



Families left behind

Submission to the ANAO's audit of international travel restrictions during COVID-19

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Human Rights Law Centre

The Human Rights Law Centre uses strategic legal action, policy solutions and advocacy to support people and communities to eliminate inequality and injustice and build a fairer, more compassionate Australia. We work in coalition with key partners, including community organisations, law firms and barristers, academics and experts, and international and domestic human rights organisations.

The Human Rights Law Centre acknowledges the people of the Kulin and Eora Nations, the traditional owners of the unceded land on which our offices sit, and the ongoing work of Aboriginal and Torres Strait Islander peoples, communities and organisations to unravel the injustices imposed on First Nations people since colonisation. We support the self-determination of Aboriginal and Torres Strait Islander peoples.

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1. Summary

The Human Rights Law Centre (**HRLC**) welcomes the opportunity to contribute to the Australian National Audit Office's performance audit to assess the effectiveness of the design and management of international travel restrictions during the COVID-19 pandemic (**Audit**).

The HRLC's submission does not address the full scope of the Audit but focuses on actions of the Department of Home Affairs and the impact on families who are separated due to international travel restrictions.

In 2020, people across Australia experienced the pain of sudden separation from family and loved ones overseas as borders closed and international travel paused in response to the COVID-19 pandemic. Important family events were missed and moments that should have been shared were experienced alone. This separation was endured by countless families for the benefit of our wider community's health and safety.

But more than 15 months later, as travel restrictions that were understood to be temporary measures remain in place, the strain on people separated from their loved ones must be addressed.

Through the following actions, the Australian Government has left many families behind and failed to uphold the standards of care, compassion and respect that we expect of our Government in a time of crisis:

1. limiting automatic travel exemptions to 'immediate' family members and excluding other vital family relationships like parents and fiancés;
2. excluding temporary visa holders entirely from automatic family exemptions, despite many being long term residents who cannot simply 'go home';
3. suspending the offshore humanitarian program, including split family applicants, and leaving over 7,000 people stranded in dangerous situations;
4. de-prioritising the processing of offshore family visa applications, forcing families who have already endured prolonged separation to wait even longer to be reunited;
5. imposing a discriminatory blanket ban on travel from India, which left families in turmoil and potentially contributed to the deaths of Australian citizens; and
6. imposing an unreasonably high threshold for compassionate travel exemptions, compounding distress for families who are already facing hardship.

The HRLC has worked for many years with families who have been separated or prevented from reuniting by Australian Government policy. We have witnessed the extreme emotional and physical toll that prolonged separation has on children and parents, loving partners, and brothers and sisters.

Policies that separate people from relatives and loved ones should never be the accepted norm. As the impacts of the pandemic continue indefinitely, systems that prevent families from reuniting must not become entrenched.

While the unprecedented restrictions on international travel continue, urgent reforms are needed to prioritise the reunification of families. The Australian Government's approach to managing COVID-19 risk must evolve beyond simply preventing people from entering the country, and focus on bringing people home to their families quickly and safely. The HRLC **recommends that**:

1. automatic exemptions from the inwards travel restrictions be available to all members of the family unit of Australian citizens, permanent residents and temporary visa holders, including at a minimum parents, grandparents, non-dependent children, siblings and those intending to marry;
2. the offshore humanitarian program be restored to full operation as a matter of priority, and people holding Refugee and Humanitarian (Class XB) visas be permitted to enter Australia without an exemption, consistent with other permanent visa holders;

3. additional resources be directed to the processing of offshore family visa applications to account for prolonged delays while onshore applications have been ‘prioritised’;
4. the Australian Government refrain from imposing blanket restrictions on travel without allowing for family or compassionate exemptions, as were applied in relation to India, and never seek to criminalise Australian residents for attempting to return home;
5. the threshold for compassionate travel exemptions be lowered and decisions on requests be reviewable by an independent body such as the Administrative Appeals Tribunal on an expedited basis; and
6. the Australian Government provide greater assistance to facilitate the travel of people stranded overseas who are seeking to reunite with their families in Australia.

2. Impact of family separation

Separation from family can have serious consequences for people’s health and wellbeing, and calls into question Australia’s compliance with human rights standards. It is imperative that Australia’s travel restrictions be reassessed to prioritise reuniting people with their families, to avoid long term health impacts and potential breaches of international law.

2.1 Health consequences

There is clear medical evidence that prolonged separation from family is harmful to adults and children, including newborns.¹ It has been shown to have a devastating impact on mental health. The consequences for children are particularly severe – separation from a parent can impact a child’s brain development, and the trauma of separation suffered in childhood can have ongoing implications for mental health and social adjustment into adult life.

2.2 International human rights law

The rights to have a family and be together as a family are recognised by international law. Family unity is protected by an overlapping matrix of legal safeguards contained in the *International Covenant on Civil and Political Rights*, the *International Covenant on Economic, Social and Cultural Rights*, the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment and the Convention on the Rights of the Child*.²

These are minimum standards that the Australian Government has agreed to uphold, recognising the importance of families to a healthy and thriving society and the suffering that is caused by family separation. The measures outlined in this submission - which have resulted in the prolonged and often arbitrary separation of some families (but not others) - call into question Australia’s compliance with the international treaties which protect the right to family unity. This is particularly so as the length of the separation progresses and the justification for wide-sweeping emergency measures diminishes.

¹ See, for example, Professor Louise Newman AM and Dr Sarah Mares, *Mental Health and Wellbeing Implications of Family Separation for Children and Adults Seeking Asylum*, available at <https://www.hrlc.org.au/family-separation-health-impacts>.

² In particular, these include the right to freedom from arbitrary interference with family; rights to non-discrimination and non-penalisation; consideration of the best interests of the child and the rights of the child to protection and care, to know and be cared for by their parents, and to have applications for family reunification treated in a positive, humane and expeditious manner.

3. Limits of the “immediate family” exemption

Since 20 March 2020, travel restrictions have been in place purporting to prohibit all travel into Australia except for Australian citizens and permanent residents, and others who are exempt.³

Inward travel restrictions are not underpinned by any specific legislative instrument. Rather, they are enforced via the threat of visa cancellation upon arrival⁴ combined with penalties for airlines who carry passengers found to be ineligible to enter.

Exemptions from inward travel restrictions are either automatic or discretionary. One category of automatic exemption applies to “an immediate family member of an Australian citizen or permanent resident”.⁵ An immediate family member is defined as a spouse, de facto partner, dependent child or legal guardian.⁶

This narrow interpretation of family excludes many relationships such as parents, grandparents, non-dependent children, siblings, aunts and uncles, and other extended or informal family members. Vital family relationships often extend beyond the ‘nuclear’ or ‘immediate’ family unit, and extended family members can hold crucial roles in financial, emotional or child rearing support.

People who are engaged to be married are not considered immediate family members. Prospective Marriage visa holders *need to provide evidence that they meet an individual exemption category* before they are able to travel.⁷ In addition to preventing couples from starting their new lives together, this poses a particular problem because once granted, Prospective Marriage visas require the holder to enter Australia within a specified window of time. Between 17 March 2020 and 27 September 2020, **51** visas expired before the holder could travel to Australia.⁸

While recent changes have introduced longer travel windows for Prospective Marriage visas, and refunds are being made available to those whose visas have already lapsed,⁹ this provides limited comfort to people who remain indefinitely prevented from travelling to Australia to be with the person they intend to marry.

This narrow and exclusionary interpretation of ‘immediate family’ has cancelled weddings, prevented grandparents from meeting newborn grandchildren, and placed immense strain on extended families for more than 15 months. The limited rights of families are difficult to justify in light of other automatic exemptions, such as those available to holders of temporary Business Innovation and Investment visas – a class of visa only available to people with high levels of income and assets. The automatic exemptions should be extended to reflect the diversity and importance of family relationships.

³ Australian Border Force, *Inwards Travel Restrictions Operation Directive*, <https://www.homeaffairs.gov.au/covid-19/Documents/inward-travel-restrictions-operation-directive.pdf>.

⁴ Pursuant to section 116 of the *Migration Act 1958* (Cth) (**Migration Act**), assumedly on the basis of risk to public health. There are longstanding and serious procedural fairness concerns regarding the exercise of the cancellation power in s 116 at the border - people are ordinarily given an extremely short window of time, while detained at the airport without access to legal representation, to argue why their visa should not be cancelled. There are serious practical challenges to seeking review of a cancellation decision in these circumstances.

⁵ Above n 3, [4].

⁶ Department of Home Affairs, *COVID-19 and the border: Immediate family of Australian citizens or permanent residents or New Zealand citizens usually resident in Australia*, <https://covid19.homeaffairs.gov.au/immediate-family-australian-citizens-or-permanent-residents-or-new-zealand-citizens-usually-resident-australia>.

⁷ Above n 3, p 2. The Department of Home Affairs has indicated that, between 1 August 2020 – 27 September 2020, between 21 – 25 Prospective Marriage visa holders were granted an exemption. See Department of Home Affairs, Freedom of Information Request FA 20/09/01303, <https://www.homeaffairs.gov.au/foi/files/2020/fa-200901303-document-released.PDF>.

⁸ Department of Home Affairs, Freedom of Information Request FA 20/09/01303, <https://www.homeaffairs.gov.au/foi/files/2020/fa-200901303-document-released.PDF>.

⁹ Department of Home Affairs, *COVID-19 and the border: Refunds and waivers of Visa Application Charges*, <https://covid19.homeaffairs.gov.au/refunds-and-waivers-visa-application-charges>.

Recommendation

The Australian Government should extend automatic exemptions from inwards travel restrictions to all members of the family unit of Australian citizens, permanent residents and temporary visa holders, including at a minimum parents, grandparents, non-dependent children, siblings and those intending to marry.

4. Exclusion of temporary visa holders

The limited automatic exemptions to inwards travel for immediate family members are not available to family members of temporary visa holders. People on temporary visas have no right to bring stranded family members back to Australia. Combined with exclusion from pandemic-related social security support, these restrictions have forced many temporary visa holders to leave Australia, with no current prospect of returning. This will have long term social and economic consequences for Australia.

For many people, temporary visa status does not accurately reflect the deep and long-term occupational, social and community connections they have to Australia. People holding temporary protection visas, for example, are unable to return to their country of origin and have resided in Australia for up to 10 years. Families who have rebuilt their lives in Australia have been left in limbo where one family member happened to be overseas at the time the inwards travel restrictions were introduced.

Discretionary exemptions may be available to family members of people on temporary visas in specific circumstances.¹⁰ Rather than maintaining a complex and selective list of exemptions that may or may not be granted, the Australian Government should extend the automatic family exemptions to temporary visa holders in Australia. People on temporary visas are essential members of the Australian community and should be afforded the same compassion and respect as other residents.

Recommendation

The Australian Government should extend the automatic family exemptions to temporary visa holders in Australia.

5. Suspension of the humanitarian program

According to the Department of Home Affairs' 2019-20 Report on Australia's Offshore Humanitarian Program, *consistent with other decisions of the Government to limit the spread of COVID-19 within Australia, the granting of all Class XB (offshore) Humanitarian visas was suspended on 19 March 2020.*¹¹ As a result, Australia's offshore humanitarian intake for FY2019-20 fell short of the allocated target by 5,579 places. The planning levels for FY2020-21 and FY2021-22 were also significantly reduced.

The HRLC has concerns about the process used to limit the humanitarian program. Section 84 of the Migration Act provides that the Minister may, by legislative instrument, determine that dealing with applications for visas (including protection visas) of a specified class is to stop until a day specified in the determination. No such legislative instrument was made in relation to the decision to suspend the granting of offshore humanitarian visas.

¹⁰ Department of Home Affairs, *Commissioner's Guidelines: Decision making about individual exemptions from Australia's inwards travel restriction policy (Version 3)*, <https://www.homeaffairs.gov.au/covid-19/Documents/commissioners-guidelines.pdf>.

¹¹ Department of Home Affairs, *Australia's Offshore Humanitarian Program: 2019-20* (21 September 2020) pp 1, 12, 15, 17 and 24, <https://www.homeaffairs.gov.au/research-and-stats/files/australia-offshore-humanitarian-program-2019-20.pdf>.

When questioned about the absence of the necessary legislative instrument, the Department of Home Affairs rephrased its position and stated that the granting of offshore humanitarian visas had been *de-prioritised*, as some urgent cases have still been processed.¹²

Regardless of the legality of the decision, the consequence is that thousands of people who would have otherwise been resettled in Australia are left in dangerous situations overseas.

Even those who are already approved for resettlement are expressly prevented from travelling to Australia, as they are not considered permanent residents prior to their first entry into Australia despite holding permanent Australian visas.¹³ This distinction is arbitrary and the Australian Government has provided no rationale for why those in need of protection should be excluded.

The offshore humanitarian program ordinarily includes a significant number of people who are ‘proposed’ or sponsored by family members in Australia. It is one of the few family reunion pathways practically available to people from refugee backgrounds. There are now more 7,000 people holding humanitarian visas who are stranded overseas, and 69% of requests for discretionary exemptions from inwards travel restrictions have been refused.¹⁴

Recommendations

The Australian Government should restore the humanitarian program to full operation as a matter of priority.

The Australian Government should permit humanitarian visa holders to enter Australia without requiring an exemption in line with other permanent residents.

6. Delays in offshore family visa applications

In response to the drastic reduction in migration resulting from inward travel restrictions, the Australian Government announced a one-off increase to the number of Partner visas available in FY2020-21 – the first increase in over five years. The majority of those additional visas were to be granted to people already in Australia. This partly resolved a backlog issue for the Australian Government but provided no relief to families who have been separated for years.

The Federal Government’s decision to prioritise visa applicants who were already present in Australia meant actively diverting resources away from offshore applications.¹⁵ Consequently, the processing of family visa applications for people outside of Australia slowed. Partners and children who have already waited for years to be reunited with their families in Australia are forced to wait even longer.

Slowing down the granting of new offshore family visas reduces inwards travel to Australia, but comes at the expense of people who were unable to access temporary visas to be with their loved ones in Australia while waiting for an outcome. It further disadvantages the thousands of families already unfairly de-prioritised in the visa processing queue under Ministerial Direction 80.¹⁶

¹² Department of Home Affairs, Answers to questions on notice, Budget Estimates (19-20 October 2020), *BE20-291 - Humanitarian program - Suspension of Processing*.

¹³ Above n 6.

¹⁴ Henry Swartz, “Thousands of vulnerable refugees granted protection in Australia remain stuck overseas”, *SBS News* (23 June 2021), <https://www.sbs.com.au/news/thousands-of-vulnerable-refugees-granted-protection-in-australia-remain-stuck-overseas>.

¹⁵ Department of Home Affairs, *The Administration of the Immigration and Citizenship Programs - Fifth edition* (October 2020), p 4; Department of Home Affairs, *The Administration of the Immigration and Citizenship Programs - Seventh edition* (May 2021), p 38; Department of Home Affairs, Response to FOI request FA 20/09/01313 (13 November 2020), *A copy of internal department policy direction outlining that the Dubai and other offshore processing posts will not process all applications*, <https://www.homeaffairs.gov.au/foi/files/2020/fa-200901313-document-released.PDF>.

¹⁶ David Coleman, Minister for Immigration, Citizenship and Multicultural Affairs, *Ministerial Direction 80 – Order for Considering and Disposing of Family Visa Applications*, issued 21 December 2018, which directs that family visa applications sponsored by persons considered to be Unauthorised Maritime Arrivals are to be given lowest priority.

Recommendation

The Australian Government should urgently direct additional resources towards the processing of offshore family visa applications which have been delayed.

7. Discriminatory India travel ban

On 30 April 2021, the Minister for Health and Aged Care made a determination under subsection 477(1) of the *Biosecurity Act 2015* (Cth) prohibiting individuals including citizens from entering Australia if they had been in India in the past 14 days.¹⁷ Failure to comply carried a penalty of five years imprisonment, a \$66,000 fine, or both.

The blanket ban on travel from India caused devastation for families separated between Australia and India, and for individuals and families stranded in India wishing to return.

Regardless of the Government's intentions, the travel ban was perceived and experienced by much of the Australian community as racially discriminatory. The criminal sanctions and targeted geographical application were both unprecedented in terms of travel restrictions – no such bans had been introduced preventing travel from Italy, the United States or other countries experiencing severe waves of infections.

The Australian Government turned its back on a group of Australian citizens, residents and their family members while India suffered an acute and devastating crisis. Several Australians died while waiting to return.¹⁸ The proportionality of the blanket ban has been questioned by the Parliamentary Joint Committee on Human Rights.¹⁹

Since the ban was lifted, the Government has not done enough to facilitate the safe return of people who were locked out of their own country or away from family members. As at 28 May 2021, 10,994 of the 35,128 Australians stranded overseas who have expressed a desire to return home were located in India. Of those, 1,024 were classified as vulnerable, and 209 were classified as minors.²⁰

Travel between India and Australia remains restricted, with fewer categories of exemptions available to people travelling to or from India than to or from all other countries.

Recommendation

The Australian Government should refrain from imposing similar blanket restrictions on travel without access to family or compassionate exemptions.

The Australian Government should not criminalise Australian residents for attempting to return home.

The Australian Government should provide greater assistance to people in India, and elsewhere, who are seeking to return home or reunite with family in Australia.

¹⁷ Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements—High Risk Country Travel Pause) Determination 2021 (Cth).

¹⁸ Tom Lowrey, "Australian citizen Sunil Khanna dies from COVID-19 in India", *ABC News* (19 May 2021), <https://www.abc.net.au/news/2021-05-19/australian-citizen-sunil-khanna-died-from-covid-19-in-india/100150614>.

¹⁹ Parliamentary Joint Committee on Human Rights, *Human rights scrutiny report: Report 8 of 2021* (23 June 2021), pp 45-47.

²⁰ Sahil Makkar, "Most Australians stranded overseas are in India, only three repatriation flights planned in June", *SBS News* (4 June 2021), <https://www.sbs.com.au/language/english/most-australians-stranded-overseas-are-in-india-only-three-repatriation-flights-planned-in-june>.

8. Harsh and inconsistent compassionate exemptions

Discretionary exemptions to inwards and outward travel restrictions are available on a ‘case-by-case’ basis, including in compassionate and compelling circumstances. However, the threshold for circumstances that will be considered compassionate is extraordinarily high, being circumstances that *would result in serious, ongoing and irreversible harm and continuing hardship to an Australian citizen or an Australian family unit, or circumstances regarding the age and/or health and/or psychological state of the person that, if not taken into account, would result in serious, ongoing and irreversible harm and continuing hardship to the person.*²¹ Examples given are the death or critical illness of a close family member. Evidence must be provided to support a request, and all documents must be officially translated into English.

Requiring evidence of permanent and irreversible harm sets an unreasonable threshold. Data indicates that just 9% of requests for inwards compassionate exemptions are approved.²² In the context of prolonged travel restrictions, there must be a reasonable pathway for people to meaningfully continue their relationships with family members overseas.

Perhaps as a consequence of high threshold requirements, there appears to be potential inconsistencies in the granting of compassionate travel exemptions. Regular media reporting refers to people in distressing personal circumstances who have been refused permission to travel, including those who appear to meet the guidelines.²³

Recommendation

To ensure consistency and fairness, the Australian Government should revise the guidelines for granting compassionate travel exemptions and introduce a lower threshold.

The Australian Government should establish an avenue for independent review of decisions regarding exemptions – for example to the Administrative Appeals Tribunal on an expedited basis or through an independent panel of experts as has been created in Victoria in relation to hotel quarantine exemptions.

²¹ Above n 10, p 2.

²² Between October 2020 and January 2021, 3,630 requests for inwards travel exemptions were granted on compelling and compassionate grounds while 36,303 were refused. Department of Home Affairs, Response to FOI Request FA 21/02/00413, *Number of inward and outward travel exemption requests received, approved and refused between October 2020 and January 2021 by category* (1 March 2021), <https://www.homeaffairs.gov.au/access-and-accountability/freedom-of-information/disclosure-logs/2021>.

²³ See eg Hannah Sinclair, “Dual citizens call for more compassionate approach to Australia's international border closure”, *ABC 7.30* and *ABC News* (24 June 2021), <https://www.abc.net.au/news/2021-06-23/dual-citizens-australia-urge-compassionate-covid-border-rules/100238760>.