



Refugee Council of Australia

SENATE LEGAL AND CONSTITUTIONAL AFFAIRS COMMITTEE

INQUIRY INTO THE MIGRATION LEGISLATION AMENDMENT (REGIONAL PROCESSING COHORT) BILL 2019

The Refugee Council of Australia (RCOA) is the national peak body for refugees, people seeking asylum and the organisations and individuals who work with them, representing over 190 organisations. RCOA promotes the adoption of humane, lawful and constructive policies by governments and communities in Australia and internationally towards refugees, people seeking asylum and humanitarian entrants. RCOA consults regularly with its members, community leaders and people from refugee backgrounds, and this submission is informed by their views.

RCOA welcomes the opportunity to provide feedback on the Migration Legislation Amendment (Regional Processing Cohort) Bill. We are, however, troubled by this proposed legislation.

We oppose this Bill for the following reasons:

- The Bill is entirely unnecessary and unreasonable because the *Migration Act* already contains extensive powers and safeguards to ensure that visas of any kind are obtained legitimately;
- The Bill would have the effect of preventing some families, who have been separated by the circumstances of their flight, from ever seeing each other again, at least without the personal permission of the Minister;
- The Bill punishes the most vulnerable of people by preventing them from ever coming to Australia, even as a visitor and even if they meet all the other criteria;
- The Bill has caused enormous anxiety among people seeking asylum in Australia, creating a real risk to their already fragile mental health, and
- The Bill undermines refugee protection, human rights and the rule of law.

1. The effect of this Bill

1.1. The proposed Bill affects anyone who was taken by the Australian Government to Nauru or Manus Island 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 Manus Island. The Bill also affects those people now living in Australia who have been transferred from Nauru or Manus Island back to Australia, for medical or other reasons.

1.2. The Bill introduces new “visa bars” into the *Migration Act 1958* (Cth) that effectively prevent this cohort of people from ever making a valid visa application, without the permission of the Minister for Immigration. This would result in a “lifetime ban” on ever setting foot on Australian soil.

1.3. The Bill also introduces specific visa bars that invalidate applications for specified visas under the *Migration Regulations 1994* (Cth), including applications for business visitor visas, Electronic Travel Authority visas, Refugee and Humanitarian (Class XB) visas, and combined applications made by their family for other permanent visas.

1.4. These bars would apply:

- To visa applications made outside Australia **from 4 July 2019** (when the Bill was introduced) that have not been determined by the time the Bill passes, and

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- To visa applications made within Australia on the day the Bill commences (which is the day after Royal Assent).

1.5. In considering who this Bill would exclude in the future, it is worthwhile to consider the experience of Associate Professor Munjed Al Muderis, MB ChB FRACS, FAOrthA, now a leading orthopaedic surgeon who came to Australia by boat in 1999 to seek asylum. After getting protection, he later applied to re-enter Australia as a skilled migrant, so that he could bring his mother here. Dr Muderis' pioneering work in osseointegration surgery has seen him help amputees – including soldiers and war victims – walk again using robotic implants. If this Bill had been in force 20 years ago, he could not have done so, depriving Australians of his much-needed skills.

2. Our concerns

Separation of families

2.1. The greatest impact of this Bill will be on those people on Nauru and Manus Island who have been separated from family in Australia.

2.2. There are a number of families currently separated by offshore processing. For example, we have met with one family in Melbourne (wife and three children) who are currently on bridging visas. Their father, who they thought was dead, is on Manus Island.

2.3. Even if the mother and children are given temporary protection in Australia (which is all they could receive under current government policy), they will not be able to bring the father to Australia or even travel overseas to visit him, unless the government believes there are compelling circumstances to allow them to do so. If this Bill passes, the father could not even attend the funeral of a child or his wife without the Minister's personal permission.

2.4. There are no guarantees, or indeed clarity, about how the US resettlement deal will handle resettlement of these split families.

2.5. The Government has said it could meet this concern through the use of the ministerial discretion in the Bill. However, this ministerial discretion:

- Does not have to be considered by the Minister at all;
- Can only be considered personally by the Minister; and
- Can be made on any grounds at all.

A court could only review whether the person is part of the cohort.

2.6. For those in Australia who are seeking protection now, they will be granted only temporary protection visas which do not give them the right to resettle their family or even to travel overseas without the permission of the Australian Government. These are children that the Australian Government has, in effect, deprived of parents.

2.7. The effect of this Bill is to compound this, so that family members in Nauru or Manus Island will never be able to visit children or parents in Australia either. Surely, these are families that have already suffered enough.

Punishing the most vulnerable of people

2.8. This Bill would effectively prevent anyone we have sent to Nauru or Manus Island from ever coming to Australia, even for a visit on a tourist visa, or to apply as a skilled migrant and contribute to Australia's economy. This effectively punishes people for life, for doing something which is not only legal but also a human right — claiming asylum.

2.9. Even worse, this Bill targets the very people that Australia has already punished the most. This Bill punishes people who have been languishing in Nauru or Manus Island for over three years in indefinite detention in awful conditions. These are people who have been abused and assaulted, and who have tried to kill themselves, as this Committee has already heard, and is currently hearing in another inquiry.

Sending people over the edge

2.10. We are deeply concerned about the effect even the announcement of this Bill has already had on people seeking asylum and refugees in this country. There is an urgent mental health crisis,

not only on Nauru and Manus Island, but among those seeking protection within the Australian community. There are people who have been living in our community for over seven years who are still waiting for the government to make decisions on their claims. They have lived with fear, uncertainty and hostility for years, waiting for the safety they had hoped for when they came here.

2.11. For these people, even if the Bill does not directly affect them, their fear that it will and the continuing demonization of them in the media could be the tipping point that sends them over the edge.

2.12. The bar on applying for a visa is currently connected to a person's status as an "Unauthorised Maritime Arrival". This Bill would extend that bar even when they cease to be an "Unauthorised Maritime Arrival" and even when they have residency or citizenship of another resettlement country.

Unnecessary and unjustified

2.13. These effects cannot be justified, because the Bill itself is entirely unnecessary. The Government's main justification appears to be that these people might be able to enter Australia illegitimately, through (for example) faking marriages with Australians.

2.14. Yet the *Migration Act* already contains extensive powers and safeguards to ensure that visas of any kind are obtained legitimately, which are used routinely. Visas are routinely refused or cancelled because there is evidence of an ulterior purpose. This Bill is not limited to fraudulent applications. Instead, it prevents entry even if a person would otherwise meet all the criteria for a visa, simply because this person has been on Nauru or Manus Island.

Repudiating refugee protection, human rights and the rule of law

2.15. The Bill adds to the suite of already extreme measures that breach Australia's international legal obligations. By targeting people who come by boat, the Bill would breach Article 31 of the Refugee Convention, which prohibits penalising people seeking asylum for their mode of entry. This Article simply recognises the reality that, when you need to flee danger, it is highly unlikely that you can delay while you fill out forms and wait on a decision for some other form of visa.

2.16. More significantly, the Bill is effectively repudiating the purpose of the Refugee Convention: to protect people fleeing persecution. Rather than protecting, we are now persecuting the very people the Refugee Convention is designed to protect.

2.17. The Bill also repudiates another cornerstone of human rights — the right to equality and protection against discrimination. This Bill entrenches discrimination against people from certain countries, by denying them the right to be treated equally with other visa applicants.

2.18. As in so many other areas of current refugee policy, this Bill also undermines the rule of law. The Bill is retrospective, in that it is punishing people for actions they have already taken. The Bill once again adds to the continuing pattern of leaving people's rights at the mercy of the Minister's personal discretion.

Parliamentary Joint Committee on Human Rights

2.19. The Parliamentary Joint Committee on Human Rights (PJCHR) conducted its scrutiny reports on this legislation and its previous iteration from 2016.

2.20. The PJCHR found that of "the human rights concerns raised, the committee is unable to conclude that the measure is compatible with the right to equality and non-discrimination, the right to protection of the family and rights of the child. The objective identified in the minister's response, that is, seeking to impose a penalty on those who seek to enter Australia for the purpose of claiming asylum, cannot be a legitimate objective for the purpose of limiting human rights under international law."¹

2.21. The PJCHR also found that "the proposal to permanently ban a group of people who have committed no crime and are entitled as a matter of international law to seek asylum in Australia,

¹ Report 2 of 2017, 2.121, p. 89.

regardless of their mode of arrival, from making a valid Australian visa application is a severe and exceptional step.”² (p.15).

2.22. The Government’s statement of compatibility does not sufficiently address the human rights implications of the Bill and, as the PJCHR notes, its justification of the limitations on the rights of people impacted by this Bill are not reasonable, necessary or proportionate.

A cruel Bill

2.23. For far too long, these people have been punished for seeking protection. They have committed no crime by claiming asylum, yet they have already suffered years of detention, abuse and neglect. Now, the Australian Government is preventing this small group of people, out of all the people in the world, from even visiting Australia at any time in the rest of their lives. This is a cruel Bill and should not be passed.

Recommendation 1

RCOA recommends that this Bill should not be passed.

If the Australian Government were to pursue this legislation, RCOA recommends:

- a.) The Australian Government first confirm permanent, durable solutions for all people that would be currently impacted by this Bill;*
- b.) The Australian Government insert language into the Bill that would ensure that Australia does not contribute to the forced separation of families, with additional amendments and safeguards that go beyond the non-compellable personal discretion of the Minister, as this power is notoriously problematic, and*
- c.) The Australian Government consider other options for people in the cohort to apply for visas, including visitor and skilled visas, so that Australia can benefit from their tourism and skilled contributions.*

² Report 9 of 2016, 1.60, p. 15.