

Refugee Legal:

Submission to the Senate Legal and Constitutional Affairs Legislation Committee:

Migration Legislation Amendment (Regional Processing Cohort) Bill 2019

A. Introduction

1. Refugee Legal (formerly the Refugee and Immigration Legal Centre) is a specialist community legal centre providing free legal assistance to asylum-seekers and disadvantaged migrants in Australia.¹ Since its inception over 30 years ago, Refugee Legal and its predecessors have assisted many thousands of asylum seekers and migrants in the community and in detention. Refugee Legal is the largest provider of free legal assistance to such people in Australia and in the last financial year our total client assistance was over 13,800.
2. Refugee Legal specialises in all aspects of refugee and immigration law, policy and practice. We also play an active role in professional training, community education and policy development. We are a member of the peak Department-NGO Dialogue and the Department's Protection Processes Reference Group.
3. Refugee Legal has substantial casework experience and is a regular contributor to the public policy debate on refugee and general migration matters.
4. We welcome the opportunity to make a submission to the Senate Legal and Constitutional Affairs Legislation Committee's inquiry into the *Migration Legislation Amendment (Regional Processing Cohort) Bill 2019 (the Inquiry)*. The focus of our submissions and recommendations reflect our experience and expertise as briefly outlined above.

B. Outline of submissions

5. The amendments to the *Migration Act 1958 (the Act)* and *Migration Regulations 1994 (the Regulations)* proposed by the Bill introduce a new legislative visa application bar which would prevent unauthorised maritime arrivals and transitory people who were taken to a regional processing country after 19 July 2013 and were at least 18 years old at the time (**the designated regional processing cohort**) from making a valid application for an Australian visa, unless permitted by the Minister to do so.
6. The amendments propose to apply the same visa application bar to people who are not only currently subject to regional processing arrangements, but also to those who have departed and are now elsewhere overseas, or to those who may be taken in future to a regional processing country.
7. Refugee Legal has significant concerns with the proposed amendments, and we submit that the Bill should not be passed for the following key reasons:
 - a. No compelling case has been provided by the Government to justify the proposed amendments;

¹ Refugee Legal (Refugee and Immigration Legal Centre) is the amalgam of the Victorian office of the Refugee Advice and Casework Service (RACS) and the Victorian Immigration Advice and Rights Centre (VIARC) which merged on 1 July 1998. Refugee Legal brings with it the combined experience of both organisations. RACS was established in 1988 and VIARC commenced operations in 1989.

Refugee Legal:

- b. The proposed amendments are inconsistent with Australia’s international human rights obligations, including:
 - by entrenching the permanent separation of families, contrary to the International Covenant on Civil and Political Rights (**ICCPR**) and the Convention on the Rights of the Child (**CROC**); and
 - the right to equality and non-discrimination under the ICCPR and the 1948 Universal Declaration of Human Rights (**UDHR**) by unlawfully discriminating against refugees and asylum seekers on the basis of their mode of entry to Australia to seek asylum.
- c. The proposed amendments would operate retrospectively to impact an extremely vulnerable group of individuals in a significantly punitive and discriminatory manner; and
- d. The proposed amendments, by providing a personal non-compellable power vested in the Minister, represent a further concerning and unwarranted expansion of Ministerial power without sufficient safeguards, and would amount to an additional unnecessary administrative burden on the Executive.

C. No compelling case

8. In our submission, no compelling case has been made by the Government to justify the Bill. The amendments proposed would punitively broaden existing visa application bars to prevent members of the designated regional processing cohort from being able to resettle or travel to Australia in future without legitimate justification.
9. The stated purpose of the proposed amendments, according to the Explanatory Memorandum and Second Reading Speech, include to ‘strengthen the government’s ability to reduce the risk of non-citizens circumventing Australia’s migration laws’² and ‘to reinforce the policy that people who travel here illegally by boat will never be settled in Australia.’³ In this regard, we submit that the proposed amendments are unwarranted and unnecessary.
10. According to the Government’s own statistics, with reference to the Second Reading Speech, their objective has already been achieved; ‘Operation Sovereign Borders has successfully halted the criminal people-smuggling networks by denying them a product to sell.’⁴
11. In this regard, we refer to and rely on oral testimony provided to the Legal and Constitutional Affairs Legislation Committee on the *Migration Legislation Amendment (Regional Processing Cohort) Bill 2016* on 15 November 2016, cited in this Committee’s report into that Inquiry:

‘No compelling case has in fact been made for these provisions to pass, noting in particular that we already have extremely harsh measures in place under law in Australia in relation to visa bans and bars. The question that arises here is: why, out of the blue, are these changes seen as so fundamental when we keep being told by the government of the day that everything is under control and that the boats have been stopped? The provisions are, as other members of the panel have noted, inconsistent with our obligations under international law—in particular, with the prohibition on imposing penalties on people who directly flee persecution and seek protection in

² *Migration Legislation Amendment (Regional Processing Cohort) Bill 2019*, Explanatory Memorandum, p 22.

³ *Migration Legislation Amendment (Regional Processing Cohort) Bill 2019*, Second Reading Speech.

⁴ *Migration Legislation Amendment (Regional Processing Cohort) Bill 2019*, Second Reading Speech.

Refugee Legal:

Australia. The provisions would operate retrospectively, which would, at heart, undermine the rule of law in our country.⁵

12. In addition, having regard to the Government's stated purposes of these provisions, a legal mechanism for deterring travel by boat and preventing circumvention of Australia's migration laws currently exists; the legislative bars in sections 46 and 46A of the Act operate to prevent non-citizens in Australia who arrive by boat from applying for a valid visa without the permission of the Minister.
13. As such, Members of the designated regional processing cohort in regional processing countries already in Australia are unable to make a valid visa application without personal intervention by the Minister. Moreover, under the existing regional processing arrangements, non-citizens in regional processing centres outside of Australia to whom the proposed amendments would apply, are also currently barred from making a valid visa application.
14. In our submission, the proposed changes would unreasonably remove the ability for this cohort to pursue legitimate visa pathways to travel to or resettle in Australia, in perpetuity – as refugees or under other visas for which they may otherwise be eligible – including in situations where members of the regional processing cohort:
 - have returned (voluntarily) to their country of origin;
 - have been removed to their country of origin;
 - have been resettled in a third country; or
 - are currently in Nauru and Papua New Guinea.
15. For example, noting the amendments and effective life-time ban from entering and settling in Australia would extend to people resettled in the United States under the Australia–United States Resettlement Arrangement, if someone later married an Australian citizen or permanent resident, they would be barred under the proposed amendments from pursuing legitimate visa pathways, such as a partner visa, to join their spouse and/or children in Australia.
16. Other people who may wish to come to Australia in future for investment, employment or cultural purposes, such as an international sportsperson, artist or skilled medical expert, would also be automatically barred, under the proposed amendments, from applying for an Australian visa they may otherwise be eligible for. For example, Associate Professor Munjed Al Munderis, a world leading Orthopaedic surgeon who arrived in Australia by boat, would be automatically barred from applying for a visa to Australia, even if only to attend a medical conference to share valuable knowledge and expertise for the benefit of Australia, if he were subject to these amendments.
17. We further note that the Minister's statement in the Second Reading Speech, that:

‘Any visa that allows transferees to come to Australia has the potential to provide a pathway to permanent residence. We cannot leave the door open for people smugglers to sell a backdoor passage to our country.’
18. In our submission, such an instance would not constitute a ‘circumvention of Australia's migration laws’. All applications for offshore visas have specific criteria against which applicants are assessed prior to a visa being granted. To impose a lifetime ban on members of the regional

⁵ David Manne, Hansard Transcript, Legal and Constitutional Affairs Committee, Migration Legislation Amendment (Regional Processing Cohort) Bill 2016 Senate Inquiry, 15 November 2016, p10.

Refugee Legal:

processing cohort where they would otherwise be eligible for the grant of a visa, having met the specific visa criteria, is unreasonable and disproportionate in the circumstances.

D. Australia's Human Rights Obligations

Impact on Family Reunification

19. The consequences of the proposed amendments would not only prevent an affected person from resettlement in Australia, but would also prevent reunification with family already resettled in Australia under different legislative frameworks.
20. The UNDHR, ICCPR and CROC recognise the principle of family reunification and the sanctity of and right to family as a fundamental human right:

‘the family is the natural and fundamental group unit of society and is entitled to protection by society and the State.’⁶
21. These principles are supported in international and domestic legal recognition of derivative status afforded to refugees who are part of the same family unit, and also reflected in Australia's policies and legislative provisions which provide for family sponsorship, unity and reunion under Australia's migration programs.
22. As such, in our submission, it is a plainly foreseeable consequence that the proposed legislative changes would run counter to our international obligations by enforcing permanent separation of families and preventing family reunification. In our experience, this is likely to cause lasting and enduring harm to families living within the Australian community.
23. We further submit that, as addressed further below, providing a non-compellable and discretionary power vested in the Minister to allow a valid visa application, is an insufficient safeguard to ensuring Australia's commitment to these international obligations. The question that arises is: why the power to decide whether those who, having come by boat in the past and want to come to Australia perhaps one or two or three or four decades down the track should be vested only in the Minister.

Impact on right to equality and non-discrimination

24. In our submission, the manner in which the proposed amendments discriminate against refugees and asylum seekers who arrived in Australia by boat is disproportionate and without legal justification.
25. Non-discrimination, as defined under Article 26 of the ICCPR, requires that ‘all persons are equal before the law and are entitled without any discrimination to the equal protection of the law...’ Article 31 of the 1951 Convention Relating to the Status of Refugees (**Refugee Convention**) specifically denounces differential treatment of refugees according to their mode of arrival, as does the CROC in respect of the rights to the child contained therein.
26. We submit that the proposed amendments unreasonably discriminate against people lawfully seeking asylum in Australia under international law by boat, without a legitimate purpose, for the following reasons:
 - a. according to the Government's own statistics, the Explanatory Memorandum and Second Reading Speech for this Bill, current legislative and policy measures under

⁶ Art 16(3) UDHR; Art 23(1) ICCPR; Art 8, 10 CRC.

Refugee Legal:

‘Operation Sovereign Borders has successfully halted the criminal people-smuggling networks by denying them a product to sell’⁷;

- b. current legislative and policy measures already operate to prevent members of the regional processing cohort from applying for a valid visa in Australia; and
- c. the proposed changes would unreasonably prevent those effected from entering Australia whether by legitimate visa pathways or otherwise.

E. Retrospective operation

- 27. Refugee Legal also holds deep concerns with respect to the retrospective application of the proposed amendments and the adverse impact this would have on the cohort who sought asylum in Australia, prior to the enactment of the proposed legislative changes.
- 28. The retrospective application of the proposed amendments would operate in a manner which further punishes an already extremely vulnerable group of people for actions that occurred in the past at a time when the Government’s current law and policies to prevent people smuggling and travel by boat to Australia did not exist, without legal justification.
- 29. In our submission, the effect of the proposed amendments offends the longstanding legal principle of the presumption against retrospectivity. Retrospective laws are commonly considered inconsistent with the rule of law as they make the law less certain and reliable. A person who makes a decision based on what the law is, may be disadvantaged if the law is changed retrospectively. It is said to be unjust because it disappoints ‘justified expectations.’⁸
- 30. In addition, the affected group includes people who are extremely vulnerable and disadvantaged; a group who have already been impacted by a change in law and policy in regards to offshore processing. This group currently includes: refugees; people experiencing severe psychological and/or physical ill-health, people who have been subjected to long-term detention, people who have experienced torture and trauma in their country of origin while fleeing, children, victims of crimes and people who have been subjected to long-term separation from their family (some of whom are in Australia).
- 31. In the context of our submission above (in which we contend there is no compelling justification for the proposed amendments) we further submit that the retrospective operation of the proposed amendments would compound the already disadvantaged position of the affected group without justification.
- 32. In Refugee Legal’s experience it is highly unusual for Parliament to pass laws in the immigration or citizenship context that apply adversely and retrospectively, to alter core eligibility criteria for a different and more beneficial statutory migration process.

F. Executive power

- 33. The Explanatory Memorandum states that the expansion of the Minister’s powers provides ‘flexibility’ for the Minister to personally lift the bar ‘where desirable’ to allow a non-citizen in the designated regional processing cohort to apply for a visa and to ensure compliance with Australia’s human rights obligations. In our submission, a personal, non compellable and discretionary power vested with the single highest level of executive would not sufficiently

⁷ *Migration Legislation Amendment (Regional Processing Cohort) Bill 2019*, Second Reading Speech.

⁸ HLA Hart, *The Concept of Law* (Clarendon Press, 2nd ed, 1994) 276.

Refugee Legal:

safeguard against a breach of Australia's obligations under international human rights law and in addition, would be a further administrative burden on the Executive arm of Government.

34. Under the proposed amendments, the Minister has no duty to consider whether to exercise his discretionary and non-compellable power, and may only consider an exercise of the power if the Minister considers that it is in the public interest.⁹
35. 'Public interest' is a term which the High Court has held is difficult to give precise content¹⁰ describing it as 'a discretionary value judgment to be made by reference to undefined factual matters, confined only "in so far as the subject matter and the scope and purpose of the statutory enactments may enable ... given reasons to be [pronounced] definitely extraneous to any object the legislature could have had in view.'¹¹
36. Refugee Legal is profoundly concerned that the expansion of the Minister's personal powers under this Bill is insufficient to ensure compliance with Australia's human rights obligations. It is Refugee Legal's experience that 'public interest' powers in the migration context have been characterised by arbitrary, inconsistent and unpredictable outcomes, in which decisions lack ordinary standards of transparency and accountability under the rule of law. In short, they are characterised by a systemic lack of procedural fairness which would ordinarily apply to visa decision-making. For example, numerous requests to the Minister to exercise personal powers have been refused where, in our submission, there were unique and compelling circumstances for the Minister to intervene and grant a visa to allow a person to remain in Australia.
37. The proposed expansion of the Minister's personal, discretionary and non-compellable powers under this Bill heightens our concerns that their selective use does not afford people affected with an oral hearing to explain their case; such that they are exempt from any form of review other than judicial review by the Federal Court of Australia; and are subject only to the precondition that the Minister believes that it is in the 'public interest' to intervene.
38. Further to this, Refugee Legal is also concerned that a proper consideration of an applicant's individual circumstances, on a case-by-case basis, would burden the Minister's already extensive portfolio, resulting in lengthy processing delays and further administrative and processing costs for the Department.
39. In this regard we note that, with respect to matters regarding family and children, the Explanatory Memoranda state that 'consideration of the individual circumstances of applicants and their relationships with family members allows the Government to ensure that it acts consistently with the above CRC and ICCPR obligations' and that 'consideration could occur... on a case by case basis in consideration of the individual circumstances of the case'.¹²
40. As such, in our submission, not only is the nature of the power inconsistent with such a process of consideration, it would also create an increased administrative burden on the Government.

⁹ *Migration Legislation Amendment (Regional Processing Cohort) Bill 2019*, Explanatory Memorandum, p7.

¹⁰ *Osland v Secretary, Department of Justice* [2008] HCA 37 at [57] per Gleeson CJ, Gummow, Heydon and Kiefel JJ.

¹¹ *O'Sullivan v Farrer* [1989] HCA 61; (1989) 168 CLR 210 at 216 per Mason CJ, Brennan, Dawson and Gaurdon JJ; [1989] HCA 61, quoting *Water Conservation and Irrigation Commission (NSW) v Browning* [1947] HCA 21; (1947) 74 CLR 492 at 505. See also *Osland v Secretary, Department of Justice (No 2)* [2010] HCA 24; (2010) 241 CLR 320 at 329-330 [13] - [14] per French CJ, Gummow and Bell JJ.

¹² *Migration Legislation Amendment (Regional Processing Cohort) Bill 2019*, Explanatory Memorandum, p 24.

Refugee Legal:

G. Conclusion

41. For these reasons we submit that the Act and Regulations should not be amended in the way proposed by the Bill.

Refugee Legal: Defending the rights of refugees

14 August 2019