Victorian Council for Civil Liberties Inc
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LIBERTY VICTORIA

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Committee Secretary
Senate Legal and Constitutional Affairs Committee
Parliament House
Canberra ACT 2600

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Submission to the Senate Legal and Constitutional Affairs Committee inquiry into the Migration Legislation Amendment (Regional Processing Cohort) Bill 2019

Liberty Victoria

1. Liberty Victoria is a peak civil liberties organisation in Australia that has worked to defend and extend human rights and freedoms in Victoria since 1936. For more than eighty years we have advocated for civil liberties and human rights. These are spelled out in the United Nations' international human rights treaties, agreed to by Australia. We speak out when such rights and freedoms are threatened by governments or other organisations.
2. We welcome the opportunity to provide a submission to the Senate Legal and Constitutional Affairs Committee inquiry into the provisions of the Migration Legislation Amendment (Regional Processing Cohort) Bill 2019 (**the Bill**). The focus of our submissions and recommendations reflect our experience and expertise as outlined above.

Outline

3. The amendments proposed by the Bill apply to all persons who: arrived in Australia by boat seeking asylum without a visa on or after 19 July 2013; were aged 18 years or more at the time of entry; and were subsequently transferred to a regional processing country (Nauru or Papua New Guinea) to have their protection claims assessed under

that country's laws. These amendments seek to impose a lifetime ban on these people obtaining a visa to travel to or remain in Australia, subject to a personal non-compellable non-delegable exemption power of the Minister.

4. We recommend the Bill not be passed. Our principal concerns with the Bill can be summarised as follows:
    a. No compelling case has been put forward by the Government to justify the proposed amendments, and they are entirely unnecessary and disproportionate;
    b. The proposed amendments would entrench the separation of families;
    c. The amendments are inconsistent with Australia's international obligations;
    d. The amendments would have a significantly harsh and discriminatorily impact on highly vulnerable individuals, including victims of torture and trauma; and
    e. A personal non-delegable non-compellable discretion of the Minister is an insufficient safeguard and a troubling further expansion of Ministerial power.
5. Each of these matters is further developed below.

No compelling case

6. The Explanatory Memorandum fails to provide an adequate policy justification for the proposed amendments.
7. The Minister stated in his Second Reading Speech for the Bill that its purpose "is to reinforce the coalition's longstanding policy that people who travel here illegally by boat will never be settled in Australia", and that it "will form an important part of the government's people-smuggling deterrence messaging by sending a clear message that noone who travels here illegally by boat will ever be settled in Australia".
8. Beyond general statements about deterrence, no attempt has been made by the Government to explain why the proposed amendments are actually necessary for that purpose or any other. There has been no attempt to demonstrate how the current legislative framework governing Australia's migration and refugee/humanitarian programmes is inadequate. The Explanatory Memorandum fails to explain why the discriminatory penalties imposed by the Bill are necessary and proportionate to any policy objective.
9. The proposed amendments are entirely unnecessary and in practice will not have the effect of strengthening the integrity of Australia's borders. The legislative framework already contains multiple statutory prohibitions on applying for visas while in Australia for this cohort.[1] There are also onerous and highly particularised visa criteria for those applying for visas offshore.
10. The proposal that a person detained at a regional processing centre who is subsequently resettled in another country should be barred from any Australian visas for life – even as a visitor – is highly discriminatory and punitive. The notion that such a regime is necessary as a deterrent to future people seeking asylum arriving by boat is not supportable.

[1] Including (but not limited to) ss 46B and 46A of the *Migration Act 1958*.

Separation of families

11. The amendments proposed by the Bill would operate in practice to prohibit family members from reuniting, including immediate and dependent family. The Bill would have this effect with respect to families who are currently separated between Australia and a regional processing centre due to different dates or methods of arrival, or due to medical transfers. It may mean that some refugees would never be able to see family members ever again – including their children, wives and husbands, and dependent family such as elderly parents. To further cut off the prospect of reunification and entrench the separation of these families would cause significant suffering.

12. Separation from family can have significant long-term adverse affects on a person's mental health and general welfare. The effects of separation are made worse where a person has a history of torture or trauma; and where a person faces linguistic and cultural barriers in their country of residence. For refugees, the safety of family members is often the most pressing concern and the cause of constant distress. Refugees in Australia prevented from reuniting with family are denied this crucial aspect of rebuilding their lives It is important to note that the harm to family members in Australia involves not only mental suffering, but may also include financial and physical hardship. For example, a person in Australia may have otherwise received financial and physical support from a family member affected by the amendments, who may have otherwise qualified for a carer or spouse visa.

13. It is noted that even though Australian-based family members may not be subject to reciprocal travel bans in countries where their family members may be residing, in practice there may be many other barriers that operate in practice to prevent them from reuniting (or even visiting). These include (but are not limited) to the following:

    a. Persons in Australia who have been granted a protection visa in Australia, or who have been resettled in Australia from a third country under Australia's offshore refugee and humanitarian program, are often unable to meet the criteria for a visa to travel to many countries. Persons residing in Australia on protection/refugee or humanitarian visas, and who have not obtained Australian citizenship, are unable to travel overseas on their country of nationality's passport and are instead reliant on a specific refugee *Titre de Voyage* travel document issued by the Australian government. Many countries worldwide impose strict criteria for the grant of visas to holders of these travel documents, much higher than those for holders of Australian passports, and some countries refuse to recognise the travel document entirely. Due to this, many find that they are unable to visit overseas family in their countries of residence. Even if the Australian-based family member holds an Australian passport they may still be unable to meet the other county's strict visa criteria.

    b. Family members overseas affected by the travel ban proposed by the Bill might be residing in countries where it may be unsafe for the Australian-based family member to travel to. Safety issues may also preclude the overseas family member from travelling out of their country of residence to a safe third country.

    c. Thirdly, financial barriers may also preclude many from reuniting with family overseas. Financial hardship may also affect the overseas relative if it was necessary for them to meet in a third country (for visa or safety reasons).

14. There is no justification for these discriminatory amendments, and the significant consequences that may follow for highly vulnerable individuals and families. The proposed amendments are not necessary or proportionate to the integrity of Australia's borders, or any other policy objective.

International obligations

Derivative status and the principle of family unity

15. The proposed amendments are inconsistent with longstanding Australian government policy and Australia's international obligations concerning principles of derivative status and right to family unity.

16. Within the international protection system immediate and dependent family members of persons recognised to be refugees are eligible to receive derivative refugee status in accordance with their right to family unity.[2] This principle of family unity has long since existed as a central component in international human rights instruments and jurisprudence. Beginning with the Universal Declaration of Human Rights[3], which states that "the family is the natural and fundamental group unit of society and is entitled to protection by society and the State", most international instruments dealing with human rights contain similar provisions for the protection of the unit of a family.[4]

17. The principle of family unity with respect to refugees is expressly provided for in the preamble to the 1951 Convention Relating to the Status of Refugees[5] (**the Refugee Convention**), which in its preamble it directs signatory states to:

> *[…] take the necessary measures for the protection of the refugee's family, especially with a view to:*
> *(1) Ensuring that the unity of the refugee's family is maintained particularly in cases where the head of the family has fulfilled the necessary conditions for admission to a particular country,*
> *(2) The protection of refugees who are minors, in particular unaccompanied children and girls, with special reference to guardianship and adoption.*

18. This intention is further evidenced by the Final Act of the Conference of Plenipotentiaries which adopted the Refugee Convention (and to which an Australian delegation was a party):

> *The Conference,*
> *Considering that the unity of the family, the natural and fundamental group unit of society, is an essential right of the refugee, and that such unity is constantly threatened, and*
> *Noting with satisfaction that, according to the official commentary of the ad hoc Committee on Statelessness and Related Problems the rights granted to a refugee are extended to members of his family,*

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[2] See: UNHCR, Procedural Standards for RSD under UNHCR's Mandate, Processing Claims Based on the Right to Family Unity – 5.1 Derivative Refugee Status, available at: http://www.unhcr.org/43170ff81e.pdf [accessed 27/07/2019].
[3] UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III)
[4] See the *International Covenant on Civil and Political Rights*, article 23(1), and the *Convention on the Rights of the Child*, preamble.
[5] As amended by the 1967 Protocol.

Recommends Governments to take the necessary measures for the protection of the refugee's family, especially with a view to:

(1) Ensuring that the unity of the refugee's family is maintained particularly in cases where the head of the family has fulfilled the necessary conditions for admission to a particular country,

(2) *The protection of refugees who are minors, in particular unaccompanied children and girls, with special reference to guardianship and adoption*.[6]

19. Furthermore, previously through its membership of the United Nations High Commissioner for Refugees (**UNHCR**) Executive Committee, the Australian government supported the following recommendations with respect to the principles of derivative status and family unity in the refugee and humanitarian context:

1. In application of the Principle of the unity of the family and for obvious humanitarian reasons, ***every effort should be made to ensure the reunification of separated refugee families****.*
2. For this purpose it is desirable that countries of asylum and countries of origin support the efforts of the High Commissioner to ***ensure that the reunification of separated refugee families takes place with the least possible delay****.*
[…]
5. It is hoped that countries of asylum will apply liberal criteria in identifying those family members who can be admitted with a view to promoting a comprehensive reunification of the family.
[…]
7. The separation of refugee families has, in certain regions of the world, given rise to a number of particularly delicate problems relating to unaccompanied minors. Every effort should be made to trace the parents or other close relatives of unaccompanied minors before their resettlement. Efforts to clarify their family situation with sufficient certainty should also be continued after resettlement. Such efforts are of particular importance before an adoption – involving a severance of links with the natural family – is decided upon.
8. In order to promote the rapid integration of refugee families in the country of settlement, ***joining close family members should in principle be granted the same legal status and facilities as the head of the family who has been formally recognized as a refugee****.*
9. In appropriate cases family reunification should be facilitated by special measures of assistance to the head of family so that economic and housing

[6] UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, 25 July 1951, A/CONF.2/108/Rev.1, available at: http://www.refworld.org/docid/40a8a7394.html [accessed 27/07/2019].

> *difficulties in the country of asylum do not unduly delay the granting of permission for the entry of the family members.*[7] [emphasis added]

20. The principle of family unity, and obligation of states to act in accordance with it also derives from other international instruments to which Australia is a signatory, including: the International Covenant on Civil and Political Rights, Articles 17 and 23 (**ICCPR**); the International Covenant on Economic, Social and Cultural Rights, Article 10; and the Convention on the Rights of the Child, Articles 9 and 10.

21. The longstanding policy and legislative position in Australia has upheld these principles. This has been facilitated in the visa context through specific visas for family members[8] and family unit criteria allowing family members to be included in another's visa application. The erosion of these basic principles with respect to people seeking asylum who arrived by boat over recent years is a matter of deep concern.

22. The legal and practical effect of the amendments proposed by the Bill would be to deny refugees the right to family unity. In this regard, the amendments would be inconsistent with Australia's international obligations, the international protection system, as well as longstanding Australian government policy.

Discrimination and penalisation

23. The amendments proposed by the Bill are discriminatory and would, if enacted, be inconsistent with Australia's international obligations under the Refugee Convention and the ICCPR.

24. Article 31(1) of the Refugee Convention relevantly obligates signatories as follows:

> *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.*

25. The proposed amendments would operate inconsistently with Australia's obligations in this regard. A lifetime ban on returning to Australia for any reason clearly amounts to a penalty imposed on account of a person's entry to Australia by boat without authorisation for Article 31(1).

26. Article 26 of the ICCPR relevantly provides:

> ***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****.* [emphasis added]

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[7] UN High Commissioner for Refugees (UNHCR), Family Reunification, 21 October 1981, No. 24 (XXXII) - 1981, Executive Committee 32nd session. Contained in United Nations General Assembly Document No. 12A (A/36/12/Add.1). Conclusion endorsed by the Executive Committee of the High Commissioner's Programme upon the recommendation of the Sub-Committee of the Whole on International Protection of Refugees - available at: http://www.refworld.org/docid/3ae68c43a4.html [accessed 27/07/2019].

[8] Such as the 'split family' stream of refugee/humanitarian visas for sponsoring overseas family, as well as child visas, partner (spouse/de facto) visas, parent visas, aged dependent relative visas etc.

27. The Government contends in the Statement of Compatibility with Human Rights attached to the Explanatory Memorandum to the Bill that the continued and differential treatment of the individuals captured by the amendments "is for a legitimate purpose and based on relevant objective criteria and that is reasonable and proportionate in the circumstances".[9] Given our above submissions that no compelling case has been put forward for the proposed amendments, we submit that it is not established that the amendments are for a legitimate purpose and/or proportionate.

Harsh and discriminatory impact on highly vulnerable people

28. Refugees and people seeking asylum are in an inherently vulnerable position by virtue of the fact that they have lost the protection of their home State, and are subject to an uneven power relationship in coming into contact with the officials of another State. Moreover, many people seeking asylum have experienced past torture and trauma, making them particularly vulnerable to mental and physical health issues.

29. The Commonwealth has an ethical responsibility to respond fairly to refugees and people seeking asylum, to minimise rather than inflict additional harm and further suffering. This ethical duty arises from the fact that Australia has held itself out as a State which provides protection to such people ever since it acceded to the Refugee Convention; and also from the proximity of the relationship, where vulnerable people have arrived to Australian shores seeking Australian protection.

30. The cohort of people affected by the proposed amendments include refugees and people seeking asylum located in and outside Australia. By their nature, these individuals are often the most vulnerable members of the communities in which they live. These vulnerabilities can derive from their lived experiences of torture and trauma, mental and physical health conditions, cultural and linguistic barriers, as well as isolation from family and community. The catastrophic mental health situation and prolonged suffering of individuals detained at regional processing centres has been extensively documented.

31. The proposed amendments would operate in practice to impose significant further hardship on many of those affected, and their families in Australia.

Personal powers of the Minister

32. The proposed personal non-compellable non-delegable discretionary power for the Minister to lift the relevant statutory bar does not alleviate our above concerns with the provisions of the Bill. To the contrary, the proposed amendments continue a deeply troubling trend of expanding personal discretionary Ministerial powers.

33. The exercise of personal Ministerial powers lacks transparency and certainty. The only precondition on the Minister exercising his or her personal powers in this regard is that he or she believes it to be in the "public interest" to do so. The High Court has held that the analogous term "national interest" cannot be given a confined meaning and "what is in the national interest is largely a political question".[10] The High Court has also consistently acknowledged the wide range of subject matters that may be taken

[9] Explanatory Memorandum, Attachment A, p. 25.
[10] *Plaintiff S156/2013 v Minister for Immigration and Border Protection* (2014) 254 CLR 28, per French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ at 46 [40].

into account in making decisions "in the public interest"'[11] and has stated: "[w]hen we reach the area of ministerial policy giving effect to the general public interest, we enter the political field. In that field a Minister or a Cabinet may determine general policy or the interests of the general public free of procedural constraints".[12]

34. In this regard, the personal powers of the Minister are liable to being exercised by the Minister according to his or her personal or political whim. As detailed in Liberty Victoria's Rights Advocacy Project's report *Playing God: The Immigration Minister's Unrestrained Power*[13], these personal powers are often characterised by arbitrary, inconsistent and unpredictable outcomes. These decisions lack ordinary standards of transparency and accountability under the rule of law.

Retrospective application

35. We are further concerned that the amendments are in a practical sense retrospective in application. While applying to future visa application, the amendments would operate to place a penalty on a group of people based on past events. 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".[14]

36. The erosion of such principles in respect of this vulnerable group is of significant concern to Liberty Victoria, representing a threat to basic principles of our society more broadly.

Conclusion

37. In conclusion we submit that no compelling case has been provided to justify the proposed amendments. The amendments are entirely unnecessary and would have significant adverse impacts on those affected and their families, many of who are highly vulnerable, and Australia's international reputation. The Bill is punitive, and runs contrary to basic principles of family unity and the rule of law.

38. For these above reasons, Liberty Victoria recommends the Bill not be passed.

Jessie Taylor
President, Liberty Victoria

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[11] *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 502 [331]. See also *O'Sullivan v Farrer* (1989) 168 CLR 210 per Mason CJ, Brennan, Dawson and Gaudron JJ at 216–17.
[12] *O'Shea* (1987) 163 CLR 378 per Brennan J at 411.
[13] Liberty Victoria, Rights Advocacy Project, Playing God: The Immigration Minister's Unrestrained Power, 4 May 2017, available at: http://libertyvic.rightsadvocacy.org.au/wp-content/uploads/2017/05/YLLR_PlayingGod_Report2017_FINAL2.1-1.pdf [accessed 9 July 2019].
[14] HLA Hart, *The Concept of Law* (Clarendon Press, 2nd ed, 1994) 276.