

Submission re Migration Legislation Amendment (Regional Processing Cohort) Bill 2019

Hunter Asylum Seeker Advocacy

Part one: Rationale for the Bill

1.

The Minister for Home Affairs the Hon. Peter Dutton MP [the Minister], said the Bill aims to send a "message to people smugglers that they cannot offer a path to Australia. Life in Australia is not an illicit commodity to be sold to the desperate and vulnerable at a great profit".

This is misleading. Those "desperate and vulnerable" people subject to this bill are not seeking any "commodity". They are simply fleeing for their lives. That is not in any way "illicit".

Fleeing for your life, without papers, with just the clothes you have on your back, and then sailing to seek asylum, is wrong, according to the Minister.

However, if you are an au pair or a high roller, or you to travel here 'legally' by air, intending to overstay your tourist, study or work visa, then no action is taken.

The Minister is quite aware of this, and is pleased with the current flood of shady characters arriving by air, and hopes to have this number increase (see point 5 below).

This contradiction means the Minister is not concerned over who enters Australia, just their means of arrival and if they have papers. Therefore targeting "people smugglers" is irrelevant, since there are other "people smugglers", who facilitate all sorts of air arrivals (except that it is on a grander scale).

2.

The Minister states the bill is designed to "reinforce the government's longstanding policy that people who travel here illegally by boat will never be settled in this country". In this, the government follows the lead of former Prime Minister Kevin Rudd's July 2013 statement.

Mr. Rudd recanted his statement in 2017. He said "the agreement expired after a year and that if no appropriate place had been found for asylum seekers, then Australia would have had a responsibility to locate them elsewhere including Australia if other places could not be identified".

As the Minister based the purpose of the Bill on Kevin Rudd's original/2013 statement, it follows that he the Minister should pay attention to Mr. Rudd's later statement and withdraw it.

3.

The claim that border protection policies have "sent the message to people smugglers that they cannot offer a path to Australia" is also incorrect on another basis. People who assist asylum seekers to flee are not the cause of people finding pathways to Australia.

A submission by Tracie Aylmer (2016) addresses this. Ms. Aylmer wrote:

"This bill would mean that the victims are being persecuted, rather than the perpetrators, for life. As the perpetrators are in different countries that Australia cannot dictate to due to sovereignty, it is uncalled for to scapegoat the victims being in the wrong place at the wrong time. Refugees do not act as terrorists. They are fleeing the terrorists. Trying to force refugees to become responsible for the actions of others in countries geographically distant from Australia is nonsensical."

4.

The Minister describes the bill as a "stick", by which he means policing with an indiscriminately wielded truncheon. He says "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 ... I can assure you — you need sticks, and this is a stick".

By referring to "only" consensual resettlement, the Minister denigrates the most ideal and therefore the wisest outcome. Surely a consensus would be in the best interests of the Australian people as well as asylum seekers?

If the Minister is denying the best possible outcome in favour of brute coercion, then by definition he is not acting in Australia's best interests.

5.

The bill cannot be regarded as "crucial" in regulating immigration. SBS News reported that in the last financial year the number of people applying for asylum who arrived by plane was nearly 28,000, up from 18,290 in 2016-17 and 9,554 in 2015-16. Those increases are quite staggering.

The number of protection visa applications made by people who arrived legally in Australia had blown out to 81,596 between July 2014 and the end of January this year.

This figure dwarfs the 14,000 asylum seekers marooned in Indonesia whom the Minister has repeatedly characterized in justifying this bill as a waiting "flood" of boat arrivals.

The Minister's colleague Linda Reynolds said of the increase "... we have a growing number of international students, of tourists coming to our country and that is a great thing ... "We want all those numbers to increase. As numbers increase, of course you will get an increase in all sorts of categories of people arriving making claims to stay, so you would expect that number to grow."

This returns us to the fact that for all the Minister's talk of preventing a "flood" of asylum seekers arriving without documents on boats, he has in fact opened the flood gates wide. He has opened the gates wide to people with fake papers or who are being deceptive as to why they are coming here - counterfeiters and organised crime rackets that are having a field day, under the cover of "legal" arrivals.

6.

The Prime Minister had made for himself and colleagues a model of an asylum seeker boat, which declares "I stopped these". If that is true, then the Bill is not needed, as there will be no boats.

If it is false, then the most likely source of boat arrivals would be the 14,000 asylum seekers and refugees stranded in Indonesia waiting settlement. Again, this number is negligible compared to the number of visa overstayers who arrive by air each year.

Mr. David Manne wrote in 2016 that the government told the public that "everything is under control, that the boats have been stopped and that the measures in place have deterred people ... 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."

That evidence has not as yet been presented. It will not be, because it does not exist. It does not exist, because it cannot exist.

7.

Australia's massive expenditure on deterring asylum seekers from arriving by boat under the guise of regulating immigration is a gross waste of taxpayers' money.

The Herald reported in 2017 that the Department of Immigration and Border Protection had spent 72.4 million on compliance activities regarding visa overstayers, and that it did not generally detain them. Compare that with the National Commission of Audit's report that the cost of imprisoning asylum seekers who had arrived by boat was \$3.3 billion in 2014.

As the Australian Financial Review recently revealed, much of this money has been spent on very questionable deals.

These are deals the Minister refuses to provide details of to the Senate.

8.

This bill is not needed, and should not be passed.

Part Two: Legal and social implications of the Bill. .

The following draws on core aspects of the 84 submissions received regarding the bill when it was presented in 2016. Four days were given to lodge submissions. All submissions opposed the bill. The government did not provide any convincing rebuttal to these submissions.

1. The Bill is an overreach

In their 2016 submission the Australian Human Rights Commission explained that a

"... temporary visa holder who overstays their visa ... or violates their visa conditions would generally face a re-entry ban of up to three years.⁷ In these cases, a three-year ban is 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".

2. The bill breaches international conventions

The UN, Human Rights Watch and several other submitting bodies point out this Bill would be in breach of:

Article 31 of the Refugee Convention, [12] (that governments must not impose penalties on refugees based on their mode of arrival or because they arrive and seek asylum without prior authorisation);

The Convention on the Rights of the Child, [13]; and

The International Covenant on Economic Social and Cultural Rights, and the International Covenant on Civil and Political Rights. [14]

3. Inappropriate Ministerial discretion

Submissions also noted that

"The establishment of a broad and vaguely defined Ministerial discretion under legislation creates a risk of unfair and inconsistent decisions, and is not in keeping with the rule of law. The establishment of the Ministerial discretion contemplated by this Bill would be highly inappropriate..."

"...the exercise of the discretionary power by the Minister is non-compellable and unreviewable. The Bill is silent about the remedies that may be available to persons affected by the operation of the proposed

provisions if, for example, the discretion is exercised by the Minister in a manner that is unreasonable and unlawful. To be meaningful, human rights include the right to an effective remedy in case rights are violated. This obligation is intended to combat impunity and to ensure that rights are practical and effective, and not rendered worthless or insignificant because they can be ignored”.

The Victorian Bar were concerned that “... the Bill does not expressly require that the Minister is bound by the rules of natural justice in the exercise of the discretionary power. This will inevitably give rise to complex legal arguments, the outcome of which can only be uncertain, concerning whether the Minister is when exercising the discretionary power subject to an implied obligation to afford procedural fairness to the refugee concerned, and if yes, the scope and extent of that obligation.”

4. Long term negative effects on the Australian economy

Doctors for Refugees said the Bill would "foreseeably" have:

“...long term negative impacts on the Australian economy and industry. We note that refugees have made a significant contribution to Australian society in business, arts, science, politics and many other areas over the decades. In our own industry of medicine we note that a renowned orthopaedic surgeon, who is a world leader in osseo-integration surgery, came to Australia as a refugee by boat. Had he arrived under this policy not only would he have been unable to work here and help the hundreds of Australian citizens that he has, he would also be prevented from visiting Australia to keynote at international orthopaedic conferences, as he is now doing.”

5. Even LNP members do not understand the point of the Bill

Even members of the Liberal Party do not understand the purpose of this Bill. During a discussion of the Bill in 2016, Mr. Giles (ALP) recounted that

“Only today, the member for Chisholm ... Having put herself up to talk about gaps and loopholes that people smugglers could apparently exploit ... was asked by a journalist, 'What's the gap or loophole that there is at the moment under this government?' She said, 'There are no gaps or loopholes.' She went on to say, 'The outcome under the Turnbull government speaks for itself.' She was asked, 'I'm sorry again. Why is it necessary to have this legislation? You've just said that there are no gaps or loopholes.' She could not ... ?

6. The point of the Bill is to distract

As noted before, in 2016 citizens had only four days to comment. There were 84 submissions. None were in favour. Mr. Thistlethwaite (ALP) remarked:

“I have had many, many emails and letters from people opposing this bill, but I am yet to receive one email or letter that supports what the government is doing. This is petty politics and it is done for one reason — to try and divert attention from a bumbling, foolish, chaotic and dysfunctional government.

His conclusion is justified. This Bill is fundamentally without any distinct purpose, other than to project that somehow, the government, by traducing the concept of law, as well as violating the international agreements we have signed, is, not weak. This is evident from the parliamentary exchange between Mr. O'Brien (LP) and Mr. Hart (ALP).

O'Brien (LP): We saw that under a coalition government. Over 830 days have gone by now without a boat—

Mr. Hart (ALP): Why is this necessary then?

Mr. TED O'Brien: A silly question, but some might ask why would this be a necessary thing to do? Well, there cannot be any loopholes in this. We cannot afford weakness.

Conclusion

The question “why would this be a necessary thing to do?” is not at all a silly question. It has been asked by all of the submitters in 2016, and it’s quite likely the majority of submitters will ask the same question again.

That is because the government has not answered it.

We have seen the rationale for the Bill is one moment to send a message to people smugglers, then to reinforce “longstanding policy”- policy which is not etched in stone.

We have seen the Minister anticipate his discretionary powers as brute force, irrespective of whether that is in Australia’s best interests. He clearly intends to use it, even though it is in breach of international law.

We cannot afford a Bill which is so clearly unjust and counterproductive to be passed.

We ask the Senate to reject this Bill in its entirety.