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14 November 2016

SUBMISSION TO THE SENATE LEGAL AND CONSTITUTIONAL AFFAIRS COMMITTEE INQUIRY INTO THE MIGRATION LEGISLATION AMENDMENT (REGIONAL PROCESSING COHORT) BILL 2016

We thank the Committee for the opportunity to make a submission to the Inquiry in relation to this Bill.

The ANU Migration Law Program, within the Legal Workshop of the ANU College of Law, specialises in developing and providing programs to further develop expertise in Australian migration law. These include the Graduate Certificate in Australian Migration Law and Practice, which provides people with the necessary knowledge, skills and qualifications to register as Migration Agents, and the Master of Laws in Migration Law.

The Migration Law Program has also been engaged in developing research into the practical operation of migration law and administration in Australia, and has previously provided submissions and presented evidence to a number of Parliamentary Committee inquiries, conferences and seminars.

For the reasons below, we submit that the Bill in its current form should not be passed.

What the Bill proposes

The Bill seeks to amend the *Migration Act 1958 (Cth)* to prohibit the making of a valid visa application after 8 November 2016 by any person who entered Australia as an unauthorised maritime arrival after 19 July 2013 and was taken to a regional processing country (Nauru or Papua New Guinea), and who was at least 18 years old at the time of transfer. In effect, the Bill proposes that this 'regional processing cohort' will not be able to make a valid visa application to enter Australia at any time in the future. This is so irrespective of where they have been resettled, or if they have acquired permanent residence or citizenship of another country.

The 'bar' on the making a valid visa application may be lifted by the Minister using non-compellable and personal powers, where the Minister considers that it is in the 'public interest' to do so.

A flawed rationale

It has long been the Government's policy that no asylum-seeker who arrives by boat will be resettled in Australia.

The measures contained in the Bill are based on a flawed rationale. This is that the lifetime ban on the 'regional processing cohort' from making a valid visa to enter Australia is necessary to deter people from making dangerous boat journeys to Australia. If, as the Government has so consistently claimed, the policy measures it has implemented since it was first elected in 2013 have been successful in deterring boat arrivals, it is difficult to see why this policy is necessary.

The Statement of Compatibility with Human Rights, attached to the Bill's Explanatory Memorandum states:

The regional processing centres in Papua New Guinea (PNG) and Nauru are central elements of the Government's border protection strategy. Preventing UMAs in the designated regional processing cohort from applying for a visa to enter Australia will strengthen the Government's ability to reduce the risk of non-citizens ***circumventing Australia's migration laws****. It will also prevent non-citizens undermining the Australian Government's return and reintegration assistance packages and* ***resettlement arrangements****.*[1]

In a doorstop interview, Minister Dutton explained that:

We're not going to allow people who have sought to come by boat to come to Australia through a backdoor and we are not going to allow sham marriages to facilitate that.[2]

It is difficult to understand why, if preventing 'back door entry' to Australia by the 'regional processing cohort' is the purpose of the Bill, that a lifetime ban on making a valid visa application is necessary. A refugee who has been resettled from Nauru or PNG to, for example, the United States (as is being proposed) would not be in a position to 'circumvent Australia's migration laws' if they were to apply for a visa to enter Australia. For example, if a member of the 'regional processing cohort' wished to apply for a partner visa permitting them to enter and remain in Australia, their application would need to be assessed against the criteria contained in *Migration Act* and *Migration Regulations*. There is a robust assessment process for determining whether a person may be granted a partner visa,

[1] Explanatory Memorandum, Migration Legislation Amendment (Regional Processing Cohort) Bill 2016, 21 emphasis added.

[2] http://www.minister.border.gov.au/peterdutton/Pages/Doorstop-Interview,-Press-Gallery,-Parliament-House.aspx

including a requirement to demonstrate that they are a genuine relationship with an Australian citizen or permanent resident. Contrary to the Minister's assertion, it is not the case that a person would be granted a partner visa to enter and remain in Australia on the basis of a 'sham marriage'.

A member of the 'regional processing cohort' who wished to visit Australia to see family or friends would need to be assessed against the criteria for the grant of a visitor visa. The person would need to satisfy the decision-maker that they genuinely intend to stay in Australia (only) temporarily if they are to be granted the visa. In addition, the duration of these visas is limited, and a mandatory condition 8503 is imposed on visitor visas, which means that a person cannot apply for another visa to extend their stay (other than a protection visa or a temporary visa of a specified kind).

The Potential Application of the Bill

Despite assurances from the Department that the measures contained in the Bill apply only to those who are currently located in a regional processing country, the definition of a 'member of the designated regional processing cohort' is *not* limited to those currently held on Nauru and Manus Island.

Subsection 5(1) applies to unauthorised maritime arrivals who arrived after 19 July 2013 and were transferred to a regional processing country. This definition would include *future* asylum-seekers who may attempt to travel to Australia, and who are taken to a regional processing country.

The Bill also has the potential to impact on asylum-seekers who are currently located in Australia. The date indicated in the definition provides that the legislation does not affect any person taken to a regional processing country *before* 19 July 2013, however all persons taken to a regional processing country *after* 19 July 2013 are potentially within the scope of the Bill.

While the provisions apply only to members of the 'regional processing cohort' who are over 18 years of age, it will apply to persons who are unauthorised maritime arrivals, but who were subsequently permitted to enter and remain lawfully in Australia.

Asylum-seekers in Australia who are part of the Asylum Legacy Caseload, (including those who arrived as minors) who may be sent to a regional processing country in the *future* will become a 'member of the designated regional processing cohort'.

Many of these minors are now young adults. They received correspondence from the Department of immigration and Border Protection in 2013 stating that they

"… may be taken to a regional processing country if and when it becomes practicable to do so".

Thousands of members of the Asylum Legacy Caseload are still waiting for their protection claims to be assessed and finally determined, and others are awaiting the outcome of review processes. The status of these asylum-seekers remains uncertain, and the potential that they may in future be caught by the provisions in this Bill serves only to exacerbate their existing stress and anxiety.

Contrary to Australia's international obligations

The proposed legislation is contrary to the requirements of Article 31 of the Refugee Convention. This provides that States must not impose a penalty on asylum seekers on account of their 'illegal entry'. This Bill imposes a penalty on those who arrived by boat, were transferred to a regional processing country, and were found to be refugees, by denying them the opportunity to re-enter Australia at some future time. It effectively creates a class of citizens of third countries who are prohibited from making a valid application for a visa to enter Australia, namely former asylum-seekers who are members of the 'regional processing cohort'.

The Bill is unprecedented and we know of no other country that has sought to impose a similar penalty. It is also a significant departure from the existing migration law in relation to exclusion from Australia. Under existing law, a person who has had their visa cancelled on character grounds can be permanently excluded from Australia.[3] There are some good public policy reasons for this, including the protection of the Australian community. By contrast, refugees are people to whom Australia owes international obligations and who have not committed crime.

The Bill also fails to respect the recognised international protection afforded to the family. It is well recognised in international law that family is a fundamental unit of society.[4] We note that many on Manus Island and Nauru already have family members in Australia. The proposed ban will deprive individuals of the right to be reunited with their families. This is both cruel and unnecessary.

The measures are also inconsistent with a key tenet of Australia's migration program: to promote family migration. We note that the Government intends to introduce a 5-year temporary visa for parents of Australian citizens or permanent residents in July 2017.[5] It is

[3] See 'special return criterion' *5001*, in Schedule 5 to the *Migration Regulations 1994* (Cth). The criterion is relevant to almost any application for a visa. The effect is that, unless the Minister decides otherwise, another visa cannot be granted to a person who has had a previous visa cancelled under s 501 (character cancellation).

[4] See, UN General Assembly, Universal Declaration of Human Rights , 10 December 1948,

217 A (III), Article 16(3); UN General Assembly, International Covenant on Civil and Political Rights , 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, Article 23(1),

[5] Department of Immigration and Border Protection, *Introducing a temporary visa for parents* (September 2016).

inconsistent for the Government to actively promote family reunification in respect of Australian citizens and permanent residents in this way, yet at the same time seek to restrict a similar right to family reunification for members of the 'regional processing cohort'.

Ministerial discretion is inadequate

The Bill allows the Minister to 'lift the bar' on making a valid visa application where he or she considers that to do so is in the 'public interest', a term not defined in the *Migration Act* or *Migration Regulations*. In effect, this gives the Minister the discretion to decide whether or not to lift the bar and allow a person to make a visa application. Given the Government's unequivocal policy position that no person arriving by boat will be resettled in Australia, it is difficult to envisage the circumstances in which the Minister would be prepared to exercise his discretion to permit a person to make a valid application for a visa which would permit them to remain in Australia as a permanent resident. Where important rights such as the right to family is at stake, it is inappropriate for decisions to be personally made by the Minister, with little or no oversight or judicial scrutiny.

It is difficult to come to any other conclusion than that this Bill is, and is intended to be, punitive in nature. It does little to reassure the international community that Australia is committed to honouring its international obligations towards refugees and asylum-seekers. For those who have been languishing on Nauru and Manus Island, a durable solution needs to be found for them. Importantly any such durable solution must contain the right to family reunification. For the reasons outlined in this submission, this Bill should not be passed.

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