Human Rights Law Centre

Lifetime visa ban – unjust, unlawful & unnecessary

Submission to the Senate Legal and Constitutional Affairs Legislation Committee review of the *Migration Legislation Amendment (Regional Processing Cohort) Bill 2016*

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Contact

Daniel Webb and Amy Frew
Human Rights Law Centre Ltd
Level 17, 461 Bourke Street
Melbourne VIC 3000

About the Human Rights Law Centre

The Human Rights Law Centre is an independent, non-profit, non-government organisation which protects and promotes human rights.

We contribute to the protection of human dignity, the alleviation of disadvantage, and the attainment of equality through a strategic combination of research, advocacy, litigation and education.

The HRLC is a registered charity and has been endorsed by the Australian Taxation Office as a public benefit institution. All donations are tax deductible.

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Endorsements

The following organisations have contributed to and endorse this submission:

Refugee Advice & Casework Service
Sarah Dale
Acting Principal Solicitor

Clothier Anderson Immigration Lawyers
Sanmati Verma
Senior Lawyer, Accredited Immigration Law Specialist

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1. Executive summary

1. The Human Rights Law Centre (**HRLC**), Clothier Anderson Immigration Lawyers and the Refugee Advice & Casework Service welcome the opportunity to make this submission on the *Migration Legislation Amendment (Regional Processing Cohort) Bill 2016* (**Bill**).

2. The Bill seeks to ban people who attempted to seek asylum in Australia after 19 July 2013 and who were then sent to Manus or Nauru (i.e. the 'regional processing cohort') from ever making a valid application for any Australian visa.

3. While the lifetime visa ban would not apply to children falling within the regional processing cohort, it would automatically apply to their parents.

4. The Bill would:

   (a) permanently separate families;

   (b) unequivocally breach international human rights law; and

   (c) apply to approximately 370 men, women and children previously detained offshore on Nauru or Manus but who are now rebuilding their lives in the Australian community.

5. The inclusion of non-compellable Ministerial discretions to exempt people from the application of the lifetime ban does not ameliorate the Bill's punitive effects. Similar Ministerial discretions already exist and have proven to be inadequate safeguards of rights and decency in this policy context. Fundamental rights require stronger protection than the broad and non-compellable discretion of one politician.

6. What makes the harm caused by this Bill particularly unacceptable is that the changes being proposed serve no discernible legal or policy purpose - there is no evidence the Bill is necessary. The Minister and his delegates already have ample power to exclude people if they so desire, with the *Migration Act*[1] and Regulations granting them extraordinary powers to reject otherwise valid visa applications on a broad range of opaque, subjective and highly discretionary grounds.

7. The Bill is a harmful and unlawful solution to a problem which doesn't exist. We recommend that it not be passed.

Recommendation: **That the Bill not be passed.**

[1] *Migration Act 1958* (Cth).

2. Entrenching family separation

8. The Human Rights Law Centre is aware of over 20 families who have some members on Nauru or Manus and others in Australia. This Bill would entrench their separation by banning those offshore from ever applying for any visa to travel to Australia.

9. The only safeguard against family separation in the Bill is the non-compellable discretion of the Immigration Minister. However, similar discretions already exist, they have not been enough to reunite families currently separated and the Minister has not indicated any intent to exercise such discretions differently in the future.

Nayser

Nayser and his family are stateless Rohingya. They fled Burma together but arrived in Australia on different dates. While his wife and children are rebuilding their lives in Sydney, Nayser has spent the last three years detained on Manus Island.

His children are now going to school. His family have learned English and have made friends. Nayser's only window into their life for the last three years has been via an intermittent internet connection from Manus.

This Bill would ban Nayser from ever coming to Australia to be reunited with his family. He would also be banned from ever coming to visit them, even as a tourist. "How can I live without my family?" Nayser said in response to this Bill.

Hussain

Hussain* fled Afghanistan. He arrived in Australia as an unaccompanied child and was transferred to Nauru 3 months after turning 18.

Hussain's mother is very ill. His next closest relative is his aunt who lives in Australia, which is why when forced to flee Afghanistan Hussain sought asylum here.

The Bill would prevent Hussain from ever joining his aunt in Australia. "It's not fair," he says. "Other boys from my boat are now living in Australia, with a visa. They can go to school, one of my friends just bought a car. I have been stuck on Nauru with no hope and now I might never see my family ever again."

Omar

Omar* fled Syria. He was detained on Manus but brought back to Australia for medical treatment after suffering injuries and serious health complications on Manus. He is one of the 370 or so 'transitory persons' caught by the operation of this Bill.

Omar has two brothers living in Australia. His brothers and their families are Australian citizens. This year Australia also granted his elderly Syrian parents permanent resettlement.

Despite his parents, his brothers and their families all living permanently in the Australian community, Omar remains in detention and faces return to Manus. This Bill would prevent him from ever being reunited with his parents and brothers.

He says, "My father is unwell and he and my mother are both very old and frail. If he dies, this law will prevent me from visiting Australia to be at his funeral. It will prevent me from visiting Australia to see my family again. I want to take care of my parents. I would ask you to reconsider and drop this proposal from ever becoming law."

*Name changed to protect identity.

3. Breaching our international obligations

10. This Bill would unequivocally breach Australia's obligations under international human rights law.

10.1 **Refugees Convention**

11. One of the central tenets of the *Convention relating to the Status of Refugees* [2] – contained in article 31 – is that governments must not impose penalties on refugees based on their mode of arrival or because they arrive and seek asylum without prior authorisation. Yet that is precisely what this Bill does.

12. The protection in article 31 exists for good reason. The very nature of flight from persecution is that it is often irregular. People are often forced to seek asylum without prior authorisation from the state whose protection they seek. The focus should be on a person's need for protection, not the mode of transport they used to seek it.

[2] *Convention relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) as modified by the *Protocol relating to the Status of Refugees*, opened for signature 31 January 1967, 606 UNTS 257 (entered into force 4 October 1967).

13. A lifetime visa ban is undoubtedly a penalty. Imposing it on account of arriving by boat without a visa would violate both the letter and spirit of article 31.

8.2 Rights of the child and family

14. The *Convention on the Rights of the Child*[3] requires that the best interest of children must always be a primary consideration. Article 9 provides that a child shall not be separated from his or her parents unless that separation is necessary. Article 10 requires states to actively and expeditiously facilitate family reunion applications by children.

15. Similarly, the *Universal Declaration of Human Rights*,[4] the *International Covenant on Civil and Political Rights*,[5] and the *International Covenant on Economic, Social and Cultural Rights*,[6] ***all*** recognise the family as 'the natural and fundamental group unit of society.'[7]

16. The Bill is fundamentally incompatible with these important human rights protections. Where people currently held on Nauru or Manus have family members in Australia, this Bill would entrench their separation. While the Bill would not apply to children, it would automatically apply to their parents.

4. Impact on 370 people already here

17. The Bill applies to 'transitory persons' - 370 people previously held offshore but returned to Australia after suffering serious harm inside the Nauru or Manus detention centres.

18. The group includes women who have been sexually assaulted on Nauru, children who have been going to Australian schools, and over 40 babies who were born in Australian hospitals and who have taken their first steps and spoken their first words in our communities.

19. The *Migration Act* already contains a legislative bar preventing members of this group from applying for a visa to stay in Australia[8]. However, after suffering harm so serious in offshore

[3] *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) ('*CROC*').

[4] *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) ('*UDHR*').

[5] *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('*ICCPR*').

[6] *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) ('*ICESCR*').

[7] *UNDR* art 16(3); *ICCPR* art 23(1); *ICESCR* art 10(1).

[8] *Migration Act* sections 46A and 46B.

detention that the Australian government evacuated them, and after so long rebuilding their lives in the community, these 370 people were hopeful the government would soon 'lift the bar' and allow them to apply for protection visas.

20. However, the introduction of this Bill has left them fearful about their futures and deeply worried that the Minister has a different plan in mind. If the Bill is passed, any application for a visa by any adult member of this cohort at any time in the future would be automatically invalid.

Ben and his family

Ben and his family sought asylum in Australia but were transferred to detention on Nauru. They were subsequently brought to Australia for urgent medical treatment and held in detention until early 2016, when they were released into the community.

Ben has two children, both of whom have spent this year attending the local primary school. Ben reports that his children have made great progress and now speak fluent English.

Since the announcement of this Bill and the talk of lifetime visa bans, Ben and his children have had trouble sleeping. Ben recently had to fill out school enrolment forms for his children next year but he wasn't sure whether he should hand them in, as he is now unsure whether the government plans to let him and his children stay and continue rebuilding their lives here.

5. Ministerial Discretion

21. The Bill makes a lifetime visa ban the default position. The only safeguard against absurd or oppressive consequences is the personal discretion of the Immigration Minister, exercisable in 'the public interest'.

22. Proposed sections 46A(8) and 46B(8) of the *Migration Act* make clear that the Minister's discretion is non-compellable – the Minister cannot be forced to even consider his powers let alone required to exercise them in any given case, however extraordinary that case may be.

23. Each is also a 'public interest' power. As the High Court has noted, such powers leave it 'open to the Minister to exclude any consideration of an individual's interests where that interest is

not reflected in the public interest'[9] - a power which the court went on to describe as 'indeterminate and very impressionistic'[10].

24. Personal and non-compellable discretion is clearly an inadequate safeguard. Strong, clear and legally-enforceable protection, not personal discretion, is required to guarantee fundamental rights and basic decency.

6. An unnecessary change

25. There is no evidence that the Bill is necessary and much evidence that it is not.

26. The Migration Act and Regulations already contain far-reaching powers allowing the Minister or his delegates to refuse visa applications made by a former 'unauthorised maritime arrival', including the Minister's broad, personal powers relating to 'character' contained under s 501 of the Act.

27. Any application for a visa is also rigorously tested against the eligibility requirements, usually contained at Schedule 2 of the Regulations. Most temporary visas require an applicant to demonstrate that they are a 'genuine temporary entrant' to Australia. These requirements are routinely used to refuse visas to people who have previously sought asylum, whether in Australia or elsewhere.

28. In relation to Partner visa applications, we note that exacting requirements exist under the Regulations requiring an applicant to demonstrate the 'genuine and continuing' nature of their relationship and the bona fides of their future intentions.

29. In relation to Humanitarian (Class XB) visas, which are the specific focus of several proposed changes to the Regulations, we note that the relevant visa criteria already ensure that it is prohibitively difficult for former 'unauthorised maritime arrivals' to obtain visas. In Clothier Anderson's experience, these relevant criteria clauses are routinely used as the basis to refuse Humanitarian visas to persons who arrived in Australia by boat.

30. In summary, the Minister and the government have provided no evidence that the further 'barring' provisions are necessary to prevent 'circumvention' of the *Migration Act* and Regulations by 'unauthorised maritime arrivals.' Ample powers exist both in the Act and the Regulations to refuse visa applications by such persons where the visa criteria are not met (for example, where applicants in a "sham marriage" apply for a Partner visa). The new 'barring'

[9] *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636, 671-672 [114] (Heydon J)

[10] Ibid 671 [113] (Heydon J).

provisions in particular create additional and unnecessary barriers to the lodgement of a visa application by a former UMA or transitory person, and significantly expand the Minister's already considerable personal interest powers under the *Migration Act*.

7. Conclusion

31. The bill would breach international law, permanently separate families and terrify 370 people already rebuilding their lives in our communities.

32. It would do so in pursuit of a solution to a problem that doesn't exist.

33. The Bill is unjust, unlawful and unnecessary. The HRLC, the Refugee Advice and Casework Service and Clothier Anderson reiterate their recommendation that the Bill not be passed.

Recommendation: **That the Bill not be passed.**