Bill C-31, the federal government’s proposed overhaul of the tangle of legislation and regulations that currently governs the field of migration to Canada, has been a long time coming. The current Immigration Act came into force in 1978. In the intervening 22 years, despite major changes in migration trends and needs, governments have left the Act largely intact, preferring to respond to changing contexts through regulations and amendments rather than replacing the Act as a whole.

This preference is, of course, understandable. In a country in which one in six people is an immigrant and many more are children of immigrants, the questions surrounding who can come to Canada is understandably a sensitive one.

Bill C-31, the proposed Immigration and Refugee Protection Act, is the result of a massive effort on the part of Immigration Department researchers and analysts over the past several years, as well as ongoing advocacy by a range of community and interest groups. The bill follows on the heels of two previous public reports on immigration legislative reform, 1998’s Not Just Numbers, an independent report commissioned by the Minister of Citizenship and Immigration and last year’s Building on a Strong Foundation for the 21st Century, a white paper outlining the federal government’s proposed directions for reform.

There are a number of positive and necessary measures in Bill C-31. To begin with, the bill as a whole is a good deal simpler and easier to understand than the Act that it is designed to replace. This is due in part to the use of plain language in the bill, and in part to its logical organization. The division of immigration and
refugee protection into separate sections, each with its own distinct objectives, is also an important step.

On the negative side, however, the bill demonstrates an unhealthy obsession with criminality and security, without any safeguards to protect the wrongly accused. Indeed, one cannot help but be struck by its disproportionate focus on measures for barring or deporting asylum seekers. By lowering the threshold on what constitutes criminality and substantially widening the power of the government to refuse, detain or remove refugee claimants and even permanent residents – in some cases without due process – the bill seriously erodes the rights of both refugees and permanent residents.

Despite its negative aspects, Bill C-31 has had a relatively easy ride since its release in early April. The bill is politically astute, offering something for everyone. But this strength is at the same time its major flaw. Bill C-31 fails to reflect a consistent and thoroughgoing commitment to core values, democratic principles and human rights norms. At the same time, the bill leaves unanswered perhaps the two most contentious questions of all: Who? And how many? These issues, we are told, will be addressed in regulations still to come.

What's in Bill C-31

refugee protection

There are a number of measures aimed at improving the refugee process in Canada. For example, the introduction of an appeal on the merits of the case, conducted by the Immigration and Refugee Board, is a major step forward. This recognition of the fundamental right to due process has been advocated strenuously by refugee advocates, human rights groups and international bodies including the United Nations High Commissioner for Refugees and the Inter-American Commission on Human Rights.

The consolidation of all protection-related decisions within the Immigration and Refugee Board is also an excellent step towards justice, and will help eliminate some of the endless hoops and hurdles refugee claimants currently must negotiate in order to get Canada’s protection. A related positive step is the inclusion of the United Nations Convention Against Torture as grounds for protection by the Immigration and Refugee Board (albeit 15 years late – Canada ratified this Convention in 1985). However, the positive impact of including these grounds for protection is greatly weakened by the bill’s explicit exemption in some situations of perhaps the most important clause of the Convention: the prohibition against returning anyone to a country where they face torture (Article 3).

The goal of faster decision making is likewise important, though it is crucial that fairness not be sacrificed in the interest of efficiency. The government must recognize that to achieve its goal of “faster but fairer” refugee determination may well require increased resources for the Immigration and Refugee Board. The plan to achieve greater efficiency through increased use of single-member panels for refugee determination is problematic and should be pursued only if it is matched with a significantly improved, non-political process for appointing qualified Board members.

The commitment to incorporating the “best interests of the child” principle at various points in the bill is a step in the right direction, though it does not go as far as it ought. For this
commitment to have any real impact, the bill should stipulate that the best interest of the child must be a primary consideration for Immigration officials, as required by the UN Convention on the Rights of the Child, which Canada has ratified. The requirement that policies and procedures for people seeking admission to Canada be consistent with the full Canadian Charter of Rights and Freedoms is also a positive change.

The increased penalty for migrant trafficking ($1 million) could prove to be a useful deterrent to traffickers. However, what is missing from the bill are concomitant safeguards to ensure that genuine refugees and those who help them are not penalized.

Some of these measures represent significant improvements on the current Immigration Act, and the federal government is to be commended for including them in the bill. In many ways, they build on the momentum established through some of the other positive measures introduced in recent months. These include the reduction to three years of the waiting period for undocumented Somali and Afghan refugees seeking landing, and the removal of the reviled $975 right of landing fee, or ‘head tax’ for refugees. All of these measures can be characterized as moving Canada a little closer to recognizing its international obligations and the needs and human rights of asylum seekers.

As necessary as these changes are, however, their positive impact on the system will be counteracted by a series of regressive changes to the Act affecting asylum seekers. These measures appear to sidestep human rights concerns altogether.

For example, despite the bill’s commitment to protecting refugees and the measures noted above which demonstrate this commitment, the bill provides for the automatic exclusion of certain categories of asylum seekers from making a refugee claim if they ever have been convicted of a “serious crime.” This could result in genuine refugees being excluded, as it is not uncommon for corrupt and repressive governments to try to silence dissidents by trumping up criminal charges and convicting them. To avoid repeating such injustices, asylum seekers must have access to due process, where decision-makers can hear the reasons for exclusion and asylum seekers can present an explanation and defense.

While there are undoubtedly situations in which refugee claimants need to be detained, Bill C-31 gives the Immigration Department too much discretion in this regard, allowing it to detain refugee claimants for no more compelling reasons than administrative convenience. This erosion of the rights of refugee claimants may be in violation of the Canadian Charter of Rights and Freedoms as well as international human rights standards.

Similarly, the failure to address existing problems in the criteria for excluding potential security threats is disappointing. Neither the current Act nor the proposed overhaul provides any definition or interpretive guidelines for the terms “member” or “terrorist” in the sections that exclude members of terrorist organizations (s. 19 of the old Act; s. 30 of the new bill). It has been suggested that strict application of these broad terms would result in Nobel laureate Nelson Mandela being excluded, as well as those who merely sympathize with the anti-apartheid cause of the African National Congress.

These regressive measures are fundamentally at odds with the protection values purported
to guide the legislation, as well as with human rights norms and Canada’s international obligations.

This is not to suggest that the bill is all bad. There are very good measures, just as there are numerous disturbing ones. And there are many key issues – such as the selection of refugees – that simply cannot be assessed because the bill is silent on them. The real problem with the bill, therefore, lies in its attempt to be all things to all people. It seeks to accommodate selected human rights norms in some situations, while violating them in others to placate conservative critics who would prefer to see our borders closed, all the while reserving inordinate discretionary power for the Immigration Department.

Immigration to Canada

If the bill is silent on some key aspects of refugee policy, that silence becomes truly deafening in the area of immigration to Canada – with the exception of one important matter: the status of permanent residents of Canada.

Currently, permanent residents enjoy most of the rights afforded to citizens. While most refugees and immigrants proceed to citizenship after being granted permanent resident status, many do not, for a variety of reasons (e.g., oversight; concern that they will lose citizenship in their country of origin). Nonetheless, permanent residents live in Canada like anyone else, working, paying taxes and contributing to society.

Bill C-31 would diminish the security and permanence of permanent resident status, designating permanent residents as “foreign nationals” alongside refugee claimants, visitors, foreign students and temporary workers. Permanent residents who travel abroad, for example, would be required to carry a renewable identity card. If the card expires or is lost or stolen, they are presumed not to be permanent residents unless they can prove otherwise to an overseas officer. By contrast, Canadian citizens who lose their passports are not subjected to any such presumption of guilt and simply can go to the nearest consulate or embassy and apply for a new one.

Furthermore, permanent residents who are convicted of a “serious” crime or who are sentenced to two or more years’ imprisonment automatically would be deported, without appeal or consideration of any extenuating circumstance. This would mean that even a person who came to Canada as an infant with her parents and lived here all her life as a permanent resident could be deported for committing a relatively minor crime.

As noted, while the bill includes some significant measures affecting permanent residents of Canada, it is silent on matters relating to immigration. To be sure, the Immigration Minister has made several positive announcements about forthcoming regulatory changes to the family class and to immigrant selection. Depending on how they are implemented, some of these measures could be very significant steps forward. However, without either the actual regulations before us or a strong statement of principles relating to, for example, the right to family reunification, it is impossible to assess how the proposed changes would work and how effective they would be.

Ottawa’s decision to leave these issues to regulations rather than include them in legislation conforms with a broader trend to framework legislation. The approach undoubtedly has the benefit of allowing the immigration system to evolve and adapt more readily to changing con-
texts. However, it also has the very serious drawback of shielding some of the most important decisions about who gets into Canada from the public scrutiny and debate to which legislative initiatives are subjected. To respect the democratic process, therefore, the government should make public the proposed regulations before proceeding any further with the bill, so that Canadians can construct a comprehensive picture of how the revamped system will work.

**What’s not in Bill C-31**

**refugees: who and how many?**

As noted, the Minister has given the public some indication of what we can expect in the regulations. With respect to refugee selection, the government has extended the period during which refugees must be able to “establish” themselves in Canada. While this provision is an improvement over the current one-year limit, it is disappointing that the government plans to maintain such requirements at all. Establishment criteria have no place in refugee selection. All refugees, regardless of their background, skills and education, have an equal claim to Canada’s protection.

Another measure announced by the Immigration Minister, but not included in the bill, is an increase in overseas interdiction of “undocumented persons.” This measure is ostensibly designed to protect the in-Canada refugee determination system from abuse by people who do not truly need protection. Maintaining the integrity of the system is, in principle, an entirely valid and important concern. A weak or porous refugee determination system would defeat the purpose of refugee determination, and would diminish the public’s confidence and support for refugee acceptance and resettlement, thus putting all refugees at risk. At the same time, however, measures to maintain system integrity must not place genuine refugees at risk.

It is a fact of life that many genuine refugees simply are unable to secure identity documents that meet Canadian standards. In order to save their lives, these refugees have no choice but to resort to false documents or irregular means of travel in order to gain freedom from persecution. This is as true today as it was some 50 years ago when the UN Convention relating to the Status of Refugees was drafted with a clause explicitly prohibiting countries from imposing penalties on refugees who enter the country illegally (Article 31). Interdiction of such persons overseas will almost certainly prevent many women, men and children who are genuinely at risk from ever gaining asylum. This is far too high a price to pay for system integrity.

Not addressed in either the bill or the government’s press releases is the related issue of identity document requirements for Convention refugees seeking landing in Canada. Under the current Act, many genuine refugees spend years in legal limbo, allowed to stay in Canada but denied permanent resident status because, through no fault of their own, they are unable to provide satisfactory documents to immigration officials.

Refugees from Somalia and Afghanistan – countries which lack a civil service that can issue documents – may seek landing without the required documents, but only after a three-year waiting period. Refugees from other countries must wait indefinitely. This untenable situation has been decried by local, national and international justice and human rights organizations, and is a violation of several international covenants. Will this issue finally be resolved in the regulations, allowing undocumented refugees who have
a good explanation for their inability to acquire documents to be landed without penalty?

The federal government has been silent on the question of how many refugees should be admitted to Canada. The number of refugees accepted over the past decade has varied widely, from a high of more than 53,000 in 1991 to a low of fewer than 21,000 in 1994. In 1999, Canada accepted 24,230 refugees. Is this the best we can do?

There is ample evidence that Canadians are prepared to accept more refugees than we currently do, provided they truly need Canada’s protection. Last year’s outpouring of compassion for ethnic Albanian refugees from Kosovo demonstrated that the compassion expressed in our welcome of Vietnamese boat people two decades ago is still alive and well in Canadian communities. The Minister should support and nurture this goodwill, and convey it into action in the form of additional government sponsorships and the promotion and facilitation of increased joint and private sponsorships.

The bill raises the spectre of annual quotas for refugee resettlement. Unless provision is made for emergencies, refugee quotas must be firmly rejected — compassion and the human rights of refugees should never be subject to quotas.

**immigrants: who and how many?**

As with refugee selection, the details of immigrant selection have been left to as-yet-undisclosed regulations. While the objectives with respect to immigration are articulated in the Act, and include social, economic and cultural factors as well as family reunification, there is no way of knowing whether these objectives will be reflected in the regulations. Nor is the much-disputed issue of the balance of economic and family class immigrants addressed in the bill.

The Immigration Minister has made some announcements about these matters. She has indicated, for example, that the selection criteria will shift away from an occupational focus to a focus on education and transferable skills. In addition, she has acknowledged the importance of the family class in building Canada and said that she would like to see it grow. She also has proposed changes within the family class, such as expanding the definition of “spouse” to include common-law and same-sex partners, and lowering the age at which an individual may sponsor someone, from 19 to 18. In addition, she has announced that a new in-Canada landing class for temporary workers will be established. But no details have been tabled.

The relative weight given to economic classes and the family class is too important to leave out of the current debate of the bill. The issue goes to the very heart of the immigration program; it requires us to examine our priorities and consider the kind of society we wish to be.

There are many examples of problems arising from short-sighted immigration policies. One of the most frustrating for many skilled immigrants now living in this country is the disconnect between the Canada presented to them while still overseas and the reality they face upon arrival. In trying to attract immigrants, Canada actively seeks people with higher education and who are qualified to practise particular trades and professions. Once these immigrants arrive, however, many discover that the very degrees and training that helped them qualify for immigration to Canada are nearly worthless in the labour market here. Doctors end up driving taxis, engineers delivering pizzas.
In part because of policies like these, Canada no longer can count on a constant stream of prospective immigrants knocking on our doors seeking admission. Canada needs to compete with other countries to attract immigrants. This will require that we look beyond short-term economic self-interest and develop policies that will attract immigrants and convince them to stay here. Making it easier for immigrants to bring their extended families with them is an important step. So is an aggressive program to improve recognition of foreign credentials and experience, and to eliminate barriers to employment in regulated professions and trades. This is an area that will require substantial leadership by the Minister of Citizenship and Immigration and by the Minister of Human Resources Development, as well as cooperation with the provinces, regulatory bodies and employers.

Another critical part of the equation is effective, comprehensive and adequately funded settlement services to help those immigrants and refugees who need assistance adapt and settle in Canada as quickly as possible. There is increasing evidence that the current policy and program framework for settlement services is not creating the desired result of effective participation in Canada’s economy for all immigrants and refugees. Creative new approaches to accelerating settlement – for example, delegating responsibility for settlement programs to local government – are desperately needed. Yet there is no indication that the federal government recognizes the need for an overhaul of settlement policy to accompany the reform of immigration policy.

Until some of these issues have been addressed, there is little point in engaging in debate about increased numbers of immigrants. The Liberal government’s proposed annual immigration target of 1 percent of the Canadian population (or 300,000) is as meaningless as the current upper target of 225,000, which we have failed to meet for the last three consecutive years.

Conclusion

In a democracy, public policy making necessarily involves accommodating diverse views and priorities. That Bill C-31 does not meet all the hopes or expectations of any one side of the debate is no reason to condemn it. However, the process of political trade-offs must not occur in a vacuum: Canadians have a right to expect vision and leadership from their government, as well as firm adherence to democratic principles and human rights norms. Bill C-31 fails to live up to this standard.

The bill’s lack of vision is demonstrated by its emphasis not on building a nation (an issue which it ignores altogether) but simply on keeping people out. By pushing to regulations many of the key decisions about who comes to Canada and failing to present those regulations for public debate alongside the bill, Bill C-31 is deeply undemocratic. And by inconsistently applying human rights norms in some contexts and violating them in others, the bill fails to demonstrate any underlying commitment to justice.

Whether good legislation can be salvaged from Bill C-31 will depend on the legislative route chosen by the government: The Immigration Department must drop its fast-track approach and submit its plan to full public review. This will require that both the bill itself and the key regulations be referred to the Standing Committee on Citizenship and Immigration for extensive public consultations, and that the advice given by the committee be incorporated into the bill and regulations. In addition, given
the growing importance of regulations, the government should commit to ensuring that, in the future, all significant regulatory change will be subjected to increased democratic scrutiny and public input.

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