

Turnbull's asylum seeker ban violates Australia's human rights obligations

Written by Michelle Foster, Professor, Melbourne Law School, University of Melbourne

The Federal Government has taken its first steps towards banning asylum seekers and refugees who attempt to reach Australia by boat from ever entering the country.

The Coalition introduced its [bill](#) to change the Migration Act in the House of Representatives on 8 November, claiming the legislation is compatible with Australia's international human rights obligations.

That claim doesn't stand up to scrutiny. If passed, this bill will be in direct contravention of the [Refugee Convention](#) and Australia's other international obligations. Here are the reasons why.

The people who will be affected by this law are predominantly asylum seekers who came to Australia by boat and have been assessed as refugees in an offshore detention centre. There's no dispute that these people are genuinely in need of international protection.

There is no visa available for people travelling to Australia to seek asylum. Nor is there an orderly international queue for recognised refugees. For most refugees, the chances of being resettled are extremely low. This makes their travel to Australia in search of protection without a visa understandable.

The drafters of the Refugee Convention foresaw this dilemma. This is why Article 31 exists. Article 31 prohibits states from imposing penalties on refugees who illegally enter or stay in a country if they come directly from a place where their life or freedom was threatened.

Even if a refugee travels through or spends time in a transit country, they're considered as having "come directly" so long as they weren't granted protection in that intermediate country. This is the case for most asylum seekers who come to Australia by boat.

Prime Minister Malcolm Turnbull and his Coalition colleagues have been unequivocal in saying the ban is designed to operate as a [penalty for unlawful entry](#). In doing so, the government is

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trying to deter asylum seekers from exercising their right to seek asylum.

There is no question the impact will be punitive. The bill does not provide a sunset clause or any other expiration date, so the prohibition will be permanent. The government states that the ban will apply even after an asylum seeker is settled in, or is offered citizenship of, another country.

If this bill comes into force, it will be in direct contravention of Article 31 of the Refugee Convention.

It's worth reflecting on the fact that some of the refugees who will be affected by this bill were taken by Australia, against their will, to countries in which at least some have suffered serious human rights violations.

International law prohibits countries from returning asylum seekers to persecution. A country must also not transfer, deport or send an asylum seeker to a place where she or he will face torture or inhumane or degrading treatment.

Australia is arguably in violation of this obligation, having exposed at least some asylum seekers to precisely such treatment. The UN Special Rapporteur on Torture [made this assessment](#) in relation to Australia's offshore detention centre on Manus Island. The allegations of [physical and sexual assaults](#) on Nauru suggest that some refugees may have suffered inhuman and degrading treatment there, too.

Australia should be seeking to remedy its breaches of international law by bringing refugees to Australia, not exacerbating them with further violations.

Removing the right to family life

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The government acknowledges that this legislation could result in families being permanently separated. This contravenes Australia's obligations to respect the right to family life.

Australia has signed treaties that prohibit arbitrary interference in a person's family. This includes recognising that family is the "natural and fundamental" group unit in society, and should be protected.

Australia has also committed to ensuring the best interests of a child are a primary consideration. The government does not deny that the bill may violate all of these obligations.

The single justification offered by the government is that Immigration Minister Peter Dutton and his ministerial successors will be able to exercise discretion to lift the ban, where he or she thinks it "is in the public interest to do so". The bill says nothing about the meaning of "public interest", let alone the consideration of international human rights obligations as part of that assessment.

The amorphous "public interest" test is largely a discretionary one, and not amenable to judicial scrutiny. Australia won't satisfy its international obligations with an optional, discretionary measure. Such broad discretion is also not conducive to transparent public administration.

The potential for ministerial benevolence is small comfort to the people this bill will affect, and who could well be permanently separated from loved ones.

Indefinite detention

There is no clarity about what will happen to the refugees already living in offshore detention or in Australia (for example, those receiving medical treatment in Australia) who can't be sent to a third country because no resettlement option can be found. With no valid visa, indefinite immigration detention is a genuine possibility.

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The United Nations has found on numerous occasions that Australia's system of indefinite detention violates the right to freedom from arbitrary detention. The Refugee Convention makes it clear that prolonged detention is illegal under international law.

Discrimination

The government acknowledges that singling out a particular group for a permanent ban could violate their right to equal protection under international law and freedom from discrimination. The government seeks to defend this on the basis that the differential treatment is for "a legitimate purpose", is based on relevant and objective criteria, and is reasonable and proportionate.

This is wrong. A policy that violates refugee and human rights law cannot meet these requirements.

In short, this bill does nothing to ease the global refugee crisis and represents a further rejection of Australia's international obligations.

Michelle Foster receives funding from the Australian Research Council. She also undertakes consultancy work with the United Nations High Commissioner for Refugees.

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