



Australian
Human Rights
Commission

Migration Legislation Amendment (Regional Processing Cohort) Bill 2016

**AUSTRALIAN HUMAN RIGHTS COMMISSION SUBMISSION TO THE SENATE
LEGAL AND CONSTITUTIONAL AFFAIRS LEGISLATION COMMITTEE**

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1 Introduction

1. The Australian Human Rights Commission makes this submission to the Senate Legal and Constitutional Affairs Legislation Committee in relation to its Inquiry into the Australian Government's Migration Legislation Amendment (Regional Processing Cohort) Bill 2016 (Cth) (the Bill).
2. The Bill seeks to prevent people from applying for any Australian visa if they arrived in Australia by boat, were over 18 years of age at the time of arrival, and were taken to a regional processing country after 19 July 2013. According to the Explanatory Memorandum accompanying the Bill, the key objectives of this permanent bar are to maintain the integrity of Australia's lawful migration programs and discourage hazardous boat journeys to Australia.
3. The Bill was referred to this Committee on Thursday, 10 November 2016 for inquiry and report by Tuesday, 22 November 2016. The Committee asked for submissions by Monday, 14 November 2016, although the secretariat indicated that submissions would be accepted after this date.
4. Due to the very short timeframe of this Inquiry, it has not been possible for the Commission to conduct a detailed analysis of the human rights implications of the Bill. As such, this submission provides a brief overview of some of the most significant human rights issues arising from the Bill. The Commission would be happy to provide further information to the Committee if required.

2 Summary

5. The Commission considers that the Bill could significantly limit the enjoyment of human rights by people who sought asylum in Australia, specifically in relation to non-discrimination and family rights. In the Commission's view, the Bill does not contain adequate safeguards to prevent breaches of human rights.
6. The Commission also considers that the Bill would limit human rights without an appropriate justification, as a permanent bar on visa applications does not appear to be a necessary, reasonable or proportionate means of achieving the Bill's objectives.

3 Recommendation

7. The Australian Human Rights Commission recommends that the Bill not be passed.

4 Non-discrimination

8. Australia has an obligation under article 26 of the *International Covenant on Civil and Political Rights* (ICCPR) to ensure that all persons are treated equally before the law and to prohibit discrimination on a range of grounds. As the permanent visa bar proposed in the Bill would apply to a specific group of people, on the basis of their mode of arrival in Australia and date of transfer to

a regional processing country, the Commission considers that this obligation may be engaged by the Bill.

9. The right to non-discrimination may be limited in circumstances where the discrimination is reasonable, necessary and a proportionate response to achieving a legitimate objective.¹ The Commission accepts that discouraging hazardous journeys and ensuring the integrity of Australia's migration program are legitimate objectives. However, we are concerned that the discriminatory grounds on which the visa bar would be applied are not necessary, reasonable or proportionate to achieving these objectives.
10. The group to which the proposed visa bar applies is already prohibited from being resettled in Australia. On 19 July 2013, the then Prime Minister Kevin Rudd announced that people who arrived in Australia by boat after that date would be subject to offshore processing and had no prospect of being resettled in Australia.² On 25 September 2014, the then Minister for Immigration and Border Protection, the Hon Scott Morrison MP, announced that this position would change following the passage of the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth) (Legacy Caseload Bill).³ After the passage of that Bill, asylum seekers who arrived in Australia by boat on or prior to 31 December 2013 and who had not already been taken to Nauru or Manus Island would have their claims for protection assessed in Australia. However, those who had already been taken to a regional processing country would not be resettled in Australia.
11. The reasons given by Prime Minister Rudd for establishing the policy that this group of people would not be resettled in Australia were that Australia needed to 'protect our orderly migration system and the integrity of our borders' and 'to protect lives by dealing robustly with people smugglers'. The Prime Minister did not say that it was necessary to prevent this group of people from ever applying for a visa, even if they were resettled in another country, in order to achieve these objectives.
12. The reasons given by Minister Morrison for continuing this policy (albeit in relation to a smaller cohort) was that it was 'a necessary part of our border protection regime'. At the time he introduced the Legacy Caseload Bill, the Minister said:

[T]he measures I introduced today into the House of Representatives add to that border protection regime already in place and honours our election commitments. They are part of this broader system that is regional deterrence working with those around our region to stop people coming into the region and getting towards Australia. ... Turn back operations have been the key factor in ensuring that these boats don't come to Australia and the bill I have introduced today addresses measures in relation to turn backs. Offshore processing and offshore resettlement are a key part of that package. ... And denying permanent protection visas for those who already arrived in Australia. That is the package.⁴
13. Minister Morrison did not say that it was a necessary part of the package or the system of regional deterrence to prevent this group of people from ever applying for a visa, even if they were resettled in another country.

14. The Explanatory Memorandum fails to provide any rationale for why it is necessary to impose an additional penalty on this cohort in order to achieve the objectives that were previously said to have been achieved through other means.
15. The Explanatory Memorandum does not explain how the existing border protection regime has been shown to be inadequate for the maintenance of its integrity or the discouragement of hazardous journeys to Australia such as to require this new measure.
16. The Commission therefore considers that the limitations on the right to non-discrimination arising from this Bill have not been shown to be reasonable, necessary or proportionate to their aims.

5 Protection of the family

17. Australia has a range of obligations under international human rights law relating to the protection of the family. Under articles 23(1) of the ICCPR and 10(1) of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR), Australia is obliged to afford protection and assistance to the family as the natural and fundamental group unit of society. Australia also has obligations under article 17(1) of the ICCPR and article 16(1) of the *Convention on the Rights of the Child* (CRC) not to subject anyone to arbitrary or unlawful interference with their family. Finally, article 10(1) of the CRC provides that applications by a child or their parents for family reunification should be treated in a positive, humane and expeditious manner.
18. The Commission is aware of a number of cases in which people taken to a regional processing country had relatives (including, in some cases, immediate family members) living in Australia. The proposed permanent visa bar may prevent these individuals from ever travelling to Australia for the purpose of family reunification. The Commission is therefore concerned that the visa bar could lead to the prolonged or permanent separation of these families.
19. The Commission notes that the permanent visa bar would not apply to people who were under 18 at the time they were first taken to a regional processing country. While we welcome this provision, the Commission is concerned that the parents and other adult relatives of these children would still be subject to the permanent bar, which could in turn interfere with family unity.
20. The Statement of Compatibility with Human Rights notes that the Bill includes provisions allowing the Minister to exercise discretionary powers to lift the visa bar so as to protect family unity. The Statement of Compatibility says that this discretion 'could' be exercised where the human rights of children or families would otherwise be breached.⁵ However, the Commission considers that a non-compellable, non-reviewable discretionary power is insufficient to safeguard the rights of children and families. In the Commission's view, such a process cannot ensure consistency or timeliness in decision-making. In addition, the Minister does not have a duty to consider whether to exercise

these powers, even in cases where Australia's human rights obligations are clearly engaged.

21. The Commission also notes that the Minister's discretionary powers are to be guided by a broad public interest test. The Minister is not explicitly required to consider the best interests of the family concerned (or of any children who may form part of that family), nor Australia's international obligations towards that family.
22. As such, the Commission considers that the Bill may result in breaches of Australia's international obligations to protect and assist the family, avoid arbitrary interference with the family and ensure the expeditious reunification of children and parents.

6 Justifiable limitations?

23. As outlined above, the Commission considers that the permanent bar on visa applications proposed in this Bill could significantly limit the enjoyment of human rights by people who sought asylum in Australia. In order for these limitations to be justifiable under international human rights law, they must be a necessary, reasonable and proportionate means of achieving a legitimate objective.⁶
24. The Commission acknowledges that the Bill's objectives are legitimate. However, it is unclear whether a permanent bar on visa applications is rationally connected to these objectives, or is a proportionate measure in the circumstances.
25. Under current Government policy, all asylum seekers who attempt to enter Australia by boat are either turned back at sea or have their claims processed in third countries without the prospect of permanent settlement in Australia. The Explanatory Memorandum does not provide any evidence to demonstrate that the introduction of a retrospective visa bar is likely to have an additional deterrent impact on people who may be currently considering a boat journey to Australia, over and above these existing deterrence measures.
26. In addition, the proposed bar on visa applications would continue to apply for the foreseeable future. The Commission questions whether there is a rational connection between deterring hazardous journeys in the current context, and preventing a person from entering Australia, for any purpose or length of time, decades from now. It is unclear, for example, how preventing a former refugee from visiting Australia as a tourist 20 years in the future would act to discourage people currently fleeing persecution from attempting a hazardous journey to Australia.
27. The broad and permanent nature of the visa bar also raises questions relating to proportionality. The Commission notes, for example, that the proposed bar appears to be considerably more severe than existing visa application bars for people who have breached their visa obligations.
28. A temporary visa holder who overstays their visa, provides false information to the Department of Immigration and Border Protection, is convicted of a

criminal offence in Australia or violates their visa conditions would generally face a re-entry ban of up to three years.⁷ In these cases, a three-year bar is evidently considered sufficient to maintain the integrity of Australia's migration programs, even in cases where the person concerned may have intentionally breached their visa conditions.

29. The amendments proposed in the Bill, however, would impose a permanent bar on individuals who arrived in Australia without a visa, but may otherwise have fully complied with the Department and with the conditions of any visas they have been granted. It is not clear to the Commission that such a restrictive measure, and one which is seemingly incongruous with existing practice, would be a proportionate means of achieving the Bill's objectives. We note that the Explanatory Memorandum does not indicate why the Bill's objectives could not be achieved through any less restrictive means.
30. The Commission also notes that international human rights law generally sets a high threshold for justifying measures which limit the enjoyment of human rights. Such measures are often only permissible in circumstances where they are necessary to protect fundamental interests, such as national security, public order, public health or morals, or the rights and freedoms of others. The Commission is concerned that the justification for the Bill may not reach a sufficiently high threshold to be considered proportional in the circumstances.
31. The Commission also notes that the Minister already has a range of powers under the Migration Act to refuse visa applications in various circumstances. It is unclear to the Commission why these existing powers are insufficient to achieve the Bill's objectives.
32. As such, the Commission considers that the permanent visa bar proposed in the Bill lacks an appropriate justification for the limitation of human rights.

¹ Parliamentary Joint Committee on Human Rights, Guidance Note 1: Drafting statements of compatibility, December 2014, pp 2 and 4. At http://www.aph.gov.au/~media/Committees/Senate/committee/humanrights_ctte/guidance_notes/guidance_note_1/guidance_note_1.pdf?la=en (viewed 15 November 2016).

² The Hon Kevin Rudd MP, Prime Minister, 'Transcript of broadcast on the Regional Resettlement Arrangement between Australia and PNG' Media Release, 19 July 2013. At <http://pandora.nla.gov.au/pan/79983/20130830-1433/www.pm.gov.au/press-office/transcript-broadcast-regional-resettlement-arrangement-between-australia-and-png.html> (viewed 15 November 2016).

³ The Hon Scott Morrison MP, Minister for Immigration and Border Protection, 'Restoring TPVs to resolve Labor's legacy caseload' Media Release, 25 September 2014. At <http://pandora.nla.gov.au/pan/143035/20141222-1032/www.minister.immi.gov.au/media/sm/2014/sm218127.htm> (viewed 15 November 2016).

⁴ The Hon Scott Morrison MP, Minister for Immigration and Border Protection, 'Reintroducing TPVs to resolve Labor's asylum legacy caseload, Cambodia' Press conference, Canberra, 26 September 2014. At <http://pandora.nla.gov.au/pan/143035/20141222-1032/www.minister.immi.gov.au/media/sm/2014/sm218131.htm> (viewed 15 November 2016).

⁵ Explanatory Memorandum, Migration Legislation Amendment (Regional Processing Cohort) Bill 2016 (Cth), p 23.

- ⁶ Parliamentary Joint Committee on Human Rights, *Guide to human rights*, pp 8 [1.22] and 17 [1.54]. At http://www.aph.gov.au/~media/Committees/Senate/committee/humanrights_ctte/resources/Guide_to_Human_Rights.pdf?la=en (viewed 15 November 2016).
- ⁷ Department of Immigration and Border Protection, Re-entry bans fact sheet (n.d.). At <https://www.border.gov.au/Trav/Visa/expired-visas/community-status-resolution-service/exclusion-period-fact-sheet> (viewed 15 July 2016).