Lawyers for the People
AUSTRALIAN LAWYERS ALLIANCE

Migration Legislation Amendment (Regional Processing Cohort) Bill 2016 [Provisions]

Submission to the Senate Standing Committee on Legal and Constitutional Affairs

14 November 2016

Suite 5 Level 7, 189 Kent Street, Sydney NSW 2000 | GPO Box 7052, Sydney NSW 2001 | ABN 96 086 880 499
T - +61 2 9258 7700 | **F** - +61 2 9258 7777 | **E** - enquiries@lawyersalliance.com.au | **W** - www.lawyersalliance.com.au

Lawyers for the People

AUSTRALIAN LAWYERS ALLIANCE

Lawyers for the People
AUSTRALIAN LAWYERS ALLIANCE

CONTENTS

Who we are

The Australian Lawyers Alliance is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA started in 1994 as the Australian Plaintiff Lawyers Association, when a small group of personal injury lawyers decided to pool their knowledge and resources to secure better outcomes for their clients – victims of negligence. While maintaining our plaintiff common law focus, our advocacy has since expanded to criminal and administrative law, in line with our dedication to justice, freedom and rights.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.[1]

[1] www.lawyersalliance.com.au

Introduction

1. The Australian Lawyers Alliance (ALA) welcomes the opportunity to have input into the inquiry by the Senate Standing Committee on Legal and Constitutional Affairs into the *Migration Legislation Amendment (Regional Processing Cohort) Bill*.

2. This submission argues that the Bill should not be passed.

3. We note that the period available for submissions was unreasonably short, particularly given the significance of the changes the Bill proposes to make. The public was first notified of the inquiry on Thursday 10 November. On Friday 11 November we were notified that the deadline for submissions would be the following Monday, 14 November. This left one full working day for interested parties to prepare considered submissions, giving rise to questions regarding the genuine nature of the consultation process.

This Bill should not be passed

4. While the ALA does not support the policy that people who travel here by boat should not be able to settle here, this Bill does much more than implement this policy. It prevents all people who have sought refuge in Australia, in line with their right under international law, from ever visiting Australia for any reason.

5. It has the potential to tear families apart (for those who might seek a family reunification visa), to deprive Australia of world-leading skills that are lacking in Australia (for those who might seek a skilled workers visa), or to gain valuable insights from leading experts who might be invited to Australia to share their expertise in academic or other contexts. It will also unreasonably refuse tourist visas.

All this merely because at one time in their past the visa applicants asked Australia to protect them from persecution, as it has promised to do. It is also cruel and unnecessary.

6. There is no need for a ban of this nature. It will not be effective or enforceable, it would apply to a minute number of people compared to the number of visas that are issued each year, it is retrospective, it places Australia in breach of its international obligations and it may well be liable to successful challenge in domestic courts.

The case has not been made that this Bill is needed

7. The Minister for Immigration and Border Protection, Mr Peter Dutton, has stated that the purpose of this Bill "is to reinforce the government's longstanding policy that people who travel here illegally by boat will never be settled in this country".[2]

8. When initially announcing the change on 30 October, Prime Minister Malcolm Turnbull said "[t]his will send the strongest possible signal to the people smugglers… it is incredibly important that we send the clearest message… They must know that the door to Australia is closed to those who seek to come here by boat with a people smuggler."[3]

[2] Commonwealth, *Parliamentary Debates*, House of Representatives, 8 November 2016, 1, (Peter Dutton, Minister for Immigration and Border Protection).

[3] Dan Conifer, "Manus Island, Nauru refugees to be banned from entering Australia, Malcolm Turnbull says", *ABC News*, 30 October 2016, http://www.abc.net.au/news/2016-10-30/manus-nauru-refugees-asylum-seekers-to-be-banned-turnbull-says/7978228.

9. However, no people smuggler boat has landed in Australia for nearly two and a half years: 840 days according to the Minister for Immigration and Border Protection, Mr Peter Dutton.[4]

10. Despite this long period without an asylum seekers boat arriving in Australia, the government announced on 13 November that military defences had been increased in advance of announcing a deal to resettle refugees in the USA (discussed further below). Any perceived additional likelihood that an asylum seeker boat will land in Australia as result of announcing this deal would be more than adequately responded to by this increase. There is no need to be sending any message to people smugglers, as people smugglers are not bringing refugees and asylum seekers to Australia and there are now even greater barriers to doing so.

11. The Minister has also stated that the Bill will prevent people from applying for visas fraudulently, for example with recourse to "sham" marriages. He went on to argue that "[a]ny visa that allows a former Illegal Maritime Arrival to come to Australia has the potential to provide a pathway to permanent residence".[5]

12. However, effective protections currently exist against such marriages or other fraudulent visas. A blanket ban as is included in this Bill is not needed for this purpose, and is a significant overreach to achieve it in any case.

13. It has also been argued that this Bill will introduce protections that will allow refugees to be resettled in other countries. On 13 November, the Prime Minister and the Minister for Immigration announced a deal with the USA to resettle refugees in RPC countries. While details were scarce at the time this submission was drafted, the ALA is supportive of finding lasting solutions to the situation of people in RPCs

[4] Press Conference, 13 November 2016, aired live on ABC News 24.

[5] Ibid.

in suitable third countries and was pleased to note that there was no suggestion that this deal was contingent on the passage of this Bill. The deal will only apply to people who are currently on Nauru or Manus Island (and selected people in Australia who have been on those islands), and so will not act to encourage people smugglers from trying to bring asylum seekers to Australia in the future.

14. New Zealand has also been mooted as a country that could take some refugees and asylum seekers from Nauru and Manus Island, having offered to do so on numerous occasions. Soon after this Bill was announced, however, the New Zealand Prime Minister stated that he could not foresee a situation in which New Zealand would accept refugees for permanent resettlement who did not have equal rights to travel to all other New Zealanders.

15. As such, this deal could in fact have a detrimental impact on the Federal government's ability to resettle people on the RPCs into the future.

Enforceability and resources

16. It is unclear how this Bill would be enforced if it were to become law. People regularly change names, particularly where people are changing nationalities and translate their names into a local formulation. It is not submitted that these name changes occur for cynical reasons, they are usually simply translation matters, or perhaps the result of marriage. However, they will mean that an individual who is ostensibly intended to be subjected to this ban would be unable to be identified if they applied for any visa to Australia.

17. Significant resources are likely to be required to attempt to enforce this Bill, as there would be a need to check each visa applicant against the list of banned individuals. Given the tiny number of people that it would impact, compared to the number of visas issued each year, this would be a further unjustifiable waste of resources in the

name of "border protection". There is also a risk that the ban could result in "false positives", with people with similar names being caught up in the ban and having visas unfairly refused. They would then need to challenge the unfair decision or would be unreasonably prevented from visiting Australia.

18. Australia's cruel asylum seeker policies have already seen many billions of dollars spent on causing immeasurable harm to thousands of people who have asked for Australia's help. There would be no benefit in investing further resources administering this Bill, or in forcing visa applicants to go through additional hurdles.

Ministerial discretion

19. Minister Dutton has said that the most unreasonable elements of this ban could be remedied by the exercise of Ministerial discretion. Ministerial discretion, however, is no guarantee that fairness will be reintroduced into the assessment of visa applications. Rather, it introduces unpredictability into an already incredibly complex visa system.

Retrospective

20. Applying this ban to people who were sent to RPCs after 19 July 2013 means that it is retrospective. This is fundamentally unfair to people who in good faith sought asylum in Australia in line with their rights under international law that Australia has agreed to be bound by.

International obligations

21. This Bill will put Australia in breach of its international obligations under the *Convention Relating to the Status of Refugees* (1951) (the Convention) and the *Protocol Relating to the Status of Refugees* (1967).

22. Under the Convention, Australia has agreed that people fleeing persecution have a right to seek asylum, and to grant such people refugee status if they can demonstrate a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion.[6]

23. Article 31 of the Convention clarifies that refugees should not be penalised for "their illegal entry or presence" or presence without authorisation in a country in which they are seeking asylum. It goes on to prohibit restricting the movement of refugees other than to the extent that it is necessary. No restriction is permitted after their refugee status has been regularised or they have been admitted into a third country.

24. These are fundamental protection which recognised the reality of the manner in which refugees often flee to seek safety from persecution.

25. Imposing a lifetime ban on any visa due to the means of arrival is clearly a penalty in breach of this article, and clearly seeks to restrict the movement of refugees resettled in third countries.

26. This Bill would accordingly directly conflict with obligations found in article 31.

[6] Convention, article 1A(2).

Legality of the Bill

27. The ALA believes there are serious questions as to whether the Bill would be found to be valid if challenged.

28. In 2010, the High Court found that s46A of the *Migration Act* 1958 (Cth) can "be seen as reflecting a legislative intention to adhere to that understanding of Australia's obligations under the Refugees Convention and the Refugees Protocol that informed other provisions made by the Act".[7]

29. Given what is outlined above regarding the clear conflicts of this Bill with the Convention, the law may not withstand challenge.

Impact of announcements of this nature

30. The ALA is aware that announcements of this nature have in the past been followed by mass incidents of self-harm, as detailed in our report *Untold Damage*.[8]

31. That report detailed two spikes in incidents of self-harm. The first, in September 2014 on Nauru, followed announcements by the then-Minister for Immigration and Border Protection that temporary protection visas would be re-introduced, but would not be available to refugees on Nauru who would still be denied protection in Australia.[9] The second, in January 2015 on Manus Island, followed a series of

[7] *Plaintiff M61/2010E v Commonwealth of Australia*, (2010) 243 CLR 319, [2010] HCA 41, [34]. Section 198A, which has since been repealed, was similarly interpreted as reflecting the legislative intention that the *Refugees Convention* inform provisions of the Act.

[8] Available at: http://www.lawyersalliance.com.au/ourwork/untold-damage/untold-damage. See in particular pages 107-113.

[9] See *Untold Damage*, http://www.lawyersalliance.com.au/ourwork/untold-damage/untold-damage, 108-110.

health and safety incidents and an announcement that 50 detainees would be forcibly transferred to insecure accommodation at Lorengau, on Manus Island.[10]

32. Examples such as these make it clear that announcements by government officials that more restrictions will be placed on refugees and asylum seekers can have a serious detrimental impact on their mental states. Given the unclear purpose of this Bill, such an announcement is reckless.

33. Depending on support mechanisms that were put in place in RPCs at the time that the announcement of this Bill was made, it is also possible that an offence under the *Work Health and Safety Act* 2011 (Cth) (WHS Act) may have been committed. As Commonwealth workplaces, the WHS Act applies to the work of the DIBP in immigration detention facilities and other work conducted by the DIBP on Nauru and Manus Island. Under s19(2) of this Act, it is an offence to put the health and safety of other persons, including refugees and asylum seekers, at risk.

34. Making announcements of draconian changes in policy in full knowledge that announcements of this nature have been followed by spikes in self-harm in the past without adequate support measures being introduced could be seen as putting the health and safety of refugees and asylum seekers at risk. This conclusion is supported by the fact that there is no indication that this policy will achieve its stated aims or be effectively unenforceable, and is unnecessarily cruel.

Priorities

35. The ALA believes that the focus of the government would be better directed to resolving the situation of asylum seekers and refugees currently in regional

[10] See *Untold Damage*, http://www.lawyersalliance.com.au/ourwork/untold-damage/untold-damage, 110- 113.

processing centre (RPC) countries, Nauru and Manus Island, and the broader refugee crisis in the Asia Pacific region. The dire circumstances that asylum seekers and refugees are living in in RPCs has been extensively documented and is the subject of a separate inquiry by your Committee, to which we have made a submission.[11]

36. To that end, the ALA is pleased that the announcement made on Sunday 13 November, referred to above, that an arrangement has been reached that refugees in RPCs will be resettled in the USA. We are comforted to note that the announcement did not make the deal conditional on the passage of this Bill, and caution against any link being made.

37. If passed, this Bill is likely to be a distraction at best, and have a negative impact at worst, on efforts to work out a regional approach to resolving irregular migration in the Asia Pacific region.

Recommendations

The Australian Lawyers Alliance believes that this Bill should not be passed for the following reasons:

- It is a draconian measure that unreasonably punishes people for exercising their right to seek asylum in Australia;
- There has been no coherent case made that this Bill will achieve its stated aims of deterring people smugglers or fraudulent visa applications from refugees or asylum seekers;
- It will be difficult or impossible to enforce, and is likely to take proportionately significant resources to do so;

[11] The submission can be found here: http://www.lawyersalliance.com.au/documents/item/710; and appendices here: http://www.lawyersalliance.com.au/documents/item/711.

- There is a risk that there would be "false positives", and visas would be unreasonably refused to those who had never attempted to reach Australia by boat;
- The assurance given by Minister Dutton that Ministerial discretion will safeguard against unfairness is not persuasive;
- It is in breach of Australia's international obligations;
- It may be in breach of Australia's domestic law;
- Announcing laws of this nature has given rise to serious risks to health and safety in the past and may well again; and
- Priorities in refugee and asylum seeker policy should relate to resolving the situation of people in RPC countries and establishing a regional solution. This Bill does nothing to achieve either of these things and may well distract from them.