

Chapter 2

Key issues

2.1 A number of key issues were raised about the Migration Legislation Amendment (Regional Processing Cohort) Bill 2016 (the bill) during the inquiry. These ranged from the need to augment Australia's suite of border protection measures, concerns regarding the impact of the bill on people and families, and the interaction of the bill's provisions with Australia's human rights obligations. This chapter will outline issues raised by submitters and witnesses, and provide the committee's views on the bill.

2.2 During the committee's inquiry, the Government announced that agreement had been reached with the United States of America (United States) (in addition to earlier agreements with Papua New Guinea and Cambodia), for the resettlement of refugees currently in regional processing centres:

This further agreement is with the United States and it will not under any circumstances be available to any future illegal maritime arrivals (IMAs) to Australia. The priority under this arrangement will be for resettlement of those who are most vulnerable, namely women, children and families. US authorities will conduct their own assessment of refugees and decide which people are resettled in the US. Refugees will need to satisfy standard requirements for admission into the US, including passing health and security checks.¹

2.3 The committee was advised that the bill is part of a comprehensive set of measures designed to form a 'strengthened protective shield' to deter unauthorised boat arrivals from coming to Australia.² In addition to the resettlement agreement and the bill, other measures include:

- A surge in intelligence and disruption operations, including with international partners;
- The largest civil maritime operation in Australia's history; and
- The maintenance of ongoing and enduring regional processing on Nauru, accompanied by a 20-year visa that the Government of Nauru has decided to implement.³

2.4 According to the Department of Immigration and Border Protection (the Department), 857 people in the proposed cohort have registered their interest in being

1 Hon Peter Dutton MP, Minister for Immigration and Border Protection (DIBP), *Media Release*, 'Refugee resettlement from Regional Process Centres', 13 November 2016, <http://www.minister.border.gov.au/peterdutton/Pages/Refugee-esettlement-from-Regional-Process-Centres.aspx> (accessed 18 November 2016).

2 Mr Michael Pezzullo, Secretary, Department of Immigration and Border Protection, *Committee Hansard*, 15 November 2016, p. 21.

3 Mr Pezzullo, DIBP, *Committee Hansard*, 15 November 2016, p. 21.

settled in the United States.⁴ The committee notes that it does not consider that the passage of the bill is dependent on the resettlement deal proceeding.

Purpose of the bill

2.5 The committee heard evidence from several witnesses at their public hearing that the objective of the bill had not been sufficiently explained. Mr David Manne from Refugee Legal stated that currently:

There is no evidence that has been presented by the government, that this is necessary in order to deter people. In fact, we have been told for a long time that everything is under control, that the boats have been stopped and that the measures in place have deterred people. Putting aside the question of whether I agree with those laws and think they meet our obligations that is what we have been told. So the onus, I would submit, is on the government to demonstrate why all of a sudden, out of the blue, these laws were not presented some time ago if they are so necessary.⁵

2.6 A significant number of submissions made to the inquiry argued that the bill is unnecessary.⁶ The Refugee Council of Australia (RCA) noted that the Government's main justification for the bill 'appears to be that these people might be able to enter Australia illegitimately, through (for example) faking marriages with Australians'.⁷ However, RCA explained that the Migration Act already contains extensive powers and safeguards to regulate these matters, and visas are refused or cancelled on a regular basis when evidence is available.⁸

2.7 Concerns were raised that the Explanatory Memorandum (EM) does not sufficiently explain the purpose of the bill, and that the bill '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'.⁹ Ms Fiona McLeod SC advised the committee that more detail of the Government's objectives in the EM 'would certainly be useful to lawyers scrutinising the bill'.¹⁰ The Department has, however, indicated that it believes the scope of the EM is sufficient.¹¹

4 The Department of Immigration and Border Protection, answers to questions on notice, 15 November 2016 (received 17 November 2016).

5 Mr David Manne, Executive Director, Refugee Legal, *Committee Hansard*, 15 November 2016, p. 16.

6 See e.g. Australian Lawyers Alliance, *Submission 18*; Civil Liberties Australia, *Submission 6*; Fr Frank Brennan, *Submission 31*; Dr Anne Junor, *Submission 33*; Dr Helen Johnson, *Submission 43*.

7 Refugee Council of Australia (RCA), *Submission 26*, p. 2.

8 RCA, *Submission 26*, p. 2.

9 Law Council of Australia (LCA), *Submission 8*, p. 11.

10 Ms Fiona McLeod SC, President-elect, LCA, *Committee Hansard*, 15 November 2016, p. 20.

11 The Department of Immigration and Border Protection, answers to questions on notice, 15 November 2016 (received 17 November 2016).

2.8 The Immigration Advice and Rights Centre (IARC) argue that there is nothing in the bill or the EM to support a conclusion that the measures are 'necessary, reasonable or proportionate', concluding that 'the proposed changes are punitive'.¹² Mr Julian Burnside QC stated that '[b]y our increasingly harsh policies, which are explicitly intended to deter boat people, we are contradicting the central purpose of the Refugees Convention'.¹³

2.9 The Department provided further information to the committee to explain why the bill was introduced:

It is a measure that the Australian government has independently determined to be in the national interest, insofar as the measure, should it be passed into law, will form a crucial and, indeed, imperative component of the suite of measures that will form a strengthened protective shield to deter potential illegal immigrants from coming by boat to Australia.¹⁴

2.10 Many submitters offered their view that the bill contravenes Australia's international human rights and other obligations, including the Refugee Convention and the Convention on the Rights of the Child.¹⁵

2.11 Potential human rights issues in the bill are addressed in Attachment A of the EM which describes how these issues are mitigated. Where a non-citizen has family members who have been granted a visa to enter or remain in Australia, and this results in separation, or the continued separation of a family unit, the EM explains that the bill:

...includes flexibility for the Minister for Immigration and Border Protection to 'lift' the bar where the Minister thinks it is in the public interest to do so. This consideration could occur in circumstances involving Australia's human rights obligations towards families and children...¹⁶

2.12 A further potential human rights issue noted in the EM is the right to equal protection of the law without discrimination.¹⁷ Attachment A of the EM explains that any differential treatment proposed by the bill is for a 'legitimate purpose and based on relevant objective criteria and that is reasonable and proportionate in the

12 Immigration Advice and Rights Centre (IARC), *Submission 22*, p. 1.

13 Mr Julian Burnside AO QC, *Submission 30*, p. 6.

14 Mr Pezzullo, DIBP, *Committee Hansard*, 15 November 2016, p. 21.

15 See e.g., Ms Elaine Pearson, Human Rights Watch, *Committee Hansard*, 15 November 2016, p. 1; Mr Daniel Webb, Human Rights Law Centre, *Committee Hansard*, 15 November 2016, p. 1.

16 Explanatory Memorandum (EM), *Attachment A*, p. 23.

17 Article 26 of the International Covenant on Civil and Political Rights (ICCPR) states:
All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

circumstances'.¹⁸ These circumstances include that it is a proportionate response to prevent a 'cohort of non-citizens who have previously sought to circumvent Australia's managed migration program by entering or attempting to enter Australia...from applying for a visa...' and that the bill seeks to discourage people from attempting hazardous boat journeys with the assistance of people smugglers, instead encouraging them to pursue regular migration pathways.¹⁹

2.13 As discussed in Chapter 1, the Government has stated that a key objective of the bill is to discourage refugees from attempting to reach Australia by boat and discourage the people smugglers who have facilitated Illegal Maritime Arrivals. In response to this, witnesses argued that Australia already has a robust visa application process:

...the Australian migration system has very robust processes for determining whether or not someone is granted, for example, a partner visa or for that matter any other kind of visa. There are already robust processes to determine whether people can get a visa to enter Australia. I should note that even if you are granted a visitor visa, for example, to come to Australia it is not the case then that you can just stay in Australia forever. These people are then expected to leave after the duration of their visas. People are subjected to quite rigorous character assessments for visas as well. In that sense, we think those kinds of arguments about sham marriages do not really stack up when you look at the current migration system and how it operates.²⁰

2.14 The Secretary of the Department confirmed for the committee that the proposed measures in the bill, if passed, would discourage refugees from attempting to reach Australia illegally by boat and discourage the people smugglers who have facilitated Illegal Maritime Arrivals:

Yes, indeed. Anything that we do that has the effect of ratcheting up the difficulties involved in getting to Australia, or ever getting to Australia if they get to regional processing, always have a dampening effect on the interest in travelling to Australia—always.²¹

2.15 The Secretary of the Department also confirmed for the committee that the proposed measures in the bill, if passed, would provide a further deterrent to persons seeking to illegally enter, or illegally facilitate entry into, the Australian migration zone.²² Finally, the Secretary explained:

It goes fundamentally to the point I made in my opening statement; that is, that this is part of a suite of further strengthening our 'shield', as I described

18 EM, *Attachment A*, p. 24.

19 EM, *Attachment A*, p. 24.

20 Mr Khanh Hoang, Co-Chair, Refugee Rights Sub-committee, Australian Lawyers for Human Rights (ALHR), *Committee Hansard*, 15 November 2016, p. 2.

21 Mr Pezzullo, DIBP, *Committee Hansard*, 15 November 2016, p. 18.

22 Mr Pezzullo, DIBP, *Committee Hansard*, 15 November 2016, p. 23.

it. The Prime Minister did not mince his words on the weekend and nor will I. Whatever resettlement arrangement you come to, if it is sufficiently conducive with carrots in it to get people to take up the option—because there is only consensual resettlement to deal with this diabolically difficult problem that has been inherited by every official at this table, I can assure you—you need sticks, and this is a stick.²³

Interpretation of the lifetime ban

2.16 The LCA considered that the bill's proposed lifetime ban is inconsistent with international human rights obligations because it discriminates on the basis of arrival method. That is, the ban only applies to boat arrivals that have been taken to a regional processing country (Nauru and Papua New Guinea), and that this constitutes a penalty.²⁴ Further, the Castan Centre for Human Rights Law (Castan Centre) states that:

Banning refugees from coming to Australia would comprise an unlawful penalty which places Australia in breach of Article 31. It is widely accepted that the term 'penalty' does not need to be a criminal punishment. Therefore administrative sanctions and a restriction on freedom of movement would constitute a penalty for the purpose of Article 31.^{25 26}

2.17 The RCA submitted that the bill 'targets the very people that Australia has already punished the most...who have been languishing in Nauru or Manus Island for over three years in indefinite detention in awful conditions'.²⁷

2.18 Save the Children is critical of a lack of detail concerning how the Government intends to implement the ban, and considers that insufficient evidence has been provided to support the claim that the bill will deter potential unauthorised maritime arrivals in the future. They emphasise that:

The decisions made by refugees about the direction in which they flee persecution involve a complex array of issues and may be influenced by a variety of push-factors as well as pull factors and individual circumstances. In our experience, most refugees who have sought to come to Australia by boat in recent years have done so with a view to simply finding a safe place to rebuild their lives.²⁸

23 Mr Pezzullo, DIBP, *Committee Hansard*, 15 November 2016, p. 24.

24 LCA, *Submission 8*, p. 14.

25 Castan Centre, *Submission 20*, p. 5.

26 Article 31(1) of the Refugee Convention states:

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.

27 RCA, *Submission 26*, p. 2.

28 Save the Children, *Submission 21*, p. 3.

2.19 However, the Department clearly stated in evidence to the committee that the measures in the bill are likely to have an important deterrent effect on the people smuggling trade:

The deterrent effect of this legislation has to play out in the future, but our assessment based on hard experience, based on toughening up or ratcheting up certain measures, is that, whenever you announce a measure of this character—either regional processing in Manus or Nauru; changes to visa conditions; the introduction of temporary visas; the introduction of more stringent checking; the escalation of maritime security patrols—we know that, literally sometimes within minutes, if not hours or days—and that has certainly happened since Sunday—there is a dampening effect in terms of the interest, particularly for people who are currently poised in Indonesia.²⁹

Potential impact on families

2.20 The Castan Centre claimed that the bill may cause children residing in Australia to be separated from their parents, and further claimed that the 'ministerial power to lift the bar in order to facilitate family reunification is not expeditious and lacks transparency and certainty'.³⁰

2.21 A number of submissions, including those received from Save the Children, the LCA, Amnesty International, and UNICEF raised concerns regarding whether Ministerial discretion could satisfy Australia's human rights obligations.³¹ For example, the LCA stated:

...if the intention is that the public interest test would provide the capacity to interpret matters on a case by case basis with reference to Australia's international human rights obligations with respect to the rights of families and children, it should be explicitly stated.³²

2.22 UNICEF Australia argue that exclusions for some individuals should be incorporated into the bill, such as whether:

...the individual concerned has family members in Australia (particularly children) and/or it is otherwise in the best interests of a child (wherever residing) for a person to be granted an Australian visa.³³

2.23 The Department advised that situations such as this can be avoided by offering people the opportunity to express an interest in going to a specific third country, and working with them and the other government to find a suitable approach on an individual basis:

The bottom line is that those transitory people—parents with children in Australia—can now express an interest in going to the United States from

29 Mr Pezzullo, DIBP, *Committee Hansard*, 15 November 2016, p. 30.

30 Castan Centre, *Submission 20*, p. 4.

31 LCA, *Submission 8*, p. 16; Save the Children, *Submission 21*, p. 5; Amnesty International, *Submission 17*, p. 2; UNICEF Australia, *Submission 5*, p. 2.

32 LCA, *Submission 8*, p. 16.

33 UNICEF Australia, *Submission 5*, p. 2.

Australia, and then once we understand whether they are interested, we can work through the logistics of that on a case-by-case basis from a compassionate perspective with those other governments that I mentioned.³⁴

Ministerial discretion

2.24 The bill confers a power on the Minister to permit a member of the designated regional processing cohort, or a class of persons within the designated regional processing cohort, to make a valid application for a visa if the Minister considers that it is in the public interest to do so.

2.25 The Department advised the committee that Ministerial decisions on whether to lift the bar would be subject to review, stating that '[t]he personal, non-compellable power of the minister to lift the bar...once engaged, is the subject of judicial review'.³⁵ However, they also advised that the Minister cannot be compelled to exercise their power to consider a particular individual's visa. If the Minister does not exercise their authority to consider an application, it cannot be pursued further by an applicant, and 'there is no review of a decision not to make a decision'.³⁶

Retrospectivity

2.26 Concerns were raised during the inquiry that the bill, if passed, contains measures that have retrospective application, as they would apply from 19 July 2013. There is an argument that this may be unfair because it imposes consequences on the basis of past conduct (coming to Australia by boat) when an individual affected could not have been aware of the bill. According to the LCA, this is discriminatory to those who arrived by boat and were taken to a regional processing country, as opposed to those who arrived via another form of transportation.³⁷ The Castan Centre also argue that this approach is 'inconsistent with well-established common law principles and undermines the rule of law'.³⁸ Ms Fiona McLeod SC explained that in her view, '...retrospective laws are bad in all circumstances. The primary reason for that is that we should be governed by laws that are known and knowable at all times'.³⁹

2.27 The Department advised the committee that the bill relies on a statement made by the then Prime Minister on 19 July 2013, that no one coming to Australia by boat would be settled in Australia. This is included in the second reading speech by the Minister for Immigration and Border Protection when the bill was introduced in the House of Representatives:

34 Ms Rachel Noble, Deputy Secretary, Policy, DIBP, *Committee Hansard*, 15 November 2016, p. 20.

35 Ms Philippa de Veau, General Counsel, DIBP, *Committee Hansard*, 15 November 2016, p. 18.

36 Ms de Veau, DIBP, *Committee Hansard*, 15 November 2016, p. 22.

37 LCA, *Submission 8*, p. 17.

38 Castan Centre, *Submission 20*, p. 2.

39 Ms McLeod SC, LCA, *Committee Hansard*, 15 November 2016, p. 18.

This legislation importantly is consistent with the announcement by former Prime Minister Kevin Rudd who when announcing the signing of the Regional Resettlement Arrangement with Papua New Guinea on 19 July 2013 declared and I quote: 'from now on any asylum seeker who arrives in Australia by boat will have no chance of being settled in Australia as refugees.'⁴⁰

2.28 Some witnesses emphasised that this statement by the former Prime Minister has no legal effect and should not be used by the Government as a basis for claiming that the bill is not retrospective. Mr David Manne from Refugee Legal stated that '...warnings are not laws...were the warning to have been legislated before, this bill would not be before parliament'.⁴¹ However, the committee notes that similar procedures are often used where legislation follows an earlier announcement.

2.29 Although there is scope for the Minister to lift the bar on valid applications in the public interest, submitters expressed concern that wide discretion is granted to the Minister to vary, revoke or change any decision.⁴² Points that have been made include a lack of procedural fairness, no reasons being provided for an adverse decision, and the administrative burden of the Minister being involved in all visa decisions, potentially resulting in lengthy delays in processing.⁴³ It was noted that while reference is made to human rights obligations, the EM does not outline the public interest grounds for the potential exercise of the Ministerial discretion to lift the bar.⁴⁴

2.30 The Secretary of the Department explained at the hearing:

As to the reach back to 19 July 2013, as the minister made clear in his speech, as I think the EM makes abundantly clear and as the Prime Minister and others have stated, that is to capture, by definition, the 'group' that falls within the ambit of this legislation. That is the date which the then Labor government agreed with a change or tightening of its policy about regional processing. Mr Rudd said, that after that date, 19 July 2013—it being significant insofar as it was the date that he and Mr O'Neill, the Prime Minister of Papua New Guinea, signed an agreement pertaining to Manus—persons who were transferred to Manus or Nauru would 'never settle' in Australia. So it has become the policy position that was carried forward by Mr Abbott and then Mr Turnbull. What this legislation seeks to do is to say that...class of people who are defined by that date fall within the ambit of the legislation. So it is retrospective in that sense. It codifies in statute what has been our policy position for 3½ years.⁴⁵

40 Mr Pezzullo, DIBP, *Committee Hansard*, 15 November 2016, p. 31.

41 Mr Manne, Refugee Legal, *Committee Hansard*, 15 November 2016, p. 14.

42 LCA, *Submission 8*, p. 17.

43 LCA, *Submission 8*, p. 18.

44 LCA, *Submission 8*, p. 18.

45 Mr Pezzullo, DIBP, *Committee Hansard*, 15 November 2016, p. 30.

Committee view

2.31 The committee notes the concerns that have been expressed about aspects of this bill by submitters and witnesses in the course of the inquiry. However, it has formed the view that the bill is part of a comprehensive suite of related measures that together act as a deterrent to people risking their lives by illegally coming to Australia by boat, and to those who would ply the illegal people smuggling trade into Australia.

2.32 The committee notes the concerns expressed by some witnesses and agrees that it would be beneficial if the explanatory memorandum clarified in more detail why further measures are necessary beyond those that are already in place to deter unauthorised maritime arrivals; as well as the factors that the Minister should consider in determining whether it is in the public interest to 'lift the bar' on a case-by-case basis.

2.33 The committee is satisfied that the proposed measures are necessary and that there are sufficient safeguards incorporated within the bill to deal with the issues that have been raised.

2.34 The committee notes that, per capita, Australia has one of the most generous refugee resettlement programs in the world. This program provides resettlement services and support for those persons already identified as refugees who are resident in camps around the world.

Recommendation 1

2.35 The committee recommends that the Senate pass the bill.

**Senator the Hon Ian Macdonald
Chair**

