



**Submission to Senate Legal and Constitutional
Affairs Legislation Committee**

**Inquiry into the Migration Legislation Amendment (Regional
Processing Cohort) Bill 2016**

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1. Introduction

1. We thank the Senate Legal and Constitutional Affairs Legislation Committee (the **Committee**) for the opportunity to provide submissions on Migration Legislation Amendment (Regional Processing Cohort) Bill 2016 (the **Bill**).
2. The Bill inserts sub section 46(2AA) into the Migration Act (1958) (Cth) (the **Act**) which has the effect of preventing those persons whom have arrived in Australia as “unauthorised maritime arrivals” who were at least 18 years of age as at 19 July 2013 from making an application for an Australian visa.
3. In our view, this Bill infringes on civil liberties and Australia’s various international legal obligations. The haphazard introduction of the Bill and limited time provided to make submissions has been cause for limitations in these submissions. An appropriately sufficient time frame would have allowed us the opportunity to engage with the wider community on the far reaching implications this Bill may have, and its impact on Australia’s international legal standing.
4. It is important to note and for the Committee to remember that it is not illegal for persons to seek asylum. To penalise persons for seeking asylum via certain avenues is, in our view a breach of international law. Put simply, the stated objective of this Bill, which is to deter people from coming to Australia by boat, is an objective that defies the international legal community’s agreed position on the status and treatment of refugees.
5. Should the Bill pass, Australia will have passed laws in direct conflict with its international legal obligations. This conflict with Australia’s international legal obligations will mean that serious constitutional doubts will be raised over the Bill’s validity, ultimately giving rise to the possibility that the Bill may be met with significant legal challenge.

6. It is therefore the view of the Muslim Legal Network (NSW) that this Bill should not be passed. The foregoing submissions outline our reasons.

2. The Proposed Amendments

7. The categories of persons who may fall under the designated regional processing cohort includes non-citizens currently in Nauru and Papua New Guinea under regional processing arrangements, those who have returned home or been removed to their home country, those who have been resettled in a third country, and transitory persons in Australia (who are already subject to statutory visa application bars).
8. There are multiple categories of persons that will be subjected to the application of this Bill either retrospectively, or prospectively. The impact on such categories of persons raises a concerning number of international human rights issues. We address some of these issues below.

Penalising people for seeking asylum

9. Australia is a signatory and is therefore bound by the UN Convention and Protocol on the Status of Refugees (**CPSR**). The CPSR sets out a number of protections that signatory countries must afford to those persons who enter their countries seeking asylum. Among them is Article 31 which states:

“1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

2. The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The

Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.”

10. The proposed Bill does indeed impose penalties on asylum seekers on the basis of their illegal entry or presence. As set out in the CPSR, this is an arbitrary, and unlawful means by which to discriminate between asylum seekers. The Muslim Legal Network (NSW) is of the view that the existence of this arbitrariness in the Bill renders it potentially unlawful, and in direct conflict with Australia’s obligations under the CPSR.

Protection of the family unit

11. The broad brush of persons who will be affected by these provisions means that circumstances may arise where the application of the Bill will necessitate a separation of the family unit. This may occur simply because certain family members arrived before 19 July 2013 while others, also found to be genuine refugees, arrived after this date. It may also occur where children were not at the age of 18 as at 19 July 2013, but adult family members were. The effect of these provisions in such circumstances will be to permanently dismantle the family unit.
12. There are a number of International Conventions that discuss the importance of respecting and maintaining the family unit. The International Convention on Civil and Political Rights (**ICCPR**) states the following:

“Article 17 ICCPR

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

Article 23 ICCPR

1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

Article 24 ICCPR

1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his

status as a minor, on the part of his family, society and the State.”

13. In addition, Article 3 of the Convention on the Rights of the Child (**CRC**) provides:

“1. 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. “

14. The response in the Explanatory Memorandum to Australia’s failure to uphold and abide by these International Conventions is that the Minister retains a discretion to lift the bar, and in exercising this discretion, may take into account the interests of maintaining the family unit. According to the Explanatory Memorandum, the existence of this discretion is therefore sufficient to uphold Australia’s international legal obligations.
15. The Muslim Legal Network (NSW) does not agree with this position. The Ministerial discretion referred to, and contained in this Bill is both personal and non-compellable. The Minister need not take any specific matter into account apart from ‘public interest’ and it is in fact up to the Minister to determine what is the ‘public interest’. Furthermore, this unfettered discretion is not subject to any mechanism of review and the Minister cannot be held to account for failing to exercise his discretion. In such circumstances, it is the view of the Muslim Legal Network (NSW) that this discretion is not sufficient to safeguard Australia’s international obligations to maintain and uphold the family unit. Again, in our view, this type of legislative approach causes Australia to be in contradiction with its clearly defined and long-standing international obligations under the ICCPR and the CRC.

Australia’s non-refoulement obligations

16. In addition to the ICCPR and CRC, Australia is also a signatory to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (**CAT**). The CAT places obligations on Australia

to not return persons to a country in certain circumstances. For example, Article 3(1) of the CAT states:

“No State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture. “

Furthermore, Articles 6 and 7 of the ICCPR state:

*“Article 6 ICCPR
Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.*

*Article 7 ICCPR
No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.”*

17. Although the Explanatory Memorandum states that *“Any person who is in the designated regional processing cohort and who is in Australia now or in the future will not be removed from Australia in breach of Australia’s non-refoulement obligations”*, it is difficult to see how such a statement can be made with any certainty. The proposed amendments do not exclude any person from being a member of the designated regional processing cohort in circumstances where this would be a breach of Australia’s non-refoulement provisions. Instead, the Minister has discretion to lift the bar on such persons as they see fit. As outlined above, this is an unfettered discretion and it is the view of the Muslim Legal Network (NSW) that it falls far short of complying with Australia’s international legal obligations.

Right to equality and non-discrimination

18. The Muslim Legal Network (NSW) disagrees with the Explanatory Memorandum’s view that the continued differential treatment of the persons within the designated regional processing cohort is for a legitimate purpose, based on relevant objective criteria and is reasonable and proportionate in the circumstances.

19. The Government has many existing laws in place to prevent persons from circumventing Australia's migration program. The proposed measures in this Bill are overreaching, arbitrary and further damage Australia's international legal standing in a way that is disproportionate to their stated objectives.

Right to security of the person and freedom from arbitrary detention

20. The Explanatory Memorandum states that:

"the Bill is unlikely to result in an increase in the number of non-citizens in Australia who will be ineligible to apply for a visa and subsequently liable for detention under the Migration Act. This is because the non-citizens in Australia to whom the bar will apply are already subject to application bars while in Australia in most circumstances."

21. The Muslim Legal Network (NSW) makes two observations in response to this statement. Firstly, there is simply no evidence proffered that the Bill will in fact not result in an increase of persons in Australia who will be ineligible to apply for a visa. In the absence of *any* evidence, this statement cannot be accepted. Secondly, the fact that existing bars exist, and that most persons would already be subject to these bars, is further evidence that these amendments are unnecessary, and overreaching in their application.

Practical Ramifications

22. The Bill, if implemented, will have significant practical implications. Much of these practical difficulties will be caused by the Bill's failure to provide any mechanism of review, except in the form of unfettered Ministerial discretion.

23. An example is where a person is relocated to a third party country and eventually resettles in a role which requires them to travel to Australia for business, a visa will not be forthcoming without ministerial intervention. Similarly, if an individual is resettled in a third party country and is invited to Australia for a particular engagement or is simply required to remain in Australia in transit as a result of logistical necessities, again Ministerial intervention would be required.
24. These cursory examples highlight how poorly thought out and dangerous the Bill can be from a practical perspective.
25. The Act already provides a number of safeguards, legal protections, powers and discretions to the Minister to exclude persons as the need arises. It is clear that this Bill is unnecessary and designed as a political tool and not any substantive deterrent.

3. Conclusion

26. The Muslim Legal Network (NSW) thanks the Committee for the opportunity to provide these submissions.