The Senate

Legal and Constitutional Affairs Legislation Committee

Migration Legislation Amendment (Regional Processing Cohort) Bill 2019 [Provisions]

September 2019

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2.55 The committee recommends that the Senate pass the bill.

Chapter 1
Introduction

1.1 On 4 July 2019, the Senate referred the provisions of the Migration Legislation Amendment (Regional Processing Cohort) Bill 2019 (the bill) to the Legal and Constitutional Affairs Legislation Committee (the committee) for inquiry and report by 13 September 2019.[1]

1.2 This followed a recommendation of the Selection of Bills Committee which noted that the bill should be referred so the committee could consider the concerns of stakeholders as well as human rights law and obligations.[2]

Conduct of the inquiry

1.3 In accordance with usual practice, the committee advertised the inquiry on its website and wrote to organisations inviting submissions by 7 August 2019. The committee received 30 submissions, listed at Appendix 1.

1.4 The committee held one public hearing on 22 August 2019 in Canberra. Details of the public hearing are provided at Appendix 2.

Acknowledgements

1.5 The committee thanks the organisations and individuals who participated in the public hearing as well as those who made written submissions.

Note on references

1.6 In this report, references to Committee Hansard are to proof transcripts. Page numbers may vary between proof and official transcripts.

Previous version of the bill and past committee inquiry

1.7 Another bill, called the Migration Legislation Amendment (Regional Processing Cohort) Bill 2016, was introduced in the House of Representatives on 10 November 2016. The Senate referred that bill to this committee for inquiry and report by 22 November 2016.[3] The committee received 84 submissions to that inquiry, held one public hearing and tabled its report on 22 November 2016. The previous bill lapsed at prorogation of the 45th Parliament on 11 April 2019.

1.8 The bill currently before the committee is substantially the same, with only minor amendments.

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1 *Journals of the Senate*, No. 3, 4 July 2019, p. 7881.

2 Senate Selection of Bills Committee, *Report 2 of 2019*, 4 July 2019, [p. 1 and Appendix 11].

3 *Journals of the Senate*, No. 15, 10 November 2016, p. 448.

Purpose of the bill

1.9 In his second reading speech, the Hon Peter Dutton MP, Minister for Home Affairs, explained the purpose of the bill:

> The purpose of the Migration Legislation Amendment (Regional Processing Cohort) Bill 2019 is to reinforce the coalition's longstanding policy that people who travel here illegally by boat will never be settled in Australia.
>
> The legislation will apply to people transferred to a regional processing country on or after 19 July 2013, including people who are currently in a regional processing country, have left a regional processing country and are in another country, are in Australia for a temporary purpose awaiting return to a regional processing country and who are taken to a regional processing country in the future.[4]

1.10 In his speech, the minister emphasised that the bill is consistent with the announcement made on 19 July 2013 by the then Prime Minister, the Hon Kevin Rudd MP, when announcing the signing of the resettlement arrangement with Papua New Guinea. Mr Rudd stated that from 19 July 2013 'any asylum seeker who arrives in Australia by boat will have no chance of being settled in Australia as refugees'.[5]

1.11 The Department of Home Affairs (the department) provided additional background to the bill:

> Without this Bill, a person who is settled from Papua New Guinea or Nauru to a third country could apply for and be granted a visa which would allow them to settle in Australia. The Bill was developed in response to concerns that this 'back-door' to Australia could be marketed by people smugglers to encourage people to get on boats to Australia.[6]

1.12 The department also advised that the bill forms part of the multilayered approach utilised by Operation Sovereign Borders which includes deterrence, disruption, detection, interception, return, regional processing and denial of a settlement pathway in Australia to successfully stem the flow of illegal maritime arrivals.[7]

Key provisions of the bill

1.13 This section outlines the key provisions of the bill in general terms.

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4 The Hon Peter Dutton MP, Minister for Home Affairs, *House of Representatives Hansard*, 4 July 2019, p. 300.

5 The Hon Peter Dutton MP, Minister for Home Affairs, *House of Representatives Hansard*, 4 July 2019, p. 300.

6 Department of Home Affairs, *Submission 2*, p. 4.

7 Major General Craig Furini AM CSC, Joint Agency Task Force Operation Sovereign Borders, Department of Home Affairs, *Committee Hansard*, 22 August 2019, p. 35.

1.14 The bill would amend the *Migration Act 1958* (the Migration Act) and the Migration Regulations 1994 to indefinitely preclude unauthorised maritime arrivals (UMAs)[8] and transitory persons[9] from making a valid application for any Australian visa. Item 1 of the bill inserts a new definition in subsection 5(1) of the Migration Act of a member of the designated regional processing cohort. This cohort includes two categories:

- a person who is an unauthorised maritime arrival, was taken to a regional processing country after 19 July 2013 and was at least 18 years old when taken to a regional processing country; and
- a transitory person who was taken to a regional processing country in accordance with relevant sections of the *Maritime Powers Act 2013* after 19 July 2013 and was at least 18 years old when taken to a regional processing country.[10]

1.15 The bill also includes measures which would prevent a member of the designated regional processing cohort from being deemed to have been granted a special purpose visa under section 33 of the Migration Act, or being deemed to have applied for particular visas under the Migration Regulations. This includes visas in the following categories: Subclass 600 (Visitor), Electronic Travel Authority, temporary protection, safe haven enterprise and Refugee and Humanitarian (Class XB).[11]

Ministerial power

1.16 The bill confers a power on the minister to permit a member of the designated regional processing cohort, or a class of persons within the designated regional processing cohort, to make a valid application for a visa if the minister thinks it is in the public interest to do so.[12]

Application provisions

1.17 The bill provides different commencement dates for the bar on visa applications depending on whether the visa applicant is outside or inside Australia. If the visa applicant is outside Australia, the bar would apply if the

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8 UMA is defined in section 5AA of the *Migration Act 1958* (the Migration Act). It includes a person who both entered Australia by sea at either an excised offshore place or at any other place at any time on or after the commencement of this section, and who became an unlawful non-citizen because of that entry.

9 A transitory person is defined in section 5 of the Act. It includes a person (and any children) taken to a regional processing country (under section 198AD) or taken to a place outside Australia under paragraph 245F(9)(b), or under Division 7 or 8 of Part 3 of the *Maritime Powers Act 2013*.

10 Explanatory memorandum to the Migration Legislation Amendment (Regional Processing Cohort) Bill 2019 (explanatory memorandum), pp. 4–5.

11 Explanatory memorandum, p. 2.

12 Explanatory memorandum, p. 2.

visa application is made (a) after commencement of the Act or (b) before commencement but after the bill was introduced in the House of Representatives (4 July 2019) and was not finally determined before commencement of the Act.[13]

1.18 For individuals inside Australia, the statutory bar would apply where an application is made after commencement and no determination has been made by the minister to lift the bar.

Consideration by other parliamentary committees

1.19 The Migration Legislation Amendment (Regional Processing Cohort) Bill 2016 was considered by both the Senate Standing Committee for the Scrutiny of Bills (the scrutiny committee) and the Parliamentary Joint Committee on Human Rights (PJCHR).

1.20 On 23 July 2019, the scrutiny committee reiterated the comments it had previously made on the 2016 bill.[14] On 30 July 2019, the PJCHR also reiterated its views set out in its previous report.[15] The following section summarises the comments made by the scrutiny committee and the PJCHR.

Senate Standing Committee for the Scrutiny of Bills

1.21 The scrutiny committee raised scrutiny concerns in relation to the 2016 bill. The scrutiny committee considered that the bill, in imposing a lifetime visa ban on adults who were transferred to a regional processing country after 19 July 2013, has a retrospective application. It also expressed concern that the bill, in applying to anyone aged 18 at the time of transfer to a regional processing country, may have particularly adverse consequences for those who were children at the time the decision was made to seek to travel to Australia but who turned 18 by the time of their transfer to a regional processing centre (and would therefore be captured within the definition of regional processing cohort). The scrutiny committee also highlighted the application provisions with particular reference to applicants outside Australia.[16]

1.22 After considering the response from the minister, the committee drew its scrutiny concerns to the attention of senators.[17]

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[13] Migration Legislation Amendment (Regional Processing Cohort) Bill 2019, s. 39.

[14] Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 3 of 2019*, p. 27.

[15] Parliamentary Joint Committee on Human Rights, *Report 3 of 2019*, 30 July 2019, p. 15.

[16] Scrutiny of Bills Committee, *Scrutiny Digest 1 of 2017*, 8 February 2017, pp. 87–93.

[17] Scrutiny of Bills Committee, *Scrutiny Digest 1 of 2017*, 8 February 2017, pp. 91–92.

Parliamentary Joint Committee on Human Rights

1.23 The PJCHR expressed concern about the permanent lifetime visa ban that would apply to the regional processing cohort. The committee noted that the imposition of a lifetime visa ban for asylum seekers in specified circumstances 'engages a number of human rights including the right to equality and non–discrimination, the right to the protection of the family and the rights of the child'.[18] It was reported that although the proposed lifetime visa ban does not apply to children under 18 years old at the time they were taken to a regional processing centre, the ban may still impact upon children by separating children (who are not subject to the visa ban) from parents (who are subject to the visa ban).[19]

1.24 The committee also observed that the minister's discretionary power to intervene in cases where the minister deems it is in the public interest 'could potentially relieve some of the harshness of the visa ban in individual cases'.[20] However:

> …on its own, this discretionary safeguard is unlikely to be sufficient to ensure that the measure is a proportionate limit on the right to protection of the family in the context of a blanket visa ban.[21]

1.25 Following a response from the minister in January 2017, the committee concluded its examination of the issues, noting that in light of its human rights concerns:

> [T]he committee is unable to conclude that the measure is compatible with the right to equality and non-discrimination, the right to protection of the family and rights of the child. The objective identified in the minister's response, that is, seeking to impose a penalty on those who seek to enter Australia for the purpose of claiming asylum, cannot be a legitimate objective for the purpose of limiting human rights under international law.[22]

1.26 The PJCHR drew these issues to the attention of the Parliament.[23]

Focus of this report

1.27 Much of the evidence received for the current inquiry highlighted similar issues to those raised in the previous inquiry during 2016. While the focus of this report is on the issues raised in the current inquiry, the committee was

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[18] Parliamentary Joint Committee on Human Rights, *Tabling statement*, 9 November 2016, pp. 2–3, see also: *Report 9 of 2016*, 22 November 2016, p. 19.

[19] Parliamentary Joint Committee on Human Rights, *Report 9 of 2016*, 22 November 2016, p. 20.

[20] Parliamentary Joint Committee on Human Rights, *Report 9 of 2016*, 22 November 2016, p. 21.

[21] Parliamentary Joint Committee on Human Rights, *Report 9 of 2016*, 22 November 2016, p. 21.

[22] Parliamentary Joint Committee on Human Rights, *Report 2 of 2017*, 21 March 2017, p. 89.

[23] Parliamentary Joint Committee on Human Rights, *Report 2 of 2017*, 21 March 2017, p. 89.

also able to consider evidence given to its previous inquiry. Key issues raised in evidence are discussed in the next chapter.

Chapter 2
Key Issues

2.1 This chapter examines the key issues raised in relation to the Migration Legislation Amendment (Regional Processing Cohort) Bill 2019 (the bill), including:

- whether the purpose of the bill has been adequately explained;
- the scope and implementation of the bill;
- the ministerial power to lift the visa application bar when deemed to be in the public interest; and
- Australia's international legal obligations, with particular reference to human rights concerns.

2.2 The chapter concludes with the committee's view and recommendation.

Purpose of the bill

2.3 As noted in chapter 1, the stated purpose of the bill is to reinforce the government's policy that people who travel to Australia by boat would never be settled in Australia. As outlined by the Department of Home Affairs (the department), the bill:

> …is designed to strengthen measures to make it difficult for people smugglers, to deter potential illegal immigrants from attempting needless dangerous voyages and to encourage people to pursue regular migration pathways.[1]

2.4 Some submitters and witnesses questioned whether the government has sufficiently explained the need or rationale for the bill.[2] In particular, concerns were raised that the bill is unjustified and disproportionate as it imposes a lifetime visa ban on a small defined cohort of people in order to send a message to deter people attempting to reach Australia.[3] The Asylum Seeker Resource Centre (ASRC) submitted:

> It is important to note that this Bill disproportionately and unlawfully penalises people of a certain cohort, being boat arrivals who happened to enter Australia after an arbitrary date. The proposed ban on entering Australia is punitive, particularly given its severity (a permanent ban on entry) for any purpose and irrespective of the personal circumstances of

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1 Major General Craig Furini AM CSC, Commander, Joint Agency Task Force Operation Sovereign Borders, Department of Home Affairs, *Committee Hansard*, 22 August 2019, p. 35.

2 See, for example, Liberty Victoria, *Submission 9*, p. 2; BITA Visitors Group, *Submission 3*, p. 1.

3 See, for example, Dr Carolyn Graydon, Principal Solicitor and Manager, Human Rights Law Program, Asylum Seeker Resource Centre, *Committee Hansard*, 22 August 2019, p. 8.

> individual refugees. This unlawfully and cruelly targets and discriminates against a particular group of people.[4]

2.5 It was also argued that the bill is unnecessary because the *Migration Act 1958* (Migration Act) already contains extensive powers and safeguards to ensure that visas are obtained legitimately.[5] Refugee Legal explained that 'a legal mechanism for deterring travel by boat and preventing circumvention of Australia's migration laws currently exists' through the operation of the legislative bars in sections 46 and 46A of the Migration Act which prevent non–citizens who arrive in Australia by boat from applying for a valid visa without the permission of the minister.[6]

2.6 This view was shared by the Kaldor Centre for International Refugee Law, the Peter McMullin Centre on Statelessness, and Professor Ben Saul who submitted that the minister already has the power to determine the granting of visas:

> People who are currently in Nauru or PNG, and those who have been brought back to Australia for medical or other purposes, are 'transitory persons' under the Migration Act 1958 (Cth) (Act). Section 46B of the Act already prohibits them from making a valid visa application in Australia unless the Minister deems it 'in the public interest' to allow them to do so. People who have been or will be resettled elsewhere (including in the United States, Canada, and any other future resettlement countries) are also subject to Australia's existing migration laws. They do not have an automatic right to enter and remain in Australia, and the Minister already has broad authority to exclude certain people. [7]

2.7 The Australian Human Rights Commission (the AHRC) also noted that the minister already has a range of powers under the Migration Act to refuse visa applications in various circumstances. The commission argued it is unclear why these existing powers are insufficient to achieve the bill's objectives.[8]

2.8 The department explained the current legal standing for members of the regional processing cohort who wish to apply for a visa. Individuals who are unlawful maritime arrivals (UMAs) and are currently in Australia are subject to an existing bar on applying for a visa under sections 46A or 46B of the Migration Act, unless the minister lifts the bar. The bar that exists under sections 46A and 46B only applies to applications made within Australia; it

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4 Asylum Seeker Resource Centre, *Submission 15*, p. 6.

5 See, for example, Refugee Council of Australia, *Submission 14*, p. 1; Law Council of Australia, *Submission 20*, p. 13; Australian Human Rights Commission, *Submission 18*, p. 11.

6 Refugee Legal, *Submission 19*, p. 3.

7 Kaldor Centre for International Refugee Law, the Peter McMullin Centre on Statelessness, and Professor Ben Saul, *Submission 7*, p. 2.

8 Australian Human Rights Commission, *Submission 18*, p. 11.

does not apply to people within that cohort who may have returned home, resettled in another country or are in a regional processing country.[9]

2.9 The department outlined the process that would be in place if the bill is passed:

> It will extend the same type of bar with the same type of ability for the minister to lift the bar for applications for a visa made from this cohort. This is a smaller cohort. It's defined as smaller than the UMAs, because it's made the distinction in relation to children under the age of 18 at the time that they were transferred to a regional processing country. It will not only have the existing bar that applies; this will be a bar that mirrors that, if there's an application made in the future from within Australia, but, equally, it will not distinguish where you are when you make your application for a visa. So, if you are in another country and you seek to come to Australia— you apply for a visa—you will not be able to make a valid application unless the minister lifts the bar.[10]

Scope and implementation

2.10 According to departmental data, the affected cohort comprises 3,127 individuals who have been transferred to regional processing countries between 19 July 2013 and 30 June 2019. Included in this total number are 333 children who would not be subject to the legislative bar, bringing the total number of affected individuals down to 2,794.[11] The department also advised that individuals in this cohort are currently residing in a number of locations.[12] As at 20 August 2019, 1,084 individuals (of the 3,127 total) are in Australia on medical transfer or accompanying a family member on medical transfer.[13]

2.11 Amnesty International drew attention to how the bill may impact the individuals currently in Australia:

> The impact on over 1000 people in Australia, brought back for medical treatment and other reasons, has also not been fully considered, given the population of this cohort has grown substantially since the Bill was first proposed. The safety, protection and medical care of these people is not considered in the Bill and could be read to suggest they are not in danger of being suddenly deported. No protections are in place to ensure this

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[9] Ms Pip De Veau, First Assistant Secretary, Legal, Department of Home Affairs, *Committee Hansard*, 22 August 2019, p. 47.

[10] Ms De Veau AM CSC, Department of Home Affairs, *Committee Hansard*, 22 August 2019, p. 47.

[11] Major General Furini, Department of Home Affairs, *Committee Hansard*, 22 August 2019, p. 41; Department of Home Affairs, *Submission 2*, p. 4.

[12] Locations including: Papua New Guinea, Nauru, the United States, Cambodia, Germany and Switzerland.

[13] Mr Michael Willard, Acting First Assistant Secretary, Immigration and Community Protection Policy, Department of Home Affairs and Ms Alana Sullivan, Senior Assistant Secretary, Regional Processing and Resettlement, Department of Home Affairs, *Committee Hansard*, 22 August 2019, pp. 41–44.

> extremely vulnerable group will not be subject to further human rights violations.[14]

2.12 With particular reference to the 1,084 people transferred to Australia for medical treatment, witnesses described them as being 'in limbo' as a result of the bill.[15] The ASRC advised the committee:

> Many of them are on bridging visas. Some are in closed detention; some are in alternative places of detention, as well as in community detention. If this law were passed, what it would mean is that it would only be through the exercise of ministerial discretion that any of that group could hold any visa or apply for any visa. The alternative consequence is then detention and removal from Australia under Australian law, which is a mandatory provision. So people that couldn't be removed due to Australia's nonrefoulement obligations could potentially end up facing indefinite immigration detention in practice; whereas, under law, it is the legal consequence that they would in fact need to be refouled, in breach of Australia's obligations under the refugee convention.[16]

2.13 When asked to comment on whether the 1,084 transferees currently in Australia for medical treatment are in 'legal limbo', the department disputed that characterisation:

> As I say, I disagree with the characterisation of being in legal limbo. These people will take up settlement options elsewhere because they will not be settled in Australia, and it will be clear that they are unable to make a valid application for a visa unless the minister lifts the bar. I do not see that that is a legal limbo; I see that is a fairly clear and objective statement of what the legislation will do.[17]

2.14 On the matter of Australia's non-refoulement obligations, the department stated:

> The Government recognises that these *non-refoulement* obligations…are absolute and does not seek to resile from or limit Australia's obligations. Any person who is in the designated regional processing cohort and who is in Australia now or in the future will not be removed from Australia in breach of Australia's *non-refoulement* obligations.[18]

2.15 Submissions also noted that the broad scope of the lifetime ban would prohibit valid applications for any visa type or category. Evidence referred to possible future scenarios whereby people who are part of the regional processing cohort who may wish to come to Australia for 'investment, employment or

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[14] Amnesty International, *Submission 6*, [p. 3].

[15] See, for example, Mr David Manne, Executive Director, Refugee Legal, *Committee Hansard*, 22 August 2019, p. 12; Dr Graydon, Asylum Seeker Resource Centre, *Committee Hansard*, 22 August 2019, p. 12.

[16] Dr Graydon, Asylum Seeker Resource Centre, *Committee Hansard*, 22 August 2019, p. 12

[17] Ms De Veau, Department of Home Affairs, *Committee Hansard*, 22 August 2019, p. 45.

[18] Department of Home Affairs, *Submission 2*, p. 6.

cultural purposes' would be automatically barred from applying for an Australian visa.[19] The AHRC posited that the measures in the bill 'go beyond' the stated objective to codify existing government policy:

> Not only would the Bill prevent people in the 'regional processing cohort' from resettlement in Australia, but it would also prevent them from applying for any type of Australian visa in the future, including tourist, visitor or business visas.[20]

2.16 Liberty Victoria argued that the imposition of a lifetime ban on this cohort is discriminatory and would be inconsistent with Australia's international obligations.[21] Australia's international legal obligations are discussed later in this chapter.

2.17 Regarding concerns relating to the lifetime ban prohibiting future visa applications, the department stated:

> …any visa, regardless of the period of its validity, provides access to Australia. This goes to giving effect to the government's policy intent here, which is the layered approach to providing a deterrent to people getting onto boats. Any further disincentive helps to make that deterrent stronger.[22]

Provisions to apply from 19 July 2013

2.18 The measures in the bill would apply to individuals who have been taken to a regional processing country since 19 July 2013. Concerns were raised that these amendments 'would operate retrospectively to impose a statutory penalty on individuals based on past events that occurred when that penalty did not exist or was even proposed'. Submissions, including from the Law Council of Australia and Liberty Victoria, emphasised that the retrospective operation is contrary to basic rule of law principles.[23]

2.19 The Law Council submitted:

> With respect to asylum seekers who arrived or attempted to reach Australia by boat without authorisation, the Bill is arbitrary, since not all such people, even among those arriving after 19 July 2013, have been taken by Australia to a regional processing country. Those who were taken, were taken upon the initiative of the Australian government, meaning that one of the key grounds identifying persons to whom the Bill relates is

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19 Refugee Legal, *Submission 19*, [p. 3].

20 Australian Human Rights Commission, *Submission 18*, p. 12.

21 Liberty Victoria, *Submission 9*, pp. 6–7.

22 Ms De Veau, Department of Home Affairs, *Committee Hansard*, 22 August 2019, p. 48.

23 Law Council of Australia, *Submission 20*, pp. 23–24; Liberty Victoria, *Submission 9*, p. 8; New South Wales Council for Civil Liberties, *Submission 13*, pp. 9–10.

> dependent on an action of the Government which is outside the control of the individual.[24]

2.20 The AHRC considered that the bill would have retrospective application that adversely affects the human rights of individuals in the cohort and furthermore:

> Unlike those who are taken to a regional processing country in the future, those already subject to regional processing were never placed on notice that they will be barred for life from making a valid application for an Australian visa.[25]

2.21 The department advised that the retrospectivity of the new bars was made clear in the bill's explanatory memorandum:

> This is to prevent members of the designated regional processing cohort from circumventing the Government's policy by making a visa application before the Act commences.[26]

2.22 The department explained that the bar applies to individuals transferred to regional countries after 19 July 2013:

> … because those persons have been on notice following an announcement made by former Prime Minister Kevin Rudd on that date that they will never be settled in Australia. The bar will also apply prospectively to applications made by this cohort of persons after the legislation commences, whether they are inside or outside Australia.[27]

Implementation

2.23 The complexity and cost of implementing the bill was raised during the course of the inquiry. The Law Council suggested that implementing the bill would 'likely…be costly given that the bar is applied for life to the cohort, and given that it applies to all visa types'.[28] The ASRC observed:

> Implementation of the lifelong ban will be cumbersome and expensive and require modifications of every single hard-copy and electronic visa application format and constant identification and vetting of this group for the duration of their life.[29]

2.24 Broader implementation issues were also highlighted by the Law Council:

> Further, the implementation of the Bill is likely to be subject, to an extent, to the agreement and cooperation of other states. Refugees recognised on Nauru hold temporary visas which are extended upon the agreement of

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[24] Law Council of Australia, *Submission 20*, p. 14.

[25] Australian Human Rights Commission, *Submission 18*, p. 12.

[26] Department of Home Affairs, *Submission 2*, p. 5.

[27] Department of Home Affairs, *Submission 2*, p. 5.

[28] Law Council of Australia, *Submission 20*, p. 15.

[29] Dr Graydon, Asylum Seeker Resource, Centre, *Committee Hansard*, 22 August 2019, p. 8.

> the Government of Nauru. If Nauru were to withdraw from that agreement, Australia's non-refoulement obligations (among others) may compel it, notwithstanding the Bill, to transfer refugees there back to Australia. This would result in their indefinite detention, at significant expense and in breach of human rights including the right to freedom from arbitrary detention, and past experience suggests that this may lead to serious mental health impacts. In any event, refugees recognised in regional processing countries remain in need of durable solutions. If those are not provided by the regional processing country and Australian visas are barred, then the support of third countries to provide settlement must be sought.[30]

Ministerial power

2.25 The bill would confer a power on the minister to permit a member of the designated regional processing cohort, or a group of persons within the designated regional processing cohort, to make a valid application for a visa if the minister considers that it is in the public interest to do so. The department advised that the ministerial power would allow a valid application for a visa on a case by case basis, thus ensuring consideration of the individual circumstances of the case, including relevant international obligations and the best interests of affected children.[31] Furthermore:

> This may include the Minister allowing an application from a medical professional or a leading international researcher (who has been resettled from a regional processing country to a third country) where it would be in the public interest to do so.[32]

2.26 With particular reference to Australia's international law obligations, the Kaldor Centre for International Refugee Law argued that the ministerial power should not be conferred in the manner set out in the bill:

> The point is that such powers should not be conferred in that way, especially when what we are talking about are international obligations, which are commitments. More important than that, they are international obligations that go to the very core of safety and the protection of life of very vulnerable people, including children. Matters of such serious import need to be enshrined in carefully considered legislation with guidance on how such decisions should be made. That's not only to assist the minister; it [is] to assist the country in knowing that we have decisions that are made in a predictable way, in a consistent way and in a clear way, and to assist those who are affected by these powers to get a better understanding of the process that they are subject to, what the outcomes might be and what their futures might hold.[33]

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30 Law Council of Australia, *Submission 20*, pp. 15–16.

31 Department of Home Affairs, *Submission 2*, p. 5.

32 Department of Home Affairs, *Submission 2*, p. 5.

33 Ms Madeline Gleeson, Senior Research Associate, Kaldor Centre for International Refugee Law, UNSW Sydney, *Committee Hansard*, 22 August 2019, p. 20.

2.27 Others raised concern that the bill does not offer any guidance as to the meaning of 'public interest'.[34] The Law Council argued that, because 'public interest' is not defined, 'its content is therefore susceptible to different interpretation by different Ministers on opaque grounds'.[35] Liberty Victoria emphasised the broad nature of the ministerial power and noted that there are no 'statutory constraints' on how they wish to apply the power which means that 'they can really apply it in any which way they can characterise the public interest or the national interest'. Liberty Victoria also noted that there is 'no way to trigger or force the minister to exercise these powers in a positive or negative manner'.[36]

2.28 The Law Council highlighted that the ministerial power is personal, non–compellable and subject to limited review. The minister would have wide discretion to vary, revoke or change any decision.[37] Concerns about procedural fairness were also raised by the Law Council:

> The Law Council considers that procedural fairness may be undermined in the exercise of Ministerial discretions with limited transparency or review, leading in some instances to unjust outcomes with no reasons provided for adverse decisions.[38]

2.29 The NSW Council for Civil Liberties argued that there would be limited review avenues available:

> What particularly concerns us is the lack of appeal to a court on the merits. It's not possible, when the minister has this kind of discretion, to go to a court or a tribunal and have the minister be found to have made a mistake…people have a moral entitlement to be able to demonstrate those mistakes to a court of law or to a legal tribunal.[39]

2.30 Other submitters were concerned that the provisions in the bill to allow ministerial discretion would be an 'inadequate safeguard'.[40] The Brisbane Immigration Transit Accommodation Visitors Group was concerned that 'ceding all power to any Minister creates a dangerous and anti-democratic situation'.[41]

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[34] See, for example, Kaldor Centre for International Refugee Law, Peter McMullin Centre on Statelessness, and Professor Ben Saul, *Submission 7*, p. 6.

[35] Law Council of Australia, *Submission 20*, p. 26.

[36] Mr Gregory Hanson, Senior Lawyer, Liberty Victoria, *Committee Hansard*, 22 August 2019, p. 27.

[37] Law Council of Australia, *Submission 20*, p. 26.

[38] Law Council of Australia, *Submission 20*, p. 26.

[39] Dr Martin Bibby, Committee Member, New South Wales Council for Civil Liberties, *Committee Hansard*, 22 August 2019, p. 28.

[40] See, for example, Australian Lawyers for Human Rights, *Submission 17*, p. 6; Refugee Legal, *Submission 19*, [p. 4]

[41] BITA Visitors Group, *Submission 3*, [p. 2].

2.31 The administrative burden of the minister being personally involved in visa decisions was also discussed. The Law Council suggested that this personal ministerial involvement is costly and lacks transparency.[42] The ASRC described the ministerial discretion as impractical and not a good use of the minister's time.[43] Refugee Legal similarly described the ministerial power as 'impractical' and a 'job description problem' as it gives 'one person in the country the call, the personal power, on this when ordinarily in our country there is a decision-making process under administrative law'.[44]

2.32 When discussing the personal non-compellable ministerial power to lift the bar, the department noted that the bill mirrors other personal non-compellable powers 'vested in the minister in the Migration Act' which have been 'accepted as an appropriate exercise of the power':

> So the fact that there is a non-compellable bar that is able to be lifted, the bar itself and the public interest considerations of the minister have been accepted by the courts as an appropriate mechanism to consider these types of cases.[45]

2.33 The department also advised that once the minister engages 'in the consideration of whether to lift the bar, that consideration is judicially reviewable'.[46] The department further explained that the ability of the minister to lift the bar ensures 'a flexible approach for individual cases that helps legislation to meet its other obligations'.[47]

International legal obligations

2.34 Evidence to the inquiry highlighted concerns that the bill is inconsistent with Australia's international legal obligations, with particular reference to the International Covenant on Civil and Political Rights (ICCPR), the Refugee Convention and the United Nations Convention on the Rights of the Child.[48]

2.35 Submitters and witnesses disputed the statement contained in the explanatory memorandum confirming that the bill is compatible with human rights.[49]

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[42] Law Council of Australia, *Submission 20*, p. 26.

[43] Dr Graydon, Asylum Seeker Resource Centre, *Committee Hansard*, 22 August 2019, p. 9.

[44] Mr Manne, Refugee Legal, *Committee Hansard*, 22 August 2019, p. 15.

[45] Ms De Veau, Department of Home Affairs, *Committee Hansard*, 22 August 2019, pp. 38, 40.

[46] Ms De Veau, Department of Home Affairs, *Committee Hansard*, 22 August 2019, p. 38.

[47] Ms De Veau, Department of Home Affairs, *Committee Hansard*, 22 August 2019, p. 38.

[48] See, for example, BITA Visitors Group, *Submission 3*, [p. 2], Amnesty International, *Submission 6*, [pp. 2–3]; Australia Association of Social Workers, *Submission 10*, pp. 2–3; New South Wales Council for Civil Liberties, *Submission 13*, pp. 13–15; Asylum Seeker Resource Centre, *Submission 15*, pp. 5–6; Ms Lanie Stockman, *Submission 26*, p. 1.

[49] See, for example, New South Wales Council for Civil Liberties, *Submission 13*, p. 15; Australian Lawyers for Human Rights, *Submission 17*, p. 14.

2.36 The department advised that 'it is the Government's view that the proposed amendments are consistent with Australia's obligations under international law'.[50] In particular:

> The measures contained in the Bill are compatible with the right to equality and non-discrimination, the Convention on the Rights of the Child, the International Covenant on Civil and Political Rights, the Refugees Convention and Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[51]

2.37 At the public hearing, several witnesses highlighted the efficacy and importance of Australia fulfilling its human rights obligations.[52] The following sections summarise issues raised about particular aspects of Australia's international legal obligations.

Discrimination based on mode of arrival

2.38 With reference to Australia's obligations under article 26 of the ICCPR, the AHRC observed that the proposed permanent visa ban would apply to a specific group of asylum seekers 'based on their mode of arrival in Australia and date of transfer to a regional processing country' which would result in differential treatment of asylum seekers. Such differential treatment 'may engage the prohibition on discrimination on the basis of 'other status' under article 26 of the ICCPR'.[53]

2.39 Similarly, the ASRC argued that the bill 'unlawfully discriminates against people, based on the time and mode of their arrival to Australia, in breach of article 31 of the Refugee Convention.[54]

2.40 The department acknowledged that the 'continued differential treatment of a group of non-citizens…could amount to a distinction on a prohibited ground under international law on the basis of 'other status', but emphasised the government's view that this continued differential treatment is for a legitimate purpose and is 'based on relevant objective criteria for identifying people in the affected cohort and is reasonable and proportionate in the circumstances'.[55]

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50 Department of Home Affairs, *Submission 2*, p. 5.

51 Department of Home Affairs, *Submission 2*, p. 6.

52 See, for example, Ms Georgina Costello, Chair, Migration Law Committee, Law Council of Australia, *Committee Hansard*, 22 August 2019, pp. 4–5; Dr Graydon, Asylum Seeker Resource Centre, *Committee Hansard*, 22 August 2019, p. 10; Ms Gleeson, Kaldor Centre for International Human Rights Law, *Committee Hansard*, 22 August 2019, p. 18; Dr Graham Tom, Refugee Coordinator, Amnesty International Australia, *Committee Hansard*, 22 August 2019, pp. 18–19; Dr Martin Bibby, NSW Council for Civil Liberties, *Committee Hansard*, 22 August 2019, p. 26.

53 Australian Human Rights Commission, *Submission 18*, p. 5.

54 Dr Graydon, Asylum Seeker Resource Centre, *Committee Hansard*, 22 August 2019, p. 8.

55 Department of Home Affairs, *Submission 2*, p. 6.

2.41 The department also referred to legal advice that has been given to the government consistently since the late 1990s that the phrase inserted into article 31 'spoke very much of a sanction relating to the mode of arrival, not a sanction more indirectly related to a person who arrives by that mode'. In addition, the committee was advised:

> So the argument that the government accepts and has been advised on is that a textual interpretation of the convention, and the debate that led to the clause being included, is that a penalty based on the mode of arrival really only relates to whether someone is being criminally prosecuted and criminally penalised for that mode of arrival—so whether they have been fined or subject to a criminal sanction for entering illegally—as opposed to the broader interpretation [noted by submitters]…[56]

2.42 Further to this, the department stated:

> We say it doesn't discriminate in relation to race or religion. We say that the cohort is objectively identified and clearly identified, and it's not based on personal characteristics, so it doesn't offend in that way. As to the differential treatment of who is in the cohort amounting to a distinction, the government is of the view that, if it's for a legitimate purpose—that purpose has been clearly articulated; it's on relatively objective criteria and it is reasonable and proportionate…[57]

Potential separation of families

2.43 The Kaldor Centre, the Peter McMullin Centre on Statelessness, and Professor Ben Saul submitted that Australia has obligations under the Convention on the Rights of the Child 'to ensure that children are not separated from their parents against their will' and that applications to enter or leave Australia for the purpose of family reunification be dealt with in a 'positive, humane and expeditious manner'.[58] It was noted that although the bill does not target children directly:

> …its application is likely to be inconsistent with Article 10(1) of the Convention on the Rights of the Child, and it could be used to exile their parents and other members of their immediate families. For any person subject to the Bill with family members already in Australia, a permanent ban would flagrantly violate…provisions of international law. Australian law would entrench the division of families, which is already an issue of great concern, and could result in parents being permanently separated from their children.[59]

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[56] Ms De Veau, Department of Home Affairs, *Committee Hansard,* 22 August 2019, p. 39.

[57] Ms De Veau, Department of Home Affairs, *Committee Hansard,* 22 August 2019, p. 46.

[58] Kaldor Centre for International Refugee Law, the Peter McMullin Centre on Statelessness, and Professor Ben Saul, *Submission 7*, p. 3.

[59] Kaldor Centre for International Refugee Law, the Peter McMullin Centre on Statelessness, and Professor Ben Saul, *Submission 7*, p. 3.

2.44 Other submitters also argued that the bill would negatively impact families.[60] For example, Amnesty International expressed concern that the bill may negatively impact 'a number of families currently split between offshore processing countries and Australia, with children and parents at risk of being permanently torn apart'.[61] The Refugee Council of Australia suggested that the 'greatest impact' of the bill would 'be on those people on Nauru and Manus Island who have been separated from family in Australia'.[62] The ASRC submitted that separating families would extend the effects of the bill beyond the regional processing cohort 'to effectively ban family reunification for these people in Australia, preventing them from rebuilding their lives and leading to severely adverse effects on mental health'.[63]

2.45 Liberty Victoria advanced the view that:

> [t]he legal and practical effect of the amendments proposed by the Bill would be to deny refugees the right to family unity. In this regard, the amendments would be inconsistent with Australia's international obligations, the international protection system, as well as longstanding Australian government policy.[64]

2.46 The AHRC drew attention to recommendations it recently made related to family separation:

> The Commission recently recommended that where members of the same family unit are subject to different policy settings due to having arrived in Australia on different dates, the Department of Home Affairs should implement strategies to harmonise their status.[65]

2.47 The AHRC was of the view that the bill 'would make it even harder for families separated by different policy settings to ever reunite'.[66]

2.48 The Statement of Compatibility with Human Rights included in the explanatory memorandum states:

> The Government takes all matters concerning families and children seriously. Consideration of the individual circumstances of applicants and their relationships with family members allows the Government to ensure that it acts consistently with [Convention on the Rights of the Child and International Covenant on Civil and Political Rights] obligations.[67]

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60 See, for example, Refugee Legal, *Submission 19*, [p. 4], Refugee Advocacy Network, *Submission 24*, [p. 1].

61 Amnesty International, *Submission 6*, [p. 3].

62 Refugee Council of Australia, *Submission 14*, p. 2.

63 Asylum Seeker Resource Centre, *Submission 15*, p. 4.

64 Liberty Victoria, *Submission 9*, p. 6.

65 Australian Human Rights Commission, *Submission 18*, p. 9.

66 Australian Human Rights Commission, *Submission 18*, p. 9.

67 Explanatory memorandum, p. 24.

2.49 As noted earlier, the ministerial power to permit a valid visa application in certain circumstances would provide a mechanism for the minister to consider particular family circumstances and assess the best interests of children in the cohort. The department also provided detail about the Special Humanitarian Program, noting that in terms of permanent resettlement programs, Australia typically ranks in the top three worldwide:

> Australia's humanitarian program increased to 18,750 places in 2018-19. That's the level it will be for the next three years. A key component of that program is the Special Humanitarian Program, which gives a wider family group the opportunity to be able to sponsor people in humanitarian need to come to Australia for permanent resettlement. It's worth pointing out that Australia's one of only a small number of countries in the world that operates an annual permanent resettlement program. It ranks very highly.[68]

Committee view

2.50 The committee acknowledges the concerns raised by submitters and witnesses about the bill. However, the committee is of the view that the measures in the bill are necessary, reasonable and proportionate.

2.51 Evidence from the Department of Home Affairs emphasised that while the threat from people smuggling is currently suppressed, it has not been defeated and therefore an ongoing and multilayered approach—with a strong deterrence message—continues to be necessary.

2.52 The bill is an important part of the suite of measures being implemented by the government in response to this ongoing threat. It is also consistent with a commitment given by the then Labor Prime Minister, the Hon Kevin Rudd, in 2013. The bill is also an important part of the government's ongoing efforts to encourage people to come to Australia via safer, legal migration pathways, to disrupt people smuggling operations and to prevent people from embarking on dangerous boat journeys that can cause future loss of life at sea.

2.53 By virtue of the discretionary decision-making afforded to the minister under the bill, the bill contains appropriate safeguards with respect to permitting valid visa applications to be made in certain circumstances. The committee also notes that the personal non-compellable powers vested in the minister under the bill are comparable with other such powers vested in the minister under the *Migration Act 1958* which have been accepted as an appropriate exercise of ministerial power.

2.54 The committee therefore recommends that the Senate pass the bill.

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[68] Mr Willard, Department of Home Affairs, *Committee Hansard*, 22 August 2019, p. 48.

Recommendation 1

2.55 The committee recommends that the Senate pass the bill.

Senator Amanda Stoker
Chair

Labor senators' dissenting report

1.1 The Minister for Home Affairs, the Hon Peter Dutton MP, claims that this bill is an important part of the 'government's people-smuggling deterrence message' by making it clear that 'from now on, any asylum seeker who arrives in Australia by boat will have no chance of being settled in Australia as refugees'.[1]

1.2 The Minister's claim was reiterated in the Department's evidence to the committee. But it is inherently implausible. It is already the case that people who arrive in Australia by boat without lawful entry documents have their claims processed offshore and are denied permanent resettlement in Australia. This bill imposes a further ban on them ever being granted an entry visa of any kind, even if they have long been resettled in a third country. No evidence has been produced, however, to demonstrate that a punitive provision of this kind is necessary to deter people smuggling. As the Australian Human Rights Commission submitted:

> The Commission questions whether there is a rational connection between deterring hazardous journeys in the current context, and preventing a person from entering Australia, for any purpose or length of time, potentially decades from now. It is unclear, for example, how preventing a former refugee from visiting Australia as a tourist 20 years in the future would act to discourage people currently fleeing persecution from attempting a hazardous journey to Australia.[2]

The effects of the bill

1.3 This bill is designed to permanently exclude any person who travelled to Australia by means other than the normal channels for immigration, and by boat, from ever entering Australia. This would include individuals travelling to visit family, for tourism, and for business or study.

1.4 Labor senators agree with the Law Council of Australia (Law Council) who stated that the bill is neither necessary nor proportionate to its intended objective:

> The Migration Act already contains provisions that exclude many unauthorised maritime arrivals from making valid visa applications in Australia and extensive powers and discretions to consider applications on their merits. We have a strict and rigorous migration system already. This bill is unnecessary. We already have character provisions that protect the Australian community from the risk of those who may be seen as 'of risk'. Again, this bill is unnecessary.

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1 The Hon Peter Dutton MP, Minister for Home Affairs, *House of Representatives Hansard*, 4 July 2019, p. 300.

2 Australian Human Rights Commission, *Submission 18*, pp. 10–11.

> The other purpose of the bill stated by the minister is to send the strong message to people smugglers and those considering travelling to Australia by boat that our borders are strong. But the thing is we already have so many ways in which we have a deterrent already. In particular, there's the use of boat interceptions, turnbacks, public messaging campaigns and the fact that people who came here on boats and have been on Manus Island or Nauru for a long time have had a pretty rough time already. So this bill, in the Law Council's view, is not only disproportionate but also unjust in that it imposes a very significant penalty on one group of people for the purpose of influencing the behaviour of third parties.[3]

1.5 The effects of the bill would extend far beyond the stated aim of enacting into law the previous Labor government and current Coalition Government's policy that asylum seekers who arrive by boat will not be *settled* in Australia. The bill would prohibit a member of the regional processing cohort from coming to Australia, under any circumstance and on any visa.

1.6 Other possible scenarios could include:

- politicians undertaking visits and attending conferences;
- athletes hoping to compete in Australian sport events;
- adverse impacts to any future Australian Olympic bids, noting that there is now a recognised Refugee Olympic Team;
- former refugees who are now citizens of another country visiting family members in Australia;
- tourist visits by former refugees who are now citizens of another country;
- business owners or employees visiting in Australia to discuss the expansion of companies and businesses into the Australia market;
- scientists and other researchers attending academic conferences or visiting universities in Australia, and thereby contributing to the international exchange of knowledge.

1.7 Labor senators are particularly concerned that the effects of this bill would be felt many years into the future. Individuals who have been resettled in a third country would never be allowed to come to Australia under any circumstance.

1.8 The discretionary ministerial power to allow a valid visa application when deemed in the public interest is completely insufficient to address the concerns of Labor senators.

Individuals in Australia on medical transfer

1.9 The Department of Home Affairs advised that 1084 individuals from the cohort are currently in Australia on medical transfer (or accompanying a family member on medical transfer).[4] Labor senators note evidence provided

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[3] Ms Georgina Costello, Chair, Migration Law Committee, Law Council of Australia, *Committee Hansard*, 22 August 2019, p. 2.

[4] Ms Alana Sullivan, Senior Assistant Secretary, Regional Processing and Resettlement, Department of Home Affairs, *Committee Hansard*, 22 August 2019, p. 41.

to the inquiry expressing concerns that these 1084 individuals would effectively be in 'limbo' as a result of this bill.[5]

International legal obligations

1.10 As many submitters and witnesses emphasised in their submissions, this bill is inconsistent with Australia's international legal obligations. In particular, the bill would be in breach of article 31 of the Refugee Convention, the Convention on the Rights of the Child, the International Covenant on Economic Social and Cultural Rights, and the International Covenant on Civil and Political Rights (ICCPR).

1.11 The Law Council drew attention to article 26 of the ICCPR which states that all persons are equal before the law and are entitled without any discrimination to the equal protection of the law'. Labor senators note the concerns of the Law Council that the 'bill serves to define a specific group of people –the cohort who are thereby barred access to Australian visas' and that such action 'amounts to discrimination'.[6]

1.12 Other evidence argued that the bill 'unlawfully discriminates against people, based on the time and mode of their arrival to Australia, in breach of article 31 of the Refugee Convention'.[7]

1.13 Labor senators share the serious concerns raised during the inquiry about how this bill could permanently separate members of the same family, in breach of Australia's international legal obligations. The Law Council illustrated some real life examples of how this bill would affect families:

> …imagine a refugee family that was separated when fleeing from their place of persecution. Dad might have travelled separately to mum and the kids. It might be that they arrived at different times and so some members of the family are caught by this bill and others, who came earlier, are not. That would mean that this bill would have the effect that the family could never live here in Australia permanently, even though some of them are here already.[8]

1.14 At the public hearing, witnesses repeatedly emphasised the importance of Australia meeting its international legal obligations. For example, Dr Carolyn Graydon, Principal Solicitor and Manager, Human Rights Law Program, Asylum Seeker Resource Centre stated:

> [I]nternational law is what prevents us as nations of the world from reaching a point of chaos. Australia relies upon international law on a daily

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5 Mr David Manne, Executive Director, Refugee Legal, *Committee Hansard*, 22 August 2019, p. 12.

6 Law Council of Australia, *Submission 20*, p. 16.

7 Dr Carolyn Graydon, Principal Solicitor and Manager, Human Rights Law Program, Asylum Seeker Resource Centre, *Committee Hansard*, 22 August 2019, p. 8.

8 Ms Costello, Law Council, *Committee Hansard*, 22 August 2019, p. 2.

> basis in its relations with other countries. We need to respect international law, because we depend upon it and we depend upon it in many different fields of life, not only in relation to human rights. International law is absolutely fundamental to our participation as a nation in the world, and the human rights obligations that Australia has ratified—Australia has voluntarily decided that it wants to participate in a community of nations to uphold minimum standards on fundamental questions facing humanity.[9]

1.15 The Law Council also highlighted the importance of Australia meeting its international law obligations:

> …Australia should look at what our international law obligations are and adhere to them. It's the right thing to do. We're one of many wonderful liberal democracies. In my subjective opinion, Australia is really a wonderful, wonderful country. We rely on other states to comply with international law in a variety of ways. Australia takes some moral leadership, for example, in relation to international whaling conventions, in respect of Japan. We need some bottom-line rules with which to run our world. We rely on other countries to adhere to international maritime law, to adhere to the laws of war, to adhere to refugee conventions themselves. Why should we just do what we want, when we're part of the world and we've signed up to meet certain obligations? Australia should adhere to international law obligations.[10]

Ministerial discretion

1.16 The ministerial discretion is non-compellable and the public interest is undefined, meaning that the Minister has no obligation to consider applications for a visa from this cohort. The bill would give the Minister the personal power to decline to make a decision about an application to allow a person otherwise ineligible for a visa to be allowed to apply, or to make the decision to decline or allow such an application. As the bill states, the Minister could permit a member of the 'regional processing cohort' to make a valid visa application if the Minister considers it to be in the public interest to do so, however 'public interest' remains undefined. The effect of this would be to shift exclusive control over access to Australia by former asylum seekers to the Minister.

1.17 Labor senators share concerns raised in evidence that the ministerial discretion is too broad and that the 'public interest' is not defined in the legislation. The Law Council argued that the lack of clarity about 'public interest' means 'its content is therefore susceptible to different interpretation by different ministers on opaque grounds'.[11] The broad nature of the ministerial power was

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[9] Dr Graydon, Asylum Seeker Resource Centre, *Committee Hansard*, 22 August 2019, p. 10.

[10] Ms Costello, Law Council, *Committee Hansard*, 22 August 2019, p. 4.

[11] Law Council of Australia, *Submission 20*, p. 26.

also questioned by Liberty Victoria, which noted that there are no statutory constraints on how the minister may wish to apply the power.[12]

1.18 Labor senators also note the reviewability of decisions made would be limited, and would necessarily require the applicant to bear the administrative (and quite possibly the financial) burden of making an application for review. It is also of concern that a decision *not* to make a decision, is not reviewable.

1.19 The establishment of a broad and vaguely defined ministerial discretion under legislation creates a risk of unfair and inconsistent decisions, and is not in keeping with the rule of law. The establishment of the ministerial discretion contemplated by this bill would be highly inappropriate.

Retrospectivity

1.20 If this bill was passed, it would mean that individuals, who have sought asylum in Australia since 19 July 2013, could be subject to its operation, despite the law not being introduced until many years later. This retrospective application is not appropriate. As the Law Council noted in its submission:

> The Bill is contrary to the rule of law, which requires that the law must be readily known and available, certain and clear. These principles are central to the fairness and integrity of Australian law and underpin community confidence in its administration.
>
> The retrospective imposition of what is effectively a civil penalty conflicts with the requirement that, as a matter of fairness, people should be able to know in advance the implications of their actions.[13]

1.21 Mr Edward Santow, Human Rights Commissioner also highlighted concerns about retrospectivity:

> This bill would apply to the conduct of a group of people that has already happened. In other words, that group of people cannot change the fact that they have already got on a boat and come to Australia to seek asylum, but what the bill would do is further disadvantage those people because of that conduct that they've already done. That is a quintessential example in legal textbooks of retrospective legislation that is contrary to the rule of law. The rule of law—as you would know, Senator, of course—is a very old principle. It's existed for centuries in our legal tradition. It's a very important principle and we are concerned that this bill would be inconsistent with that principle.[14]

Concluding remarks

1.22 The stated aim of the bill – that it is necessary for the continued deterrence of boat arrivals and the continued effectiveness of Operation Sovereign Borders –

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[12] Mr Gregory Hanson, Senior Lawyer, Liberty Victoria, *Committee Hansard*, 22 August 2019.

[13] Law Council of Australia, *Submission 20*, p. 6.

[14] Mr Edward Santow, Human Rights Commissioner, Australian Human Rights Commission, *Committee Hansard*, 22 August 2019, p. 32.

has not been demonstrated by any evidence produced by the Government. The bill's real purpose seems to be a political declaration of the Government's resolve to deter boat arrivals, even though that aim has largely been achieved by the existing policy of offshore processing and denial of permanent resettlement in Australia. By overreaching to make that declaration, the Government is only likely to permanently divide families; to put many asylum seekers who have been brought to Australia for medical or other reasons into a legal limbo and at risk of refoulement;, and to deny significant future visits by resettled refugees that could provide significant cultural and intellectual benefit to this country.

Recommendation 1

1.23 Labor senators recommend that the Senate reject the bill.

1.24

1.25

Senator the Hon Kim Carr
Deputy Chair

Senator Anthony Chisholm
Labor Senator for Queensland

Dissenting report by the Australian Greens

1.1 The committee's inquiry into the Migration Legislation Amendment (Regional Processing Cohort) Bill 2019 (the bill) received 30 submissions from legal and immigration experts, with the 2016 version of this bill having received 84 submissions. Many of these submissions raised serious concerns regarding this bill.

1.2 Despite the evidence provided and concerns raised by submissions and witnesses, the report recommends that this bill be passed. The Australian Greens agree with the submission of the Asylum Seeker Resource Centre who strongly oppose the passage of this legislation and that the Government's priority should be 'finding a durable solution'.[1]

1.3 The Australian Greens are concerned that the bill is punitive, will impact negatively on families, and that the Government has not demonstrated the bill is necessary to deter asylum seekers. There is no evidence that this bill will actually achieve its stated objective.

1.4 The bill arbitrarily discriminates against the cohort on the basis of their mode of arrival.

1.5 The Kaldor Centre has correctly submitted that:

> The Bill would punish refugees and asylum seekers for entering or seeking to enter Australia by boat in violation of Article 31(1) of the Refugee Convention, which requires Australia not to 'impose penalties, on account of… illegal entry' to Australia on refugees who have come 'directly' from a place of persecution, as long as they 'present themselves without delay to the authorities and show good cause for their illegal entry'.[2]

1.6 The Australian Greens note the issues raised by witnesses about the public interest test and capacity of the Minister to 'lift the bar' in individual cases. We do not believe that this is sufficient to satisfy Australia's international human rights obligations. The public interest is not defined in the bill, and there is no duty on the minister to exercise this power. The bill provides yet another non-compellable and therefore non-reviewable discretionary power to the Minister.

1.7 The Refugee Council of Australia in their submission stated the greatest impact of this Bill will be on the separation of families. Family members in In Narau or Papua New Guinea will not be able to visit their families in Australia.[3]

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1 Asylum Seeker Resource Centre, *Submission 15*, p. 7.

2 Kaldor Centre, the Peter McMullin Centre on Statelessness, and Professor Ben Saul, *Submission 7*, p. 4.

3 Refugee Council of Australia, *Submission 14*, p. 2.

1.8 The bill has the potential to further separate families and sever support networks of people who have already been significantly damaged, both mentally and physically, by Australia's policy of indefinite offshore detention.

Conclusion

1.9 The Australian Greens find that the report has not adequately responded to or addressed the concerns raised in all 30 submissions received on this bill.

1.10 The Australian Greens find that the bill contravenes international obligations to which Australia has committed, including the rights to non-discrimination and equality, and the rights of the child and protection of the family.

Recommendation 1

1.11 The Australian Greens recommend that the bill be rejected by the Senate.

Senator Nick McKim
Greens Senator for Tasmania

Appendix 1
Submissions and answers to questions on notice

Submissions

1 Legal Services Commission
2 Department of Home Affairs
3 BITA Visitors Group
4 Combined Refugee Action Group
5 Queenscliffe Rural Australian for Refugees
6 Amnesty International
7 Kaldor Centre, Peter McMullin Centre on Statelessness, and Professor Ben Saul
8 Hunter Asylum Seeker Advocacy
9 Liberty Victoria
10 Australian Association of Social Workers
11 Australian Human Rights Institute
12 Bayside Refugee Advocacy and Support Association
13 NSW Council for Civil Liberties
14 Refugee Council of Australia (RCOA)
15 Asylum Seeker Resource Centre (ASRC)
16 Montmorency Asylum Seekers Support Group (MASSG)
17 Australian Lawyers for Human Rights
18 Australian Human Rights Commission
19 Refugee Legal
20 Law Council of Australia
21 Ms Julie Hopkins
22 Ms Cathy Robertson
23 Ms Carmen Tudorache
24 Refugee Advocacy Network
25 Ms Jane Touzeau
26 Ms Lanie Stockman
27 Dr Kevin Sweeney
28 Ms Catharine Errey
29 Ms Abigail Benham-Bannon
30 Mrs Faye Quennell and Dr Lindsay Quennell

Answers to Questions on Notice

1 Department of Home Affairs, answers to questions on notice taken on 22 August 2019 (received 5 September 2019)

Appendix 2
Hearing

Thursday, 22 August 2019
Committee Room 2S3
Parliament House
Canberra

Law Council of Australia

- Ms Georgina Costello, Chair, Law Council Migration Law Committee

Refugee Council of Australia (ROCA)

- Ms Rebecca Eckard, Director of Policy and Research
- Mr Amir Taghinia, Community advocate

Asylum Seeker Resource Centre

- Dr Carolyn Graydon, Principal Solicitor

Refugee Legal

- Mr David Manne, Executive Director

Australian Lawyers for Human Rights

- Ms Jessica Bayley, Chair, Refugee Rights Subcommittee

Amnesty International

- Dr Graham Thom, Refugee Adviser

Andrew & Renata Kaldor Centre for International Refugee Law

- Ms Madeline Gleeson, Senior Research Associate

Liberty Victoria

- Mr Greg Hanson, Senior Lawyer, Accredited Specialist in Immigration Law

NSW Council for Civil Liberties

- Dr Martin Bibby, Committee member

Australian Human Rights Commission

- Mr Edward Santow, Human Rights Commissioner
- Ms Alice McBurney, Specialist Adviser for Immigration

Department of Home Affairs

- Major General Craig Furini, AM, CSC, Commander, Joint Agency Task Force Operation Sovereign Borders

- Ms Alana Sullivan, Senior Assistant Secretary - Regional Processing and Resettlement
- Mr Michael Willard, Acting First Assistant Secretary, Immigration and Community Protection Policy
- Ms Pip De Veau, First Assistant Secretary, Legal
- Mr David Wilden, First Assistant Secretary – International Policy Division