Submission to the Senate Legal and Constitutional Affairs Committee

Migration Amendment (Removal and Other Measures) Bill 2024

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Submitted by
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About Amnesty International

Amnesty International is a global movement of more than 10 million people who take injustice personally. We are campaigning for a world where human rights are enjoyed by all.

We investigate and expose the facts, whenever and wherever abuses happen. We lobby governments as well as other powerful groups such as companies, making sure they keep their promises and respect international law. By telling the powerful stories of the people we work with, we mobilise millions of supporters around the world to campaign for change and to stand in the defence of activists on the frontline. We support people to claim their rights through education and training.

Our work protects and empowers people – from abolishing the death penalty to advancing sexual and reproductive rights, and from combating discrimination to defending refugees' and migrants' rights.

We help to bring torturers to justice, change oppressive laws, and free people who have been jailed just for voicing their opinion. We speak out for anyone and everyone whose freedom or dignity are under threat.

We are impartial and independent of any government, political persuasion or religious belief and do not receive funding from governments or political parties.

Amnesty International is a proud People Powered movement founded on the work of volunteers and activists all around the country. More than 500,000 Amnesty International supporters live in Australia.

1. Summary

1.1 Amnesty International Australia (AIA) welcomes the opportunity to make a submission to the Senate Legal and Constitutional Affairs Committee.

1.2 A number of the elements of the Bill risk putting Australia in breach of its international obligations, including:

- the criminalisation of non-cooperation with removal, punishable with up to 5 years' imprisonment with a mandatory sentence of 12 months;
- the ability of the Minister to arbitrarily reverse a person's protection finding; and
- the broad prohibition on any type of visa applications from almost all nationals of certain countries.

1.3 AIA is particularly concerned that these elements will put Australia at risk of breaching its International obligations with regard to:

- Non-discrimination;
- Non-refoulement; and
- Its impact on children and families.

1.4 AIA also remains concerned that the overly broad scope of the Bill and the further criminalisation of Australia's migration system, runs the risk that thousands of people will suddenly face criminal charges and imprisonment, with the potential for a never-ending cycle of imprisonment and detention.

2. Recommendations

AIA recommends that:

1) The Senate Legal and Constitutional Affairs Committee recommends the government abandon the Migration Amendment (Removals and Other Measures) Bill 2024.

3. Designation of Removal Concern Countries

3.1 The Bill gives the Minister the ability, under proposed sections 199F and 199G, to designate countries who do not accept the return of citizens on a non-voluntary basis as 'removal concern countries'. At a practical level, this designation would result in the suspension of almost all visa applications from these countries.

3.2 Sadly, this Bill raises the spectre of former US President Donald Trump's "Muslim Ban" policy, targeting a select group of countries in clear violation of Australia's international human rights obligations given the undeniable discrimination based on race, religion, and national origin, as well as the potential devastating impacts of family separation.

3.3 AIA maintains that banning nationals from specific countries, in an arbitrary and discretionary manner would put Australia in violation of a number of the ICCPR Articles including Article 2(1) (right of non-discrimination); Article 17 (protection against unlawful or arbitrary interference with home and family); Article 23 (protection of family life); Article 24 (rights of the child); and Article 26 (prohibition of discrimination).

Non-Discrimination

3.4 With regards to non-discrimination AIA is particularly concerned that this Bill would breach Australia's obligations under Article 2(1) and Article 26 of the ICCPR. As noted by by the Australian Human Rights Commission:

> *Article 2.1 of the ICCPR*
>
> - *applies to discrimination affecting the rights set out in the ICCPR itself; and*
> - *requires governments to take measures regarding discrimination in society as well as by government itself.*
>
> *Article 26 on equal protection of the law*
>
> - *applies only to actions by government; but*
> - *extends to all laws, policies and programs (including those affecting economic, social and cultural rights) rather than only those affecting rights set out in other articles of the ICCPR itself.*[1]

3.5 The UN Human Rights Committee has previously noted with regards to Non-discrimination:

"In the view of the Committee, article 26 does not merely duplicate the guarantee already provided for in article 2 but provides in itself an autonomous right. It prohibits discrimination in law or in fact in any field regulated and protected by public authorities. Article 26 is therefore concerned with the obligations imposed on States parties in regard to their legislation and the application thereof.

[1] Australian Human Rights Commission, 'Rights to equality and non discrimination,' accessed 11 April 2024, available at, https://humanrights.gov.au/our-work/rights-and-freedoms/rights-equality-and-non-discrimination.

Thus, when legislation is adopted by a State party, it must comply with the requirement of article 26 that its content should not be discriminatory."[2]

3.6 Under this understanding, any legislation that would ban virtually all individuals from specific countries based solely on their nationality, would clearly be discriminatory.

3.7 Following Australia's abolition of its "White Australia policy", in the 1970s, Australia has maintained a bi-partisan approach to a non-discriminatory migration program. Only last year the Minister for Immigration, the Hon. Andrew Giles, commissioned a review of the multicultural framework of Australia. It was stated that the purpose of the Review was to explore ways the government and the community could work together to support a cohesive, multicultural society. Sadly, it is clear that there was very little, if any, consultation with communities before the introduction of this Bill. Furthermore, the banning of nationals from specific countries, in breach of Australia's obligations under the ICCPR, will only divide, rather than further any efforts at greater social cohesion.

Family Reunion

3.8 One of the key criticisms of former US President Trump's "Muslim Ban" was its impact on families and the forced family separation that resulted from the ban, in breach of the country's obligations under the ICCPR, specifically Article 17 (protection against unlawful or arbitrary interference with home and family) and Article 23 (protection of family life).

3.9 While AIA notes under the proposed Bill, with respect to family:

"Some exceptions are built into the provision, including, for example, proposed subsection 199G(2) which provides that the visa application bar does not apply to spouses, de facto partners or dependent children of Australian citizens, permanent visa holders, or persons who usually reside in Australia without time limits."

3.10 AIA remains seriously concerned at the impact any bans could have on families reuniting beyond this narrow definition. For instance, many Afghan refugees now residing in Australia could be restricted from reuniting with mothers, sisters, and adult children, for example, if a ban was placed on Afghanistan.

3.11 A report by the Huffington Post in January 2022 revealed that in a sample of hundreds of visa applicants rejected because of Trump's Muslim Ban, over 90% had family members in the US from whom they were separated because of the bans. Despite the bans now being revoked for many the separation continues, with the visa backlog, as at 23 September 2023, standing at 275,000.[3]

3.12 It is also important to note that the limited protections for close family members, subjected to any ban, would not apply to those subject to removal pathway directions. The bill would authorise the Minister to issue removal directions to immediate family members, including spouses if they meet the overly broad criteria for a 'removal pathway non-citizen'. In certain circumstances this

[2] United Nations International Covenant on Civil and Political rights, Human Rights Committee Thirty Seventh Session (1989), General Comment No. 18: Non-discrimination, https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCCPR%2fGE C%2f6622&Lang=en.
[3] U.S. Dep't of State, 'National Visa Center (NVC) Immigrant Visa Backlog Report,' accessed 11 April 2024, available at, https://travel.state.gov/content/travel/en/us-visas/visa-information-resources/visas-backlog.html.

could even include the children of an Australian citizen. There is no requirement that the Minister respect, or even consider, the importance of family unity in such contexts.[4]

4. *Non-Refoulement* Obligations

4.1 AIA has grave concerns that the proposed Bill will lead to serious breaches of Australia's non-refoulement obligations. There are a number of elements to the proposed legislation where there is a very real risk this could happen, including:

- the ability to expand impacted visa categories;
- the ability to revisit protection findings; and
- the fairness of previous protection findings.

Ability to Expand Impacted Visa Categories

4.2 While the current Bill relates to a group of people on a specific visa-class, the legislation, under proposed section 199(1)(d), gives this or any future government the ability to expand the visa categories that this legislation would capture and apply the same draconian provisions without the need to pass new legislation through the Parliament.

4.3 AIA is particularly concerned with the impact this could have on the so-called 'Transitory persons' caseload - those subject to Australia's policy, for those arriving after 19 July 2013, prohibiting them from being processed, or ever settling, in Australia. Currently there are approximately 1040 individuals who have been transferred back to Australia from Nauru and PNG, with the vast majority, approximately 95% found to be refugees. While a small number of these individuals remain in either held or community detention, most now reside in the community with bridging visas, described in government documents as 'final departure Bridging E Visas' or BVEs. Upon being granted a visa, visa holders are told they must make arrangements to leave Australia within the next six months. As refugees however they are unable to return to their home country and in reality the only option to them is to apply for resettlement in a third country. For various reasons however individuals may be unable, unwilling or excluded from applying for third country solutions. Critically there are not even enough resettlement places available, even if all the 'transitory persons' were able or willing to again uproot their lives and move to a third country. Meaning they will remain in indefinite limbo in Australia (where they have been working, paying taxes and raising their families, for years).

4.4 Yet despite being recognised as refugees, under the proposed legislation people in this group could ultimately be designated as 'removal pathway non-citizens'. The proposed legislation would mean that refugees and people seeking asylum who have been detained in offshore detention on PNG and Nauru for nearly 10 years - and who were brought to Australia for urgent medical treatment - may be forced to return to a country where they fear for their safety (and where it has been recognised they will face persecution), in breach of Australia's non-refoulement obligations, or face the prospect of 5 years imprisonment.

[4] UNSW Kaldor Centre Submission.

Ability to Revisit Protection Findings

4.5 The Bill, under sections 197C and 197D, also expand the discretionary power of the Minister to reverse a protection finding, which could compel a person seeking asylum to return home under the threat of a criminal penalty, seriously risking Australia's obligations not to *refoule* someone to a country where they face human rights abuses. The amendments expand this power to cover all 'removal pathway non-citizens'.

4.6 AIA echoes concerns raised by the Kaldor Centre regarding the lack of procedural fairness protections for individuals who may have their protection visas overturned, with no safeguards in place to allow an individual to respond to information or evidence relied upon prior to the decision being made by the Minister to reverse a protection finding.

Fairness of Previous Protection Findings

4.7 The current Bill assumes that people who have pursued a protection claim in Australia and have exhausted their legal avenues have had the opportunity to engage in a fair process, but this is not always the case. When in opposition, the Australian Labor Party criticised what is referred to as the 'fast-track process', by which protection claims, for a specific group of boat arrivals, were reviewed under a different system, with no right to meaningful review. This cohort is often referred to as the "legacy caseload".

4.8 Thousands of people seeking asylum rejected under this process, who have been living and working in Australia for more than a decade, have faced limbo and uncertainty. Under this Bill, this same group will be facing the very real prospect that they will be forcibly returned to the country from which they fled, or 5 years imprisonment. This would have included the Murugappan family (also known as the Biloela family), had the newly elected Labor government not granted them permanent visas shortly after being elected in May 2022.

4.9 Currently there are 2466 people from the legacy caseload who are considered finally determined, having exhausted all appeals processes and are subject to removal. There are a further 5116 who have had at least one rejection and are currently making their way through the appeals process. This includes Afghans from minority groups who were still having their protection claims rejected in the weeks leading up to the return of the Taliban, on the flawed assessment that it was still safe for them to return to Kabul. Under this Bill, people in this, or similar circumstances, could now face 5 years imprisonment for refusing to return back to a country that they consider unsafe.

4.10 It is difficult to understand how a government which has committed to abolish the 'fast track' Immigration Assessment Authority (IAA) (driven in part by the clear evidence that it produced unfair decisions)[5], with the introduction of the Administrative Review Tribunal Bill, will now rely on

[5] See the Kaldor Centre Submission to the Inquiry into the Administrative Review Tribunal Bill 2023 (ART Bill) and the Administrative Review Tribunal (Consequential and Transitional Provisions No.1) Bill 2023 (Consequential and Transitional Bill), p5-6.

erroneous IAA decisions as proof people don't have protection claims. Either then removing them to countries where they fear persecution, or imprisoning them.

5. Conclusion

The Australian Government should use this inquiry as an opportunity to reflect on its obligations under international law, rather than continue to pursue a piece of legislation so clearly in breach of them.

Considering the issues raised in this submission pertaining to non-discrimination and non-refoulement in particular, AIA recommends that the Senate Legal and Constitutional Affairs Committee recommend to the Australian Government that they abandon the Migration Amendment (Removals and Other Measures) Bill 2024.