Migration Legislation Amendment (Regional Processing Cohort) Bill 2019

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Date introduced: 4 July 2019
House: House of Representatives
Portfolio: Home Affairs
Commencement: The day after Royal Assent

Links: The links to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bill’s home page, or through the Australian Parliament website.

When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the Federal Register of Legislation website.

All hyperlinks in this Bills Digest are correct as at November 2019.
History of the Bill

The Migration Legislation Amendment (Regional Processing Cohort) Bill 2016 (the original Bill) was introduced into the House of Representatives on 8 November 2016. It passed the third reading in the House of Representatives on 10 November 2016. It was introduced into the Senate on 10 November 2016 but was not debated, and the Bill lapsed at the end of the 45th Parliament on 1 July 2019.

The present Bill was introduced into the House of Representatives on 4 July 2019. It has the same name and is in near-identical terms to the original Bill, with only one substantive difference. This difference is found in items 31–33 of Schedule 1 of the current Bill, which amend regulation 2.08AAA of the Migration Regulations 1994 (the Migration Regulations). Regulation 2.08AAA was inserted into the Migration Regulations in 2017, and therefore did not exist at the time the original Bill was introduced. This is discussed further below under ‘Key issues and provisions’.

A Bills Digest was prepared in respect of the original Bill. Much of the material in the present Digest has been sourced from that earlier one.

Purpose of the Bill

The purpose of the Migration Legislation Amendment (Regional Processing Cohort) Bill 2019 (the Bill) is to amend the Migration Act 1958 (the Act) and the Migration Regulations to:

• indefinitely preclude ‘unauthorised maritime arrivals’ (UMAs) and ‘transitory persons’, who were at least 18 years of age upon transfer and were taken to a regional processing country after 19 July 2013 (to be known collectively in the Act as a ‘member of the designated regional processing cohort’) from making a valid application for any Australian visa

• insert a discretionary and non-compellable personal power for the Minister to permit a member of the cohort, or a class of persons within the cohort, to make a valid application for a visa if the Minister thinks it is in the public interest to do so and

• indefinitely preclude a member of the cohort from being deemed to have been granted a Special Purpose visa under section 33 of the Act, or being deemed to have applied for particular visas under the Migration Regulations (with an accompanying power for the Minister to waive such exemptions).

Background

These proposed legislative amendments were first mentioned in the media in September 2016:

Back home, Mr Dutton has ordered his department to draw up options to toughen the law and ensure he can meet his commitment that asylum seekers who arrive by boat will never enter Australia.

“People on Manus and Nauru will never be settled in Australia,” he said. “Regardless of what third country people end up in, the Government will never allow those people to settle in Australia.”

...
All asylum seekers on Nauru and Manus Island will be added to a list of banned migrants so they are denied visas. They would trigger an alert if they arrived in Australia in the future, even if travelling on a passport from a new country.  

On 30 October 2016 the then Prime Minister, Malcom Turnbull, and the Minister for Immigration and Border Protection, Peter Dutton, held a joint press conference confirming the Government’s intention to introduce legislation to prevent UMAs who were taken to a regional processing country since 19 July 2013, from making a valid application for an Australian visa:

That is why today, I’m announcing that the Government will introduce legislation in the next parliamentary sitting week to amend the Migration Act to prevent irregular maritime arrivals taken to a regional processing country, from making a valid application for an Australian visa.

The Bill will apply to all taken to a regional processing country since the 19th July 2013. The reason for that date is that is the date when Labor Prime Minister Kevin Rudd declared and I quote, “As of today, asylum seekers who come here by boat without a visa will never be settled in Australia.” Now this Bill will reflect the Government’s long standing position and as we understand it, the bipartisan position initially set out by Mr Rudd and since then confirmed by Mr Shorten. And that position is, and I repeat, that irregular maritime arrivals who have been sent to a regional processing country, that is Papua New Guinea and Nauru at the present time, will never be settled permanently in Australia.

This will send the strongest possible signal to the people smugglers. It will send the strongest possible signal to those who are seeking to persuade persons currently on Nauru and in Manus that the Australian Government will change its policy and allow them to settle here. It is critically important that we send the clearest message. We have one of the most generous humanitarian programs in the world. But the only reason we can do it, the only reason it has the public acceptance that it does, is because we are in command of our borders.  

The original Bill was subsequently introduced into the House of Representatives on 8 November 2016.

**Why is this Bill necessary?**

The Government has put forth a number of reasons why this Bill is needed. These include:

- to reinforce the Government’s policy that UMAs will never be permanently settled in Australia
- to send a strong message to people smugglers, advocates in Australia and UMAs in Nauru and Papua New Guinea (PNG) that UMAs will never be permanently settled in Australia
- to prevent future spouse visa applications being lodged by UMAs and their Australian citizen or permanent resident partner
- to prevent people who have been brought to Australia for medical assistance from claiming protection and engaging the legal process which may prevent them being returned in the future (though such persons are currently prevented from lodging a valid visa application under section 46B of the Act)
- to prevent UMAs arriving on a temporary visa from a country that does not accept involuntary returns (such as Iran) which would prevent the Government from returning such persons in the future (though the standard processing of such applications would necessarily involve such a risk assessment)

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• to prevent non-citizens undermining the Australian Government’s return and reintegration assistance packages and

• to further discourage persons from attempting hazardous boat journeys and encourage them to pursue regular migration pathways instead.5

While the Government has not explicitly linked the introduction of the original Bill, nor passage of the current Bill, to the offer from New Zealand to resettle refugees from the processing centres in Nauru and PNG, there are indications it may be more open to that offer should the current Bill be passed by Parliament.6 Detail on the New Zealand resettlement offer, and the Government’s response to it, is provided below.

Offshore processing in Nauru and Papua New Guinea

Offshore processing of asylum seekers in Nauru and PNG was a feature of the Howard Government’s asylum policy (the ‘Pacific Solution’) which had begun in 2001 in response to rising numbers of asylum seekers arriving by boat. It ceased in mid-2008 under the Rudd Government which considered it to be a ‘cynical, costly and ultimately unsuccessful exercise’.7 A total of 1,637 people were detained in the Nauru and Manus facilities, of whom 1,153 (or 70 per cent) were ultimately taken from the processing centres to Australia or other countries—around 61 per cent (705 people) of the people settled, were settled in Australia.8

However, by July 2010, then Prime Minister Julia Gillard announced in her first major policy speech that the Government had begun having discussions with regional neighbours about the possibility of establishing a regional processing centre (RPC) for the purpose of receiving and processing irregular entrants to the region.9 It took another two years for Prime Minister Gillard’s Government to secure the statutory and practical arrangements for asylum seekers to be sent to third countries. On 29 August 2012 the Australian Government signed a Memorandum of Understanding (MOU) with the Government of Nauru and on 8 September 2012 the Government signed an updated MOU with the PNG Government.10 Under these arrangements, any asylum seeker who arrived in Australia by boat could be transferred to either Nauru or PNG for processing. The first transfer of asylum seekers to Nauru occurred on 14 September 2012 and to PNG on 21 November 2012.11

In June 2013 Kevin Rudd was reinstated as Prime Minister and on 19 July 2013, in the lead up to the 2013 federal election, he announced that all, not just some, asylum seekers who arrived by

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7. C Evans (Minister for Immigration and Citizenship), Last refugees leave Nauru, media release, 8 February 2008.

8. Ibid.

9. J Gillard (Prime Minister), Moving Australia forward: Lowy Institute, Sydney, transcript, 6 July 2010.

10. J Gillard (Prime Minister) and C Bowen (Minister for Immigration and Citizenship), Australia signs memorandum of understanding with Nauru, joint media release, 29 August 2012; and J Gillard (Prime Minister) and C Bowen (Minister for Immigration and Citizenship), Australia and Papua New Guinea sign updated memorandum of understanding, joint media release, 8 September 2012.

11. C Bowen (Minister for Immigration and Citizenship), First transfer to Papua New Guinea, media release, 21 November 2012; C Bowen (Minister for Immigration and Citizenship), Nauru designated for regional processing, media release, 10 September 2012; and C Bowen (Minister for Immigration and Citizenship), Press conference, Sydney: Asylum seeker transfer to Nauru, Expert Panel recommendations, ‘no advantage’ principle, Tony Abbott, transcript, 14 September 2012.
boat would be transferred to PNG for processing and, if found to be refugees, would be settled there or elsewhere in the region—they would ‘never’ be settled in Australia.  

A similar agreement was made with the Government of Nauru in August 2013.

Upon forming Government in 2013, the Coalition Government continued with the policy of regional processing of asylum seekers in Nauru and PNG, and remained committed to the former Government’s policy of not allowing any refugees processed in Nauru or PNG to settle in Australia. The Coalition argued that settling such refugees in Australia would act as a ‘pull factor’ to other asylum seekers in the region, fuel the people-smuggling trade, and risk the further loss of lives at sea.

Since its recommencement, the offshore processing of asylum seekers in Nauru and PNG has proved contentious for a number of reasons, including:

• the financial cost
• ongoing concerns about the safety and security of asylum seekers and refugees in the processing centres and in the broader community
• ongoing concerns about the desirability and sustainability of involuntary settlement
• prolonged uncertainty and punitive living conditions which are said to be causing or exacerbating psychological harm and
• inadequate independent oversight and transparency.

**Regional settlement**

Responsibility for processing refugee claims in Nauru and PNG rests with the governments of those countries, not Australia. Those found to be refugees have various options available in relation to their long-term resettlement:

• those assessed as refugees in Nauru may receive a visa to remain in Nauru for 20 years
• those assessed as refugees in PNG may be resettled permanently in PNG and
• those assessed as refugees in either Nauru or PNG may apply for resettlement in the United States (US) under the resettlement arrangement agreed between Australia and the US in 2016.

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12. K Rudd (Prime Minister), T Burke (Minister for Immigration) and M Dreyfus (Attorney-General), *Australia and Papua New Guinea Regional Settlement Arrangement*, joint media release, 19 July 2013; Department of Immigration and Citizenship (DIAC), "Regional Resettlement Arrangements", [9 August 2013].

13. K Rudd (Prime Minister) and T Burke (Minister for Immigration), *New arrangement with Nauru Government*, joint media release, 3 August 2013.

14. See, for example, S Morrison (Minister for Immigration and Border Protection), *Operation Sovereign Borders update*, transcript, 30 September 2013; and M Turnbull (Prime Minister) and P Dutton (Minister for Immigration and Border Protection), *Joint press conference with the Minister for Immigration and Border Protection: Sydney*, op. cit. The Coalition’s commitment to maintaining regional processing was part of a broader package of policies concerning border protection. Other measures included turning boats around at sea, and reintroducing temporary protection visas. See Liberal Party of Australia and the Nationals, *The Coalition’s Operation Sovereign Borders Policy*, Coalition policy document, July 2013.


17. Ibid., p. 118.

18. M Turnbull (Prime Minister) and P Dutton (Minister for Immigration and Border Protection), *Refugee resettlement from regional processing centres*, joint media release, 13 November 2016. A small number of people (seven) processed in Nauru
When then Prime Minister Kevin Rudd announced the signing of the ‘Regional Resettlement Arrangement’ with PNG on 19 July 2013, he emphasised that the context for negotiating such an agreement was a commitment that no asylum seekers who arrived in Australia by boat would ever be settled in Australia. PNG and Nauru thus became sites not only of processing, but also of settlement. This is fundamentally different from the regional processing arrangements that were in place under the Howard Government. All those processed in PNG and Nauru during the Howard era, who were found to be refugees, were subsequently settled in other countries—the majority in Australia and New Zealand.19

The Australian Government further indicated in 2013 that these arrangements represented the beginnings of a broader regional framework, and it would be seeking to negotiate further settlement arrangements with other countries in the region.20 In September 2014, Australia signed a settlement agreement with Cambodia.21 Under this arrangement, Cambodia agreed to accept for permanent voluntary settlement people who have been processed in Nauru, and been found to be refugees. Only seven people processed in Nauru were resettled in Cambodia under this agreement and the arrangement ceased in 2018.22

On 13 November 2016, two weeks after the Government announced that it was proposing to introduce the original Bill, Prime Minister Turnbull and Minister Dutton announced that the Government had secured an agreement with the US for a number of refugees to be settled there.23 Priority would be given to the most vulnerable (namely women, children and families) and the Government’s policy remains that the arrangement ‘will not under any circumstance be available to any future illegal maritime arrivals (IMAs) to Australia’.24 Under the agreement, US authorities conduct their own refugee status assessments and ultimately determine who the US will accept (subject also to the successful completion of health and security checks). As at 31 July 2019, 604 refugees have been resettled in the US under this arrangement.25

The vast majority of people transferred from Australia to an RPC have now had their refugee claims assessed, and those found to be refugees have either been settled in Nauru, PNG or the US, or are awaiting resettlement. Those found not to be refugees have either returned to their country of origin (voluntarily or involuntarily) or are waiting to be returned. The RPC in PNG was closed in October 2017 and those awaiting return or resettlement were moved to transit centres elsewhere on Manus Island.26 The RPC in Nauru remains open, with people still residing there, but

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20. Rudd and Burke, New arrangement with Nauru Government, op. cit.
21. S Morrison (Minister for Immigration and Border Protection), Refugee settlement arrangement, media release, 26 September 2014.
22. SBS News, ‘Cambodia refugee deal to lapse this year’, op.cit.
23. M Turnbull (Prime Minister) and P Dutton (Minister for Immigration and Border Protection), Refugee resettlement from regional processing centres, media release, 13 November 2016. It was later confirmed by the White House that the US had agreed to resettle up to 1,250 people under the arrangement. See B Doherty, 'White House says US will take up to 1,250 refugees under Australian deal’, The Guardian (Australia), 1 February 2017.
24. Turnbull and Dutton, Refugee resettlement from regional processing centres, op. cit.
operates as an ‘open centre’ (meaning residents may come and go from the centre and move around the island).  

New Zealand resettlement offer

In addition to the resettlement arrangements outlined above, New Zealand has offered to assist Australia by accepting for resettlement some of the people from the RPCs in PNG and Nauru who are found to be refugees. There is precedent for this kind of arrangement—New Zealand had previously assisted Australia in resettling refugees from Nauru and PNG during the first incarnation of offshore processing under the Howard Government. 

The New Zealand resettlement plan was reportedly negotiated under Prime Minister Gillard in 2013, but was abandoned by the Coalition upon forming Government later that year. Under the agreement, New Zealand allocated 150 places annually within its humanitarian quota for the resettlement of refugees from the processing centres in Nauru and PNG.

Then New Zealand Prime Minister John Key confirmed in February 2016 that New Zealand had offered to assist Australia by resettling around 150 people per year from RPCs, but that Australia had not accepted this offer.

Resettlement in New Zealand has so far been rejected by the Australian Government due to concerns that this would create an incentive for people to attempt a maritime journey to Australia. There are two potential ‘pull factors’ which concern the Government about this arrangement: first, that New Zealand is a developed country, similar to Australia, and that resettlement in any developed country will act as an incentive for more asylum seekers to make the journey; second, and most significantly, that refugees who are resettled in New Zealand could eventually become citizens of New Zealand and then be entitled to live in Australia under the right of entry granted to New Zealand citizens in the Trans-Tasman Travel Arrangement. 

Minister Dutton expressed these two concerns in a media interview in February 2016:

One of the things that we need to be mindful of is that we’re not creating a situation where there’s a pull factor for people to come here because they know that they’re going to a particular country that might be seen in similar terms to Australia, in terms of welfare support or in terms of employment opportunities, whatever the motivation might be.

So it needs to be crafted carefully. For example, the way in which the Labor Party put together a proposal with New Zealand would mean that people could go to New Zealand, get New Zealand citizenship and then turn up in Australia... 

Since then, the Australian Government has consistently declined to accept the offer of resettlement in New Zealand for refugees in Nauru and PNG. However, in July 2019, Minister Dutton confirmed the offer remained open, and in an apparent softening of its position indicated

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27. P Dutton (Minister for Immigration and Border Protection), Australia welcomes Nauru open centre, media release, 5 October 2015.
30. M Turnbull (Prime Minister), Transcript of joint media conference with Rt Hon John Key, Prime Minister of New Zealand Prime Minister John Key: Sydney, media release, 19 February 2016.
31. For detailed information on how New Zealand citizens are treated in Australia’s immigration system see H Spinks and MKlapdor, New Zealanders in Australia: a quick guide, Research paper series, 2016–17, Parliamentary Library, Canberra, 2016.
that the Australian Government may consider it at some point, subject to national security interests:

I have never ruled out the New Zealand option but I've made the point and I make it again today—now is not the right time for us to be sending people to New Zealand ...

There may be a time when we can exercise the New Zealand option—we’re grateful for it, but we will exercise that option when and if it is in our national interest and it’s not going to restart boats.  

Committee consideration

**Senate Legal and Constitutional Affairs Legislation Committee**

The Bill was referred to the Senate Legal and Constitutional Affairs Legislation Committee for inquiry and report by 13 September 2019. Details of the inquiry are at the inquiry [web page](#). The inquiry received 30 submissions on the Bill. All submissions—other than that from the Department of Home Affairs—opposed the Bill.

The Committee’s majority report recommended that the Senate pass the Bill. While it acknowledged the concerns raised by submitters and witnesses, it was of the view the measures in the Bill were ‘necessary, reasonable and proportionate’. The Committee noted:

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 ...

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.

Dissenting reports were issued by Australian Labor Party (ALP) senators and the Australian Greens which recommended the Bill be rejected (discussed below).

Report on 2016 Bill

The Senate Legal and Constitutional Affairs Legislation Committee reported on the 2016 Bill in November 2016, with the majority report similarly recommending that Bill be passed. The Committee noted:

... the concerns that have been expressed about aspects of this Bill by submitters and witnesses in the course of the inquiry. However, it has formed the view that the Bill is part of a comprehensive suite of related measures that together act as a deterrent to people risking their lives by illegally coming to Australia by boat, and to those who would ply the illegal people smuggling trade into Australia ... The committee is satisfied that the proposed measures are necessary and that there are sufficient safeguards incorporated within the Bill to deal with the issues that have been raised.

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35. Ibid.
37. Ibid., p. 13.
The ALP and the Australian Greens issued dissenting reports which recommended that the Senate reject the Bill.\(^{38}\)

**Senate Standing Committee for the Scrutiny of Bills**

In its *Scrutiny Digest* dated 24 July 2019, the Scrutiny of Bills Committee referred to its comments on the original Bill.\(^{39}\) In relation to that Bill, the Committee had raised concerns with the Bill’s retrospective application, in relation to both:

- the fact that the Bill defines the affected group (in part) by events that had occurred in the past (since 19 July 2013) and
- the application of the new statutory bars to offshore visa applications lodged after the Bill was introduced but before its commencement.\(^{40}\)

Its concerns about retrospectivity are discussed in further detail under the ‘Key issues and provisions section below’.

The Committee considered that the Bill could have ‘particularly adverse consequences for those who were children at the time the decision was made to seek to travel to Australia’, but who had turned 18 years old by the time of their transfer to a RPC (and thus would come within the defined cohort the subject of the Bill).\(^{41}\) Accordingly, the Committee sought the Minister’s advice as to whether consideration had been given to the consequences of the Bill for this group.\(^{42}\)

The Minister responded to the Committee by letter dated 22 December 2016, advising that the Bill codified Government policy announced on 19 July 2013 and stating that the Ministerial discretion provided by the Bill could be used in situations to allow visa applications in specific cases ‘and in consideration of the individual circumstances of the case, including the best interest of affected children and/or their age at the time a decision to travel illegally to Australia was made’.\(^{43}\)

The Committee considered that the Minister’s response did not ‘provide additional information to that provided in the explanatory memorandum to address with specificity the committee’s concerns’.\(^{44}\)

**Policy position of non-government parties/independents**

The ALP voted against the original Bill in the House of Representatives in 2016.\(^{45}\) ALP Senator Kim Carr is reported to have described the current Bill as ‘unnecessary, arbitrary in its application and discriminatory in its effect’.\(^{46}\)

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44. Ibid., p. 90.


46. P Karp, *Coalition has lost control of borders, with 80,000 asylum arrivals by plane, Labor says*, The Guardian (Australia), 23 August 2019.
In the Senate inquiry into the current Bill, ALP senators issued a Dissenting Report and recommended the Bill be rejected.\(^47\) Their concerns included:

- that the effects of the Bill would extend beyond its stated aims of preventing asylum seekers who arrive by boat from settling in Australia to prohibit members of the regional processing cohort coming to Australia ‘under any circumstance and on any visa’
- the Bill could permanently separate members of the same family, in breach of Australia's international legal obligations
- the Bill establishes a broad and vaguely defined ministerial discretion under legislation which creates a risk of unfair and inconsistent decisions and
- the Bill would have retrospective application on individuals who have sought asylum in Australia since 19 July 2013.\(^48\)

The ALP senators’ Dissenting Report concluded:

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 – 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.\(^49\)

The Australian Greens also voted against the original Bill in 2016.\(^50\) They made a Dissenting Report in the Senate inquiry recommending the Senate reject the Bill.\(^51\) It stated:

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 …

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.\(^52\)

The independent Member for Denison (now Clark) Andrew Wilkie, and Centre Alliance member for Mayo, Rebekha Sharkie voted against the original Bill in the House of Representatives.\(^53\)
Senator Jacqui Lambie reportedly supported the original bill, as did One Nation. Neither appears to have made any formal statement on the current Bill at the time of writing.

Position of major interest groups

All of the submissions to the Senate inquiry into the Bill, other than that from the Department of Home Affairs, opposed its passage. Refugee and human rights advocates, including the Refugee Council of Australia and the Australian Human Rights Commission (AHRC), as well as legal advocacy groups including the Law Council of Australia and Australian Lawyers for Human Rights, are opposed to the Bill on several grounds, notably:

- that the Act already provides sufficient power for the Minister to refuse people a visa
- that a ban on allowing people to obtain any kind of visa to enter Australia, including a visitor visa, is disproportionate to achieving Australia’s policy intention of ensuring people sent to RPCs do not settle in Australia
- that the provisions are contrary to Australia’s international legal obligations concerning unity of the family, as they may result in people being unable to reunite with family members who are resident in Australia
- that the provisions are contrary to Australia’s obligations under the Convention Relating to the Status of Refugees to not punish refugees on the basis of their mode of entry
- that the provisions granting the Minister discretion to lift the ban in certain cases are an inadequate safeguard against the above concerns, and an unnecessary expansion of the Minister’s already broad discretionary powers and
- that the provisions will be difficult and expensive to implement in practice.

Some refugee advocates, despite being opposed to the original Bill, argued in 2018 in favour of Parliament passing it if it would result in the Government accepting New Zealand’s offer to resettle refugees. They reluctantly concluded that it would be an acceptable compromise, in the

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55. Australian Lawyers for Human Rights, Submission to Senate Standing Committee on Legal and Constitutional Affairs, Inquiry into the Migration Legislation Amendment (Regional Processing Cohort) Bill 2019 [Provisions], [Submission no. 17], 9 August 2019; Kaldor Centre, Peter McMullin Centre on Statelessness, and Professor Ben Saul, Submission to Senate Standing Committee on Legal and Constitutional Affairs, Inquiry into the Migration Legislation Amendment (Regional Processing Cohort) Bill 2019 [Provisions], [Submission no. 7], 7 August 2019.
56. Law Council of Australia, Submission to Senate Standing Committee on Legal and Constitutional Affairs, Inquiry into the Migration Legislation Amendment (Regional Processing Cohort) Bill 2019 [Provisions], [Submission no. 20], 16 August 2019; Australian Lawyers for Human Rights, Submission to Senate Standing Committee on Legal and Constitutional Affairs, op. cit.; Refugee Council of Australia (RCOA), Submission to Senate Standing Committee on Legal and Constitutional Affairs, Inquiry into the Migration Legislation Amendment (Regional Processing Cohort) Bill 2019 [Provisions], [Submission no. 14], August 2019; Australian Human Rights Commission (AHRC), Submission to Senate Standing Committee on Legal and Constitutional Affairs, Inquiry into the Migration Legislation Amendment (Regional Processing Cohort) Bill 2019 [Provisions], [Submission no. 18], 7 August 2019.
57. Kaldor Centre, Peter McMullin Centre on Statelessness, and Professor Ben Saul, Submission to Senate Standing Committee on Legal and Constitutional Affairs, op. cit.; RCOA, Submission to Senate Standing Committee on Legal and Constitutional Affairs, op. cit.; Australian Lawyers for Human Rights, Submission to Senate Standing Committee on Legal and Constitutional Affairs, op. cit.; Law Council of Australia, Submission to Senate Standing Committee on Legal and Constitutional Affairs, op. cit.; AHRC, Submission to Senate Standing Committee on Legal and Constitutional Affairs, op. cit.
58. Kaldor Centre, Peter McMullin Centre on Statelessness, and Professor Ben Saul, Submission to Senate Standing Committee on Legal and Constitutional Affairs, op. cit.; Australian Lawyers for Human Rights, Submission to Senate Standing Committee on Legal and Constitutional Affairs, op. cit.; Law Council of Australia, Submission to Senate Standing Committee on Legal and Constitutional Affairs, op. cit.
59. Ibid.
60. Law Council of Australia, Submission to Senate Standing Committee on Legal and Constitutional Affairs, op. cit.
face of a ‘wicked choice’, in order to achieve the desired objective of removing people from Manus Island and Nauru.\(^{61}\)

Professor Jane McAdam of the Andrew and Renata Kaldor Centre for International Refugee Law (Kaldor Centre) at the University of NSW, as well as being opposed to the Bill on the basis that it is contrary to Australia’s human rights obligations, has also argued against it on the basis that ‘unilateral enforcement would violate the terms of Australia’s agreement with New Zealand’ under the Trans-Tasman Travel Arrangement.\(^{62}\)

New Zealand Deputy Prime Minister Winston Peters has expressed concern that the provisions of the Bill could potentially lead to the creation of two categories of future New Zealand citizens, with those who arrive via Manus Island or Nauru subject to restrictions on their travel:

> We’re going to have to consider whether or not, as a result of our 2013 commitment (to offer to take 150 refugees from Nauru), we end up with people who are second-class citizens in New Zealand.

> Do we, in our endeavour to be humanitarian about it, end up with a substandard level of citizenship, which is not what this country is about?\(^{63}\)

### Financial implications

The Explanatory Memorandum to the Bill states that the amendments will have ‘low financial impact’.\(^{64}\)

### Compatibility with Human Rights

As required under Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), the Government has assessed the Bill’s compatibility with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of that Act. However, the *Convention Relating to the Status of Refugees* as amended by the *Protocol Relating to the Status of Refugees (Refugee Convention)*\(^{65}\) is not listed as an international instrument for this purpose.\(^{66}\) The Government considers that the Bill is compatible with the listed human rights instruments, relying predominantly on the Minister’s personal power to ‘lift the bar’ and on the basis that any limitations ‘are reasonable, necessary, and proportionate to achieving the legitimate aim of maintaining the integrity of Australia’s lawful migration programs and discouraging hazardous boat journeys’.\(^{67}\)

A number of Australian international refugee law experts have suggested that the Bill is not compatible with Australia’s obligations under the *Refugee Convention*. Article 31(1) of the Convention states as follows:

> Refugees unlawfully in the country of refuge

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63. K Murphy, ‘Russell Broadbent says Shorten has “moral obligation” to support Coalition’s Nauru legislation’, *The Guardian (Australia)*, 18 October 2018.
64. Explanatory Memorandum, Migration Legislation Amendment (Regional Processing Cohort) Bill 2019, p. 2.
67. The Statement of Compatibility with Human Rights can be found at pages 22 to 26 of the Explanatory Memorandum to the Bill. The High Court of Australia has found that the distinct nature of similar personal public interest powers conferred on the Minister by the Act means that the exercise of such powers is not conditioned on the observance of the principles of procedural fairness: *Plaintiff S10-2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636, [2012] HCA 31.
1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.68

A joint submission to the Senate inquiry from Professor Jane McAdam, Professor Guy S Goodwin-Gill and Madeline Gleeson from the Kaldor Centre, Professor Michelle Foster, Director of the Peter McMullin Centre on Statelessness at Melbourne Law School, and Professor Ben Saul, Challis Chair of International Law at Sydney Law School, argued that the Bill would punish refugees and asylum seekers for entering or seeking to enter Australia by boat in violation of Article 31(1):

First, a ‘penalty’ is not limited to criminal sanctions but includes any serious unfavourable treatment. The proposed ban on entering Australia is punitive in this sense, particularly given its severity – a permanent ban on entry, for any purpose, and irrespective of the personal circumstances of individual refugees.

Secondly, the ban would only apply to refugees who sought to enter Australia ‘illegally’ under Australia’s immigration law. It would not apply to refugees who entered ‘legally’ on any visa, including under Australia’s refugee resettlement program. As such, the penalty of a lifetime ban would be imposed ‘on account of’ illegal entry. Article 31(1) prohibits punishing such refugees because even if entry is technically ‘illegal’ under Australian law, everyone has the right to seek asylum under international law – with or without a visa.

Thirdly, while Article 31(1) applies to refugees ‘coming directly’ from a country or territory in which their life or freedom were threatened, this does not mean that refugees are only protected from punishment if they travel immediately to Australia from their home country. Rather, the protection still applies to refugees who may transit through other countries on their way to Australia, so long as those other countries did not offer effective protection...69

**Parliamentary Joint Committee on Human Rights**

In its report dated 30 July 2019, the Parliamentary Joint Committee on Human Rights reiterated its views previously provided on the original Bill.70 In regard to that Bill, the Committee observed:

• ‘[the Bill] applies what is likely to be considered an unlawful penalty for seeking asylum, in contravention of article 31 of the Refugee Convention’

• ‘on the information available, the proposed ban does not appear to be compatible with the right to equality and non-discrimination’ and

• ‘[it is unclear] whether the measure is rationally connected to and a proportionate means of achieving its stated objective, so as to be compatible with the right to protection of the family and rights of the child’.71

In response, the Minister stated that any differential treatment of the affected cohort was for a legitimate purpose and based on relevant objective criteria, and was:

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69. Kaldor Centre, Peter McMullin Centre on Statelessness, and Professor Ben Saul, Submission to Senate Standing Committee on Legal and Constitutional Affairs, op. cit., p. 4. The same concerns were raised in relation to the original Bill—for further discussion, see: Karlsen, *Migration Legislation Amendment (Regional Processing Cohort) Bill 2016*, op. cit., pp. 12–14.
… a proportionate response to prevent a cohort of non-citizens who have previously sought to circumvent Australia’s managed migration program by entering or attempting to enter Australia as a [unauthorised maritime arrival] from applying for a visa to enter Australia.\(^\text{72}\)

The Minister further stated that the flexibility to personally lift the visa bar and consider the individual circumstances of applicants and their family members would enable the Government to ensure it acts consistently with its international human rights obligations to families and children in Australia.\(^\text{73}\)

The Committee suggested the Minister’s discretionary power was ‘unlikely to be sufficient to ensure that the measure is a proportionate limitation on the right to protection of the family in the context of a blanket visa ban’, and noted that:

… 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.\(^\text{74}\)

It was unable to conclude the measure was compatible with the rights to equality and non-discrimination, the right to protection of the family and rights of the child.\(^\text{75}\)

### Key issues and provisions

#### Statutory bars

**Existing provisions**

The *Migration Act* contains statutory ‘bars’ which prevent certain people from lodging a valid visa application, unless the Minister exercises their discretion to allow the application. Relevantly, statutory bars currently apply to:

- ‘unauthorised maritime arrivals’ (section 46A) and
- ‘transitory persons’ (section 46B)

who are in Australia and who either do not have a valid visa or hold a temporary protection visa or bridging visa.\(^\text{76}\)

The term ‘unauthorised maritime arrival’ (UMA) captures people who entered Australia by sea without a valid, in-force visa, either at an excised offshore place (such as Christmas Island) or, since 1 June 2013, at any other place. It also captures any child born in the migration zone to a parent who is an unauthorised maritime arrival, unless the child’s other parent is an Australian citizen or permanent resident.\(^\text{77}\)

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\(^\text{73}\) Ibid., p. 88.

\(^\text{74}\) Ibid., pp. 87–89.

\(^\text{75}\) Ibid.

\(^\text{76}\) There is an exception for current and former Safe Haven Enterprise Visa holders who satisfy certain employment and social security requirements, though this allows them to apply only for visas of a prescribed kind: *Migration Act*, subsection 46A(1A); *Migration Regulations 1994*, regulation 2.06AAB.

\(^\text{77}\) *Migration Act*, section 5AA.
The term ‘transitory person’ includes a person (and any children) taken to a regional processing country under the Migration Act, or taken to a place outside Australia under Divisions 7 or 8 of Part 3 of the Maritime Powers Act 2013.\(^{78}\)

If the Minister thinks it is in the public interest to do so, they may lift the statutory bar and allow a person to apply for a visa. This discretion cannot be delegated and is non-compellable.\(^{79}\) The Minister has issued guidelines to the Department as to when cases should and should not be referred for his consideration. Ministerial guidelines regarding the Minister’s section 46A intervention powers currently note:

> The public interest may be served by ensuring that a UMA, who has made or wishes to make claims that may engage Australia’s protection obligations, is allowed to have those claims assessed through a statutory process against the criteria in [section 36(2)] of the Act.\(^{80}\)

### Proposed amendments

While the existing statutory bars apply to UMAs and transitory persons who are currently in Australia and on a temporary protection or bridging visa, the changes proposed by the Bill will significantly extend their scope to prevent certain persons from ever lodging a valid visa application, regardless of when or from where they are applying.

**Item 4** of Schedule 1 of the Bill inserts proposed subsection 46A(2AA), which applies an indefinite statutory bar to all UMAs who have been taken to a regional processing country after 19 July 2013, and who were at least 18 years of age when they were first taken to the regional processing country.

This will capture persons in Nauru and PNG under regional processing arrangements, persons who have been transferred to Australia from a regional processing country for medical treatment, those who have voluntarily returned home or been involuntarily removed to their home country, and those who have been settled in a third country (such as the United States or Cambodia). It will also apply to UMAs who are taken to a regional processing country in the future.\(^{81}\)

**Item 13** inserts proposed subsection 46B(2AA), which applies an indefinite statutory bar to all transitory persons who have been taken to a regional processing country under Division 7 or 8 of Part 3 of the Maritime Powers Act, if they were at least 18 years of age when they were first taken to the regional processing country.

This captures persons taken directly to a regional processing country following the interception of a vessel outside of Australia’s territorial waters.\(^{82}\) It will not extend to persons on vessels which are intercepted and turned back if they have not been ‘taken to a regional processing country’.\(^{83}\)

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78. Migration Act, subsection 5(1) (definition of transitory person). The Maritime Powers Act 2013 provides a broad set of enforcement powers used by maritime officers to give effect to Australian laws, international agreements and decisions. Divisions 7 and 8 of Part 3 deal with detaining vessels, aircraft and other conveyances and placing and moving persons.

79. Migration Act, subsections 46A(2)–(3), (7) and 46B(2)–(3), (7).


81. Department of Home Affairs, Submission to the Senate Standing Committee on Legal and Constitutional Affairs, Inquiry into the Migration Legislation Amendment (Regional Processing Cohort) Bill 2019 [Provisions], [Submission no. 2], n. d., p. 4.

82. The Department has stated that section 46B is ‘rarely used’: P De Veuve, Evidence to Senate Legal and Constitutional Affairs Legislation Committee, Inquiry into the Migration Legislation Amendment (Regional Processing Cohort) Bill 2019 [Provisions], 22 August 2019, p. 47.

83. As required by proposed paragraphs 46A(2AA)(b) and 46B(2AA)(a).
Ministerial discretion

Under both provisions, the Minister is able to ‘lift’ the statutory bar and permit a person to lodge a visa application, if the Minister thinks it is in the public interest to do so. The Minister may:

- give to a UMA or transitory person (as applicable) a written determination that the bar does not apply to an application for a visa of a specified class or
- by legislative instrument, determine that the bar does not apply to an application by a person included in a class of UMAs or transitory persons (as applicable) for a specified class of visa.\(^\text{84}\)

The Minister may also vary or revoke a determination, if the Minister thinks it is in the public interest to do so.\(^\text{85}\)

These discretionary powers are non-delegable.\(^\text{86}\) While a mechanism enabling the Minister to permit visa applications to be lodged is undeniably necessary to ensure that the Act operates as intended and to accommodate exceptional circumstances, including to enable adherence to Australia’s international human rights obligations (albeit on a purely discretionary and non-compellable basis), the Minister does not have a duty (under any circumstances) to consider whether to exercise the powers.\(^\text{87}\)

As a consequence, there is no right of review if the Minister does not decide to lift the bar.

What is in the ‘public interest’ is not defined in the Act or the Migration Regulations and it is purely a matter for the Minister of the day to determine.

Legal and refugee advocacy groups have argued that the Minister’s discretionary intervention powers, as provided for in the Bill, do not provide a sufficient safeguard against the human rights concerns raised by the proposed measures.\(^\text{88}\) The joint submission by the Kaldor Centre, Peter McMullin Centre on Statelessness, and Professor Ben Saul, suggested that the ‘public interest’ is an ‘amorphous and largely discretionary test that is not amenable to judicial scrutiny’, and further argued:

> The history of non-compellable, non-reviewable discretionary power is an affront to accountability in a democratic State committed to the rule of law. Moreover, the Bill includes no requirement for the Minister to take into account Australia’s international human rights obligations as part of that assessment, which is particularly concerning given that the human rights outlined above, including the right to family unity, are indisputable and their effective protection requires that they be backed up by law, if arbitrariness is to be avoided.\(^\text{89}\)

Refugee Legal submitted that in its experience, public interest powers in the migration context ‘have been characterised by arbitrary, inconsistent and unpredictable outcomes, in which

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\(^{84}\) Proposed subsections 46A(2A), (2AC) and 46B(2A), (2AC).

\(^{85}\) Proposed subsections 46A(2D) and 46B(2D) (inserted by items 8 and 17, respectively).

\(^{86}\) Migration Act, subsections 46A(3) (as amended by item 9) and 46B(3) (as amended by item 18).

\(^{87}\) Migration Act, subsections 46A(7) (as amended by item 11) and 46B(7) (as amended by item 20); proposed subsections 46A(8) and 46B(8) (inserted by items 12 and 21, respectively).

\(^{88}\) For example: AHRC, Submission to the Senate Standing Committee on Legal and Constitutional Affairs, op. cit., pp. 9–10; Law Council of Australia, Submission to the Senate Standing Committee on Legal and Constitutional Affairs, op. cit., pp. 26–27; Kaldor Centre, Peter McMullin Centre on Statelessness, and Professor Ben Saul, Submission to the Senate Standing Committee on Legal and Constitutional Affairs, op. cit., p. 6; Asylum Seeker Resource Centre (ASRC), Submission to the Senate Standing Committee on Legal and Constitutional Affairs, Inquiry into the Migration Legislation Amendment (Regional Processing Cohort) Bill 2019 [Provisions], [Submission no. 15], 7 August 2019, p. 7.

\(^{89}\) Kaldor Centre, Peter McMullin Centre on Statelessness, and Professor Ben Saul, Submission to the Senate Standing Committee on Legal and Constitutional Affairs, op. cit., p. 6.
decisions lack ordinary standards of transparency and accountability under the rule of law’. 90
Liberty Victoria noted that the courts have afforded the Executive broad discretion in respect of
the exercise of ‘public interest’ and ‘national interest’ powers. 91

The Law Council suggested that the term ‘public interest’ is ‘susceptible to different interpretation
by different Ministers on opaque grounds’, and that procedural fairness may be undermined in the
exercise of Ministerial discretions with limited transparency or review. 92 In regard to existing
intervention powers, the Law Council stated:

The exercise of Ministerial discretions has also been subject to judicial scrutiny with regard to the
requirement that he give proper, genuine and realistic consideration to the merits of the given case. The
volume of such matters requiring the personal consideration of the Minister may make it very difficult
for him to meet this standard. 93 (citations omitted)

Additional exclusions
In addition to the statutory bars described above, the Bill also amends provisions of the Act and
the Migration Regulations to preclude ‘members of the designated regional processing cohort’
from being deemed to have been granted or to have validly applied for, certain visas such as
Special Purpose Visas, 94 the Subclass 600 (Visitor) visa in the Business Visitor stream, 95 or a
Refugee and Humanitarian (Class XB) visa. 96

Item 1 of the Bill inserts a definition of member of the designated regional processing cohort into
subsection 5(1) of the Act, which captures:

• all UMAs who have been taken to a regional processing country after 19 July 2013, and who
  were over 18 years of age when they were first taken to the regional processing country and
• all ‘transitory persons’ who have been taken to a regional processing country after 19 July 2013,
  and who were over 18 years of age when they were first taken to the regional processing
country.

As an example of how these amendments work, regulation 2.08A of the Migration Regulations
currently provides that when a person applies for a permanent visa, in certain circumstances their
spouse, de facto partner or dependent child may be ‘taken to have applied’ for a visa of the same
class if they make a written request to be added to the original application and have paid the
relevant application fee. Item 29 of the Bill inserts an additional requirement in proposed
paragraph 2.08A(1)(db) which is that the additional applicant ‘is not a member of the designated
regional processing cohort’. Proposed subregulation 2.08A(3) provides that the Minister may
waive this requirement in a particular case.

Regulation 2.08AAA similarly provides for the adding of family members to certain applications for
Temporary Protection Visas and Safe Haven Enterprise Visas. This provision is amended by items

90. Refugee Legal, Submission to the Senate Standing Committee on Legal and Constitutional Affairs, Inquiry into the Migration Legislation Amendment (Regional Processing Cohort) Bill 2019 [Provisions], 14 August 2019, [Submission no. 19], p. 6.
91. Liberty Victoria, Submission to the Senate Standing Committee on Legal and Constitutional Affairs, Inquiry into the Migration Legislation Amendment (Regional Processing Cohort) Bill 2019 [Provisions], 5 August 2019, [Submission no. 9], pp. 7–8.
93. Ibid.
94. Migration Act, section 33 (as amended by items 2 and 3).
95. Migration Regulations, regulation 2.07AA (as amended by items 22 and 23).
96. Migration Regulations, regulation 2.07AM and Schedule 1, item 1402 (as amended by items 27, 36 and 37).
31 to 33 of the Bill to exclude members of the designated regional processing cohort, except where the Minister chooses to waive this.97

Unlike the ‘public interest’ discretions provided for in relation to the statutory bars (discussed above), the Bill does not provide any further guidance as to the circumstances in which the Minister may waive the exclusion and allow a member of the designated regional processing cohort to be deemed to have made a valid visa application.

Retrospectivity

Many submissions to the Senate inquiry criticised the Bill’s retrospective operation in applying visa bars to persons who have previously travelled to Australia as unauthorised maritime arrivals. The Law Council described the operation of the proposed amendments as follows:

The Bill operates prospectively with regard to any future arrivals who may at a later time fall within the Cohort. It effectively places those people on notice, prior to seeking to come to Australia, that doing so in this manner may result in permanent ineligibility for an Australian visa.

The Bill will, however, operate retrospectively in regard to people who fall within the Cohort upon its commencement. For those people, the Bill ‘is prospective, but it imposes new results in respect of a past event.’ A person’s past action in seeking to come to Australia will have the new, and immediate, result of permanent ineligibility for any visa.98

The Scrutiny of Bills Committee emphasised that, in keeping with the rule of law, ‘people should be able to guide their actions on the basis of fair notice about the legal rules and requirements that will apply to them’. It questioned the retrospective operation of the Bill in light of its stated purpose of discouraging people from attempting hazardous boat journeys, stating: ‘for people who have already undertaken such a journey, it seems that the proposed law can only play a punitive, rather than deterrent, function’.99

The AHRC similarly submitted that it ‘does not consider that the Bill’s retrospective adverse effect on human rights is necessary, reasonable and proportionate to prevent hazardous boat journeys and irregular migration’.100 Refugee Legal argued that the amendments will:

... operate in a manner which further punishes an already extremely vulnerable group of people for actions that occurred in the past at a time when the Government’s current law and policies to prevent people smuggling and travel by boat to Australia did not exist...101

Application provision

The Bill also has retrospective application in relation to certain visa applications lodged prior to commencement. Item 39 provides that the new statutory bars for UMAs and transitory persons (provided for in proposed subsections 46A(2AA) and 46B(2AA), respectively) will take effect at different times depending on whether a visa application has been lodged onshore or offshore.

97. As regulation 2.08AAA was inserted into the Regulations by the Migration Legislation Amendment (2017 Measures No. 1) Regulations 2017, it did not exist at the time the original Bill was introduced—this means that Items 31 to 33 were not contained in that Bill.
98. Law Council of Australia, Submission to the Senate Standing Committee on Legal and Constitutional Affairs, op. cit., pp. 23–24.
100. AHRC, Submission to the Senate Standing Committee on Legal and Constitutional Affairs, op. cit., p. 13.
101. Refugee Legal, Submission to the Senate Standing Committee on Legal and Constitutional Affairs, op. cit., p. 5.
Where the visa applicant is outside Australia when making the visa application, the new statutory bar will apply to an application:

- made after commencement (the day after Royal Assent) or
- made before commencement but after the date the Bill was introduced into the House of Representatives (being 4 July 2019) if the application has not been finally determined before commencement.

The Explanatory Memorandum notes:

The Government’s intention is that from the time of introduction of the Bill, members of the designated regional processing cohort should not be permitted to make a valid application for a visa unless permitted to do so by the Minister. The retrospective application of these provisions is required to give effect to this policy, and is directed to preventing members of the designated regional processing cohort from attempting to circumvent the amendments by lodging an offshore visa application after introduction of the Bill and before the commencement of Schedule 1. From the time of introduction of the Bill, members of the designated regional processing cohort are considered to be on notice of the Government’s intention.\(^1\)

Where the visa applicant is in Australia at the time of making the application, the new statutory bar will apply to an application made after commencement (the day after Royal Assent), unless the Minister has already ‘lifted’ an existing bar to allow the application.

The original Bill similarly sought to apply to offshore visa applications made after the Bill was introduced in the House of Representatives which had not been finally determined before commencement. The Scrutiny of Bills Committee expressed concerns about this retrospective application, stating:

The committee reiterates its long-standing scrutiny concern that provisions that retrospectively apply provisions to the date of the announcement of the bill (i.e. ‘legislation by press release’) challenges a basic value of the rule of law that, in general, laws should only operate prospectively (not retrospectively).\(^2\)

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102. Explanatory Memorandum, op. cit., p. 20. Also see Department of Home Affairs, Submission to the Senate Standing Committee on Legal and Constitutional Affairs, op. cit., p. 5.