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11 November 2016

Submission to the Senate Legal and Constitutional Affairs Committee's Inquiry into the Migration Legislation Amendment (Regional Processing Cohort) Bill 2016

We are the co-chairs of the Refugee Rights Subcommittee of the Australian Lawyers for Human Rights (ALHR). ALHR is a leading national human rights organisation established in 1993 and is a network of Australian solicitors, barristers, academics, judicial officers and law students who practise and promote international human rights law in Australia. ALHR has active and engaged National, State and Territory committees and a secretariat at La Trobe University Law School in Melbourne.

We thank the Committee for the opportunity to make a submission to the *Regional Processing Cohort Bill 2016* (Cth). ALHR is of the view that this Bill should not be passed. In our view, the Bill is seriously flawed. Legally, the proposed legislation breaches Australia's international obligations and, socially, it undermines the principles of family unity, cohesion and multiculturalism that are fundamental to Australia's identity.

ALHR endorses the submissions made by other organisations, including those of the Refugee Council of Australia, Professors Jane McAdam, Ben Saul, Michelle Foster and research associate Madeline Gleeson.

The proposed legislation

Under the proposed legislation, persons who arrived in Australia by boat on or after 19 July 2013 and who were over 18 years old at the time they were taken to Nauru or Manus Island,

will not be permitted to make a valid visa application to enter Australia – ever.¹ They will not, even if they have been resettled to a third country and have acquired permanent residence or citizenship of that country, be permitted to enter Australia.

The statutory bar on making a valid visa application can be lifted by the Minister exercising his or her personal and non-compellable powers, if he or she considers it to be in the ‘public interest’.²

Breach of international refugee law

As you would be aware, Australia is a signatory to the 1951 UN Convention Relating to the Status of Refugees and its 1967 Protocol. As such, we have undertaken to provide protection for those who seek asylum in Australia and who are found to be refugees. Article 31 of the Refugee Convention prohibits states from imposing a ‘penalty’ on asylum seekers who come directly to its territory “illegally” (i.e. by boat) provided that they ‘present themselves without delay to the authorities and show good cause for their illegal entry’. This proposed legislation does exactly that: it penalises those who arrive by boat by preventing them from ever entering Australia. It would create different classes of refugees by discriminating between those who come by boat and those who arrive by plane. We refer you to the submission of Professors McAdam, Saul et al for a comprehensive explanation of the international law aspects of this Bill.

The lifetime ban on refugees has the potential to tear families apart. Many of the recognised refugees on Manus Island and Nauru already have family residing in Australia. Denying these refugees their right to family reunification breaches Australia’s obligations under the Convention on the Rights of the Child,³ the International Covenant on Civil and Political Rights⁴ and the International Covenant on Economic, Social and Cultural Rights⁵. It will cause further mental anguish for those on Manus and Nauru. We find it difficult to reconcile the government’s move to facilitate family reunification in other areas of the migration program (for example, through a new temporary parent visa for Australian citizens and permanent residents)⁶ with these measures, which seek to deprive refugees of the very

¹ Migration Legislation Amendment (Regional Processing Cohort) Bill 2016 (Cth) sch 1 amending s 46(2A).

² Ibid.

³ International Convention on the Rights of the Child, arts 3, 8.

⁴ International Covenant on Civil and Political Rights, art 23 .

⁵ International Covenant on Economic, Social and Cultural Rights, art 10.

⁶ Department of Immigration and Border Protection, Introducing a new temporary parent visa (September 2016). The government’s new temporary parent visa will come into effect in July 2017.

same opportunities. If it is recognised that the family is a fundamental unit of society, the right to family reunification must be available to all, without discrimination.

Radical departure from current law and policy

The proposed lifetime ban for refugees is a radical departure from the current law and policy. Existing migration law provides that a person who has had their visa cancelled in Australia on character grounds, and has been removed from Australia, can be permanently excluded from re-entering Australia.⁷ We note that there can be some good public policy justifications in these cases, such as where this is necessary to protect public safety. By contrast, the refugees to whom the proposed legislation applies have not committed any crime. It is not a crime to seek asylum under international law. The proposed legislation unfairly categorises genuine refugees as ‘criminals’. On the contrary, refugees have made and continue to make a significant contribution to Australia’s economic, social and cultural wellbeing.

Ministerial discretion is an inadequate safeguard

The Bill contains provisions to allow the Minister to ‘lift the bar’ and allow a refugee to make a valid application for a visa, where the Minister considers that it is in the ‘public interest’. According to the Statement of Compatibility with Human Rights that accompanies the Bill, the discretionary power to lift the bar affords flexibility ‘in circumstances involving Australia’s human rights obligations towards families and children’. With respect, this is woefully inadequate. Given the government’s consistent and strong statement of its policy that no person arriving by boat will ever be resettled to Australia, it is difficult to trust that the Minister would exercise this discretionary power in a sensible manner that is consistent with Australia’s international obligations.

Undermines international and regional support for refugee protection

The Turnbull government has argued that this legislation is necessary to send a strong message to people smugglers and to prevent people from undertaking dangerous boat journeys. If it is serious, the government must recognise that people undertake such journeys because of a lack of effective protection within our region and a lack of legal pathways to enter Australia. A sustainable and effective refugee policy must involve

⁷ See ‘special return criterion’ 5001, in Schedule 5 to the *Migration Regulations 1994* (Cth). The criterion is relevant to almost any application for a visa. The effect is that, unless the Minister decides otherwise, another visa cannot be granted to a person who has had a previous visa cancelled under s 501 (character cancellation).

Australia working in cooperation with other countries in the region and must be premised on upholding the rights of refugees under the Refugee Convention. Punishing refugees in this manner is not the answer.

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