migration Act of 'member of the designated regional processing cohort.' The new definition (Item 1) includes:

people who arrived by boat who were at least 18 years of age and were taken to a regional processing country after 19 July 2013; and

transitory persons who were at least 18 years of age and were taken to a regional processing country after 19 July 2013 under the Maritime Powers Act 2013.

- 2 The new definition of regional processing cohort specifically excludes children: subsection (5)(b)(ii) of the Migration Act definition makes clear that a transitory person is only a member of the designated regional processing cohort if they were at least 18 years of age when they were first taken to a regional processing country.

The Bill inserts a new bar on valid applications by certain unauthorised maritime arrivals. Item 4 provides for subsections 46A(2AA), 46A(2AB) and 46A(2AC) after subsection 46A(2). New subsection 46A(2AA) provides that an application for a visa is not a valid application if it is made by a person who:

is an UMA under subsection 5AA(1); and

after 19 July 2013, was taken to a regional processing country under section 198AD; and

was at least 18 years of age on the first or only occasion after 19 July 2013 when he or she was taken to a regional processing country

- 3 Similar to the existing bar contained in section 46A (which prevents UMAs lodging valid visa applications), new subsection s46A(2AB) is a provision for the Minister to exercise his discretion to lift the bar under section 46A(2AA) if the Minister thinks it is in the public interest to do so.

The Bill inserts a new bar on valid visa applications by transitory persons in subsections 46B(2AA), 46B(2AB) and 46B(2AC) (Item 13). New subsection 46B(2AA) provides that an application for a visa is not a valid application if it is made by a transitory person who:

after 19 July 2013, was taken to a regional processing country under Division 7 or 8 or Part 3 of the Maritime Powers Act; and

was at least 18 years of age on the first or only occasion after 19 July 2013 when he or she was so taken to a regional processing country.

- 4 Similar to the new provisions described above, new subsection 46B(2AB) provides that if the Minister thinks that it is in the public interest to do so, the Minister may determine that subsection 46B(2AA) does

not apply. The Minister's power to lift the bar is personal, non-compellable and it is for the Minister to decide what is in the public interest.

These application bars described above have effect as follows:

For people outside Australia, this affects any applications made after 4 July 2019 (when the Bill was introduced); and

For people inside Australia, this affects any visa applications made after the Act commences.

People affected by the Bill

The Bill specifically affects anyone who was taken by the Australian Government to Nauru or Papua New Guinea after 19 July 2013, if they were an adult at the time they were first taken there. It also applies to people intercepted on the seas by the Australian Government and transferred to Nauru or Papua New Guinea. The Bill also affects those 'transitory persons' now living in Australia who have been transferred from Nauru or Papua New Guinea back to Australia, for medical or other reasons.

However whilst the bar on valid applications only applies to these cohorts, the Bill also has wider implications for other cohorts, particularly people who have family who are within the definition of 'regional processing cohort.'

Presently there are around 30,500 people who arrived by boat residing in the Australian community, which is comprised of:

Around 6,000 people who arrived on or before 12 August 2012;

24,500 people who arrived between 13 August 2012 and 31 December 2013 who are known as the 'Fast Track cohort,'

Around 17,000 of this total group have now been found to be refugees and granted three year Temporary Protection Visas (**'TPVs'**) or five year Safe Haven Enterprise Visas (**'SHEVs'**), with the others mainly still undergoing processing and remaining on bridging visas.

Since 19 July 2013, asylum seekers who travelled to Australia by boat have been transferred to one of the regional processing centres on Papua New Guinea or Nauru pursuant to section 198AD, contained in Subdivision AD of the Migration Act. There are currently around 600 people who remain in offshore regional processing centres, (approximately 370 in Papua New Guinea and approximately 230 people in Nauru, changing daily based on medical transfers).

In addition there are over 1000 transitory persons residing in Australia, who have been transferred from Nauru or Papua New Guinea back to Australia, predominantly for medical reasons.

The Bill does not directly affect (but may still indirectly affect, as set out below):

people seeking asylum in Australia who have not been on Nauru or Papua New Guinea after 19 July 2013, or

people who have arrived on refugee and humanitarian visas through resettlement.

Concerns with the Bill

Separation of families

The greatest impact of this Bill will be on those people still in Nauru and Papua New Guinea who have been separated from family in Australia, as well as 'transitory persons', who are already in Australia but have no lawful status in Australia and who face expulsion and renewed family separation. The key point is that there are approximately 1600 people (around 600 still in regional processing centres and around 1000 'transitory persons' already in Australia), who, if this Bill were to pass, will face a lifelong ban on being granted any kind

of Australian visa, irrespective of their circumstances, including the presence of immediate family in Australia. Approximately one quarter of the 1600 people who would be subjected to this law, are children.

The impact of this would be to leave this cohort in indefinite legal limbo: most have been found to be owed protection and are unable to return to their country of origin; they are currently without access to any resettlement plan or durable protection in any other country; yet they face a permanent ban from being granted any visa in Australia, the country from whom they sought protection and were instead transferred against their will to Papua New Guinea and Nauru, and now face being cast into an indefinite legal purgatory.

There are many people in Australia, including citizens, permanent residents, TPV or SHEV holders/applicants and Bridging Visa holders who have family members in Nauru and Papua New Guinea or who are now in Australia but as 'transitory persons'.

Thus the effect of the Bill extends beyond the 'regional processing cohort' to effectively ban family reunification for these people in Australia, preventing them from rebuilding their lives and leading to severely adverse effects on mental health. For people who are citizens and permanent residents, they are essentially a second class of citizen in Australia who, if this Bill passes, will be unable to sponsor their parents, partners and children to Australia.

For people seeking asylum within the pre-August 2012 cohort or the Fast Track group, according to current government policy, they will only ever be eligible for TPVs or SHEVs which do not allow travel outside of Australia except with permission of the government. This permission is only granted in specific circumstances prescribed in policy. Pursuant to current policy, permission to travel to another country will only be granted if the Department believes there are 'compassionate or compelling circumstances', including:

to visit close relatives who the applicant has not seen in over 1 year

to care for close relatives who are seriously ill

to attend the funeral of a close relative

TPV and SHEV holders are also unable to use the passports of their home country and may only access a UN Convention travel document. Travel outside of Australia on a travel document is extremely limited, and many countries do not allow even temporary entry to people who only hold a travel document, not a passport.

As such, the practical reality is that any person in Australia who has family members in Papua New Guinea or Nauru is effectively prevented from travelling overseas to be with them on a temporary or permanent basis. The effect of this Bill is to compound this damage to the family unit, so that their family currently in Nauru or Papua New Guinea will never be able to visit them in Australia either.

The detriment caused by an inability to reunify with family cannot be underestimated. The ASRC has previously expressed its concerns to this Committee about the impact that temporary protection visas have on a family's ability to reunify, and the devastating consequences this has on the mental health of those impacted.¹ From our experience working with people seeking asylum over the past 18 years, the ability to operate as a family unit is one of the key determiners of mental health for people seeking asylum.

This Bill effectively takes away the last opportunity that many TPV and SHEV holders will have to see their family members and will result in substantially and unnecessarily increasing the mental health burden on people who have already been adjudged to be owed protection.

This Bill denies refugees their right to reunite with close family members; rights explicitly recognised by governments globally.² It also interferes with the rights of refugee children. These provisions breach Australia's

¹ See Refugee Council of Australia 'Addressing the Pain of Separation for Refugee Families', November 2016 accessed at <https://www.refugeecouncil.org.au/wp-content/uploads/2018/12/Addressing-the-pain-of-separation-for-refugee-families.pdf> and see also ASRC's submission to the Legal and Constitutional Affairs Legislation Committee, "Inquiry into Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014", 31 October 2014.

² 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).

obligations under the *Convention on the Rights of the Child* (CRC),³ the *International Covenant on Civil and Political Rights*, (ICCPR)⁴ and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR)⁵.

Case study 1 – families split across Fast Track and Manus/Nauru

Shakiba arrived in Australia by boat with her husband and two children in September 2012. When fleeing their country of origin, they were travelling with Shakiba's brother, Hossein. They became separated in a transit country.

Seeking to reunite with his sister as his only remaining family member, Hossein continued his journey to Indonesia. Hearing that his sister and her family were in Australia, Hossein boarded a boat for Australia after 19 July 2013. Upon interception by the Australian Navy, Hossein was transferred to Papua New Guinea, where he has remained. Shakiba, her husband and children are currently applying for a SHEV under the Fast Track system. Hossein now faces separation from his only remaining family members.

Shakiba and her family, even if granted a SHEV, can only travel overseas with permission of the Australian government in certain limited circumstances, and even then may face difficulties travelling overseas to visit Hossein whilst they hold a temporary visa and a UN Convention travel document.

Case study 2 – partners affected by visa ban

Sara is an Australian citizen by birth who worked on Papua New Guinea from January - December 2014. During her time there, she formed a relationship with Mahan. They married under Papua New Guinean law in November 2015.

Under the proposed Bill, Sara will never be able to sponsor Mahan to come to Australia and he will not even be able to visit as a tourist to see Sara. Sara would be faced with the impossible decision of relocating to a third country or being separated from Mahan indefinitely.

Breach of Refugees Convention

The Bill undermines basic principles of international human rights and refugee law (including the right to seek asylum) and unlawfully punishes refugees for entering Australia by boat. This Bill therefore contravenes Article 31(1) of the Refugee Convention and the good faith interpretation of the treaty. It sets an alarming new low for refugee protection standards globally and will further erode international norms of refugee protection, which will likely be replicated in other states, which like Australia, also seek to avoid their obligations to refugees.

The ASRC has been highly concerned about the human rights abuses resulting from poor conditions and lack of access to adequate health services on Manus and Nauru and the prolonged effective detention in those places since offshore processing has been in place since July 2013.

³ Article 8(1) and article 3(1) to give primary consideration to the 'best interests' of children in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

⁴ Art 23(1), recognising that 'the family is the natural and fundamental group unit of society and is entitled to protection by society and the State'.

⁵ Art 10(1) recognizing that 'the widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children'.

The effect of this offshore processing policy has been punishment of people for seeking safety in Australia, and this Bill further targets a highly vulnerable group of refugees by denying them the opportunity to ever apply for a visa to Australia.

It is important to note that this Bill disproportionately and unlawfully penalises people of a certain cohort, being boat arrivals who happened to enter Australia after an arbitrary date. The proposed ban on entering Australia is punitive, particularly given its severity (a permanent ban on entry) for any purpose and irrespective of the personal circumstances of individual refugees. This unlawfully and cruelly targets and discriminates against a particular group of people.

The Bill has the practical effect of retrospective application, insofar as it adversely affects people's rights and legitimate expectations and operates to punish them for past actions of seeking safety.

There are also around 30,000 people seeking protection in Australia who have already suffered through punitive changes in policy, and whose mental health is extremely vulnerable. This cohort were adversely affected by the radical changes to the refugee status determination process ushered in by the *Migration and Maritime Powers (Resolving the Asylum Legacy Caseload) Act 2015*, which amongst other things:

- reintroduced Temporary Protection Visas and created a new category of visas known as Safe Haven Enterprise Visas;

- introduced a system of Fast Track processing involving limited merits review on the papers;

- provided for conversion of permanent Protection visa applications not finally determined at 16 December 2014 to be converted to TPVs.

For these people, even if the Bill does not directly affect them, those people who have family members on Nauru and Papua New Guinea or who are now 'transitory persons', will also be adversely affected through their inability to reunify with family members. The imposition of this restriction is entirely arbitrary, and will result in cohorts of people seeking asylum having vastly different rights in relation to family unification.

In addition, this Bill and the measures contained therein will lead to continuing demonisation in public discourse which adds yet another burden on their already fragile mental health.

Unnecessary and unjustified

The Bill itself is entirely unnecessary and unjustified. Through the existing visa regime, the Government already has at its disposal full powers to determine who may or may not be granted a visa to travel to or remain in Australia. Section 46B of the Migration Act (Cth) 1958 already prevents 'transitory persons' from lodging any visa application in Australia unless the Minister personally exercises discretions to allow individuals to do so where the Minister considers it to be in the 'public interest'. Those already, or yet to be, re-settled in other countries, also remain subject to Australian migration laws regarding the grant of visas, including character provisions.

Secondly, the Migration Act already contains extensive powers to ensure that visas of any kind are obtained legitimately. For example, partner visas contain a 'genuine and continuing relationship' requirement which is assessed at the time of application for the visa, the time of decision, and two years subsequently. Partner visas are frequently refused or cancelled on the basis of non-genuine relationships, and there are criminal penalty provisions for entering into false marriages. All temporary visas (including visitor and student visas) contain a 'genuine temporary entrant' requirement, which balances the legitimate intentions of the person and their objective circumstances.

Thirdly, the specific nature of this Bill (being only applicable to those people falling within the finite 'regional processing cohort' provides no general deterrent to others seeking safety in the future as the Bill, if passed, will not apply to them. The Bill therefore cannot be seen to be fulfilling any deterrent purpose.

In light of the existence of these rigorous requirements and policy framework, the restrictions imposed by the proposed Bill will not add any further integrity to those visa processes. It will only serve to impose punitive restrictions that lack a policy justification.

Ministerial discretion insufficient

The Ministerial discretion contained in the Bill is completely insufficient to address the concerns outlined above.

The Bill contains provisions to allow the Minister to 'lift the bar' and allow a refugee to make a valid application for a visa, where the Minister considers that it is in the 'public interest'.

According to the Statement of Compatibility with Human Rights, the public interest may be enlivened where there are 'circumstances involving Australia's human rights obligations towards families and children'. However, the ASRC believes that a Bill which is incompatible with principles of family reunion and the interests of the child as outlined above, cannot be tempered by Ministerial discretion which purports to protect these rights.

In our experience, there is a lack of procedural fairness associated with the personal powers of the Minister, which often leads to unjust and unpredictable results. The policy guidance on exercise of the powers is usually extremely limited, and rarely exercised even in the most compelling of cases.

As the application bars proposed in subsections 46A(2AA) and 46B(2AA) operate as a bar on making a valid application, there is no right to review of any adverse decision.

Conclusion

The ASRC reiterates its opposition to the Bill on account of the concerns outlined above. The priority should be the urgent resettlement of the people detained on Manus and Nauru, and finding a durable solution for those still in regional processing centres, which accords with international human rights principles. We believe that this Bill has no connection to this aim.

The ASRC believes this Bill should not be passed in its entirety.

Yours sincerely

Kon Karapanagiotidis, CEO