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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

MIGRATION LEGISLATION AMENDMENT (REGIONAL PROCESSING COHORT) BILL 2019

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Home Affairs, the Hon. Peter Dutton MP)

MIGRATION LEGISLATION AMENDMENT (REGIONAL PROCESSING COHORT) BILL 2019

OUTLINE

The Migration Legislation Amendment (Regional Processing Cohort) Bill 2019 (the Bill) amends the *Migration Act 1958* (Migration Act) and the *Migration Regulations 1994* (the Migration Regulations) to prevent unauthorised maritime arrivals (UMAs) who were at least 18 years of age and were taken to a regional processing country after 19 July 2013 from making a valid application for an Australian visa.

The amendments will also apply to transitory persons who were at least 18 years of age and were taken to a regional processing country after 19 July 2013 under Division 7 or 8 of Part 3 of the *Maritime Powers Act 2013* (the Maritime Powers Act).

These groups of people will be referred to as the designated regional processing cohort.

The amendments will include a personal power of 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.

The Bill includes measures to 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.

The amendments will apply to a member of the designated regional processing cohort: who is currently subject to regional processing arrangements; who has left a regional processing country and is in another country; or who is taken to a regional processing country in the future.

FINANCIAL IMPACT STATEMENT

These amendments will have low financial impact.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

A Statement of Compatibility with Human Rights has been completed in relation to the amendments in this Bill and assesses that the amendments are compatible with Australia's human rights obligations. A copy of the Statement of Compatibility with Human Rights is at Attachment A.

MIGRATION LEGISLATION AMENDMENT (REGIONAL PROCESSING COHORT) BILL 2019

NOTES ON INDIVIDUAL CLAUSES

Clause 1 Short Title

1. Clause 1 provides that the short title by which this Act may be cited is the *Migration Legislation Amendment (Regional Processing Cohort) Act 2019*.

Clause 2 Commencement

2. Subclause 2(1) provides that each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table.

3. Table item 1 provides that the whole of the Act is to commence on the day after the Act receives the Royal Assent.

4. Subclause 2(2) provides that any information in column 3 of the table is not part of this Act. Information may be inserted in this column, or information in it may be edited, in any published version of this Act.

Clause 3 Schedules

5. Subclause 3(1) provides that legislation that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned. In addition, any other item in a Schedule to this Act has effect according to its terms.

6. Subclause 3(2) provides that the provisions of the Migration Regulations amended or inserted by this Act, or any other provisions of those regulations, may be amended or repealed by regulations made under section 504 of the Migration Act, with reference to subsection 13(5) of the *Legislation Act 2003*. Section 504 of the Migration Act provides that the Governor-General may make certain regulations not inconsistent with the Act. In accordance with subsection 13(5) of the *Legislation Act 2003*, the amendment of a legislative instrument does not prevent the instrument, as so amended, from being amended or repealed by the Governor-General.

SCHEDULE 1—Amendments

Part 1 – Amendments

Migration Act 1958

New Definition of *Member of the Designated Regional Processing Cohort*

Item 1 Subsection 5(1)

7. Item 1 inserts a new definition in subsection 5(1) of the Migration Act of ***member of the designated regional processing cohort***.

8. The term ***member of the designated regional processing cohort*** is defined to mean:

- A person who:
  - is an unauthorised maritime arrival under subsection 5AA(1) ; and
  - after 19 July 2013, was taken to a regional processing country under section 198AD; and
  - was at least 18 years of age on the first or only occasion after 19 July 2013 when the person was so taken to a regional processing country; or
- a transitory person who:
  - after 19 July 2013, was taken to a regional processing country under Division 7 or 8 of Part 3 of the *Maritime Powers Act 2013* (Maritime Powers Act); and
  - was at least 18 years of age on the first or only occasion after 19 July 2013 when the transitory person was so taken to a regional processing country.

9. Subparagraph (a)(i) of the definition links to the definition of unauthorised maritime arrival (UMA) in subsection 5AA(1) of the Migration Act because it is not intended to capture children born in the migration zone or in a regional processing country who are UMAs under subsections 5AA(1A) and 5AA(1AA) respectively. By not including UMAs under subsections 5AA(1A) and 5AA(1AA) in new subparagraph (a)(i) of the definition, children born in the migration zone or in a regional processing country will not be included in the definition of ***member of the designated regional processing cohort***.

10. Subparagraph (a)(ii) provides that the definition will capture UMAs who were taken to a regional processing country under section 198AD after 19 July 2013.

11. Subparagraph (a)(iii) also makes clear that a person is only a member of the designated regional processing cohort if they were at least 18 years of age when they were first taken to a regional processing country. This recognises that children may not be able to make decisions on their own behalf and may have been subject to regional processing through the decisions of their parents to travel illegally to Australia by boat.

12. Subparagraph (b)(i) applies to transitory persons who may have been taken directly to a regional processing country without having first been taken to Australia. A transitory person is defined in subsection 5(1) of the Migration Act and includes a person who was taken to a place outside Australia under Division 7 or 8 of Part 3 of the Maritime Powers Act.

13. Subparagraph (b)(ii) makes clear that a transitory person is only a member of the designated regional processing cohort if they were at least 18 years of age when they were first taken to a regional processing country.

14. The date of 19 July 2013 is the date when the Regional Resettlement Arrangement between Australia and Papua New Guinea (PNG) was signed. The effect of this arrangement was that any UMA entering Australia after this date, who is found to be a refugee, would be resettled in PNG or another participating regional processing country. These people would not be resettled in Australia.

Special Purpose Visas

Item 2 Subsection 33(2)

15. Item 2 omits the words "subsection (3)" and substitutes the words "subsections (3) and (3A)" in subsection 33(2) of the Migration Act.

16. Section 33 establishes a class of temporary visas known as special purpose visas. Subsection 33(2) provides that, subject to certain provisions, a non-citizen is taken to have been granted a special purpose visa if the person satisfies the requirements in that subsection.

17. This amendment is a consequential amendment to item 3 of the Bill to reflect that subsection 33(2) will also be subject to new subsection 33(3A), which provides that a non-citizen who is a member of the designated regional processing cohort is not taken to have been granted a special purpose visa.

18. This amendment is required because it is the intention, that if a non-citizen is a part of the designated regional processing cohort, they should not be granted a visa by operation of law even if they satisfy the requirements in subsection 33(2).

Item 3 After subsection 33(3)

19. Item 3 inserts new subsections 33(3A) and 33(3B) after subsection 33(3) of the Migration Act.

20. New subsection 33(3A) provides that a member of the designated regional processing cohort is not taken to have been granted a special purpose visa. This is to reflect the intention that members of this cohort should not be granted a visa by operation of law even if they satisfy the requirements in subsection 33(2).

21. New subsection 33(3B) provides a delegable power for the Minister to waive the operation of subsection 33(3A) in a particular case. By waiving the operation of subsection 33(3A), a non-citizen who is a member of the designated regional processing cohort, if they satisfy the requirements of subsection 33(2), will be taken to have been granted a visa by operation of law. It is the intention that if the operation of subsection 33(3A) has been waived, the non-citizen will have been taken to have been granted a visa at the time provided for in subsection 33(4).

22. Whether the power is to be waived in the particular circumstances is entirely at the discretion of the Minister or his or her delegate.

Visa Applications by Unauthorised Maritime Arrivals

Item 4 After subsection 46A(2)

23. Item 4 inserts new subsections 46A(2AA), 46A(2AB) and 46A(2AC) after subsection 46A(2) in Part 2 of Division 3.

24. Section 46A of the Migration Act deals with visa applications by unauthorised maritime arrivals (UMAs). The definition of ***unauthorised maritime arrival*** is provided in section 5AA of the Migration Act.

25. Subsection 46A(1) provides that an application for a visa is not a valid application if the person is an UMA who is in Australia and is an unlawful non-citizen or holds a visa of a certain kind.

26. Subsection 46A(2) provides a mechanism for the Minister to determine, if he or she thinks it is in the public interest to do so, that the application bar does not apply to an application for a visa of a class specified in the determination. Subsection 46A(2C) enables the Minister to vary or revoke the determination. Relevantly, subsection 46A(3) provides that the power to make, vary or revoke a determination may only be exercised by the Minister personally. Subsection 46A(7) provides that the Minister does not have a duty to consider whether to exercise these powers.

27. New subsections 46A(2AA), 46A(2AB) and 46A(2AC), which are inserted after subsection 46A(2), provide a framework for a new visa application bar. This new application bar will prevent valid visa applications by UMAs who are members of the designated regional processing cohort, and will also prevent applications by persons in the cohort while they are outside Australia.

28. New subsection 46A(2AA) provides that an application for a visa is not a valid application if it is made by a person who:

- is an UMA under subsection 5AA(1); and
- after 19 July 2013, was taken to a regional processing country under section 198AD; and
- was at least 18 years of age on the first or only occasion after 19 July 2013 when the person was so taken to a regional processing country.

29. The effect of this amendment is to introduce a new application bar for this cohort of UMAs. This application bar will apply to any UMA described above, whether they are in Australia or outside Australia, or whether they are a lawful non-citizen or an unlawful non-citizen.

30. The purpose of this amendment is to ensure that a UMA, who was taken to a regional processing country under section 198AD of the Migration Act after 19 July 2013, and was at least 18 years of age at that time, will not be eligible to apply for an Australian visa of any kind. This includes both permanent and temporary visas.

31. If a person in this cohort is an unlawful non-citizen, they will be prevented from applying for a visa. If they hold a visa and are therefore a lawful non-citizen, they will also be prevented from applying for any subsequent visas.

32. New subsection 46A(2AB) provides that if the Minister thinks it is in the public interest to do so, the Minister may, by written notice given to a UMA, determine that subsection 46A(2AA) does not apply to an application by the UMA for a visa of a class specified in the determination.

33. The effect of this provision is that the Minister may decide to "lift" this application bar for individual UMAs for a particular visa where the Minister thinks it is in the public interest to do so.

34. New subsection 46A(2AC) provides that if the Minister thinks that is in the public interest to do so, the Minister may, by legislative instrument, determine that subsection 46A(2AA) does not

apply to an application by an UMA included in a class of UMAs specified in the determination for a visa of a class specified in the determination.

35. The effect of this provision is the Minister may decide to "lift" this application bar for a defined class of UMAs, for a particular visa, where the Minister thinks it is in the public interest to do so.

36. The Minister's power to lift the bar is personal and non-compellable and it is for the Minister to decide what is in the public interest. The Minister may, for example, wish to consider whether to lift the bar in cases where individual circumstances justify special consideration or to ensure that Australia's international obligations are met.

Item 5 Subsection 46A(2A)

37. Item 5 inserts the words ", (2AB) or (2AC)" after the words "subsection (2)" in subsection 46A(2A) in Part 2 of Division 3.

38. This item ensures that the operation of the Minister's new powers to "lift" the application bar in new subsection 46(2AB) and 46(2AC) are consistent with the existing equivalent power in subsection 46A(2).

39. The effect of this amendment is that a determination under subsection 46A(2AB) or subsection 46A(2AC) may provide that it has effect only for the period specified in the determination and, if it does so, the determination ceases to have effect at the end of the specified period.

Item 6 Subsection 46A(2B)

40. Item 6 inserts the words "under subsection (2), (2AB) or (2AC)" after the word "determination" in subsection 46A(2B).

41. This item ensures that the operation of the Minister's power to "lift" the application bar in new subsection 46(2AB) and subsection 46A(2AC) are consistent with the existing equivalent power in subsection 46A(2).

42. The effect of this amendment is to make clear that the period specified in a determination under existing subsection 46A(2) or new subsections 46A(2AB) and 46A(2AC) may be different for different classes of UMAs.

Item 7 Subsection 46A(2C)

43. Item 7 inserts the words "or (2AB)" after the words "subsection (2)" in subsection 46A(2C).

44. This item ensures that the operation of the Minister's new powers to "lift" the application bar in new subsection 46A(2AB) is consistent with the existing equivalent power in subsection 46A(2).

45. The effect of this amendment is that the Minister may, in writing, vary or revoke a determination made under subsection 46A(2AB) if the Minister thinks it is in the public interest to do so.

Item 8 After subsection 46A(2C)

46. Item 8 inserts new subsection 46A(2D) after subsection 46A(2C).

47. New subsection 46A(2D) provides that the Minister may, by legislative instrument, vary or revoke a determination made under subsection 46A(2AC) if the Minister thinks it is in the public interest to do so.

48. The purpose of new subsection 46A(2D) is to provide the Minister with the power to vary or revoke, by legislative instrument, a determination made under subsection (2AC).

Item 9 Subsection 46A(3)

49. Item 9 omits the words "(2) or (2C)", and substitutes the words "(2), (2AB), (2AC), (2C) or (2D)" in subsection 46A(3).

50. This item ensures that the operation of the Minister's power to "lift" the application bar, or vary or revoke a determination under new subsections 46A(2AB), 46A(2AC) and 46A(2D), is consistent with the equivalent powers in subsections 46A(2) and 46A(2C) and can only be exercised by the Minister personally.

51. The effect of this amendment is to make clear that the powers under subsections 46A(2), 46A(2AB), 46A(2AC), 46A(2C) and 46A(2D) may only be exercised by the Minister personally.

Item 10 Paragraphs 46A(5)(a) and(b)

52. Item 10 omits the words "the unauthorised" and substitutes the words "an unauthorised" in paragraphs 46A(5)(a) and 46A(5)(b) of the Migration Act.

53. This amendment is consequential to new subsection 46A(2AC) which is inserted by item 4 above, which enables the Minister to make a determination in relation to a class of UMAs.

Item 11 Subsection 46A(7)

54. Item 11 inserts the words ",(2AB)" after the words "subsection (2)" in subsection 46A(7) in the Migration Act.

55. This item ensures that the operation of the Minister's power to "lift" the application bar in new subsection 46(2AB) is consistent with the existing equivalent power in subsection 46A(2).

56. The effect of this amendment is to make clear that the Minister does not have a duty to consider whether to determine (or vary or revoke a determination) that the application bar in new subsection 46A(2AA) does not apply to an application for a visa by a UMA.

Item 12 At the end of section 46A

57. Item 12 adds new subsection 46A(8) at the end of section 46A.

58. New subsection 46A(8) provides that the Minister does not have a duty to consider whether to exercise the power under subsection 46A(2AC) or subsection 46A(2D) in respect of any class of UMAs, whether the Minister is requested to do so by an UMA included in such a class or by any other person, or in any other circumstances.

59. The effect of this amendment is to make clear that the Minister does not have a duty to consider whether to determine (or vary or revoke a determination) that the application bar in new subsection 46A(2AA) does not apply to an application for a visa by a UMA included in a class of UMAs specified in the determination.

Visa Applications by Transitory Persons

Item 13 After subsection 46B(2)

60. Item 13 inserts new subsections 46B(2AA), 46B(2AB) and 46B(2AC) after subsection 46B(2) of the Migration Act.

61. Section 46B of the Migration Act deals with visa applications by transitory persons. ***Transitory person*** is defined in subsection 5(1) of the Migration Act, and relevantly includes a person who was taken to a regional processing country under section 198AD of the Migration Act or a person who was taken to a place outside Australia under paragraph 245F(9)(b) of this Act, or under Division 7 or 8 of Part 3 of the Maritime Powers Act.

62. Subsection 46B(1) provides that an application for a visa is not a valid application if it is made by a transitory person who is in Australia and is either an unlawful non-citizen or holds a bridging visa or certain kinds of temporary visas.

63. Subsection 46B(2) provides a mechanism for the Minister to determine, if he or she thinks it is in the public interest to do so, that the application bar does not apply to an application for a visa of a class specified in the determination. Subsection 46B(2C) enables the Minister to vary or revoke the determination. Relevantly, subsection 46B(3) provides that the power to make, vary or revoke a determination may only be exercised by the Minister personally. Subsection 46B(7) provides that the Minister does not have a duty to consider whether to exercise these powers.

64. New subsections 46B(2AA), 46B(2AB) and 46B(2AC), which are inserted after subsection 46B(2), provide a framework for a new visa application bar. This new application bar will prevent valid visa applications by transitory persons who are members of the designated regional processing cohort, and will also extend to prevent applications by persons in the cohort while they are outside Australia.

65. New subsection 46B(2AA) provides that an application for a visa is not a valid application if it is made by a transitory person who:

- after 19 July 2013, was taken to a regional processing country under Division 7 or 8 of Part 3 of the Maritime Powers Act; and
- was at least 18 years of age on the first or only occasion after 19 July 2013 when the transitory person was so taken to a regional processing country.

66. The effect of this amendment is to introduce a new application bar for this cohort of transitory person. This application bar will apply to any transitory person described above, whether they are in Australia or outside Australia, or whether they are a lawful non-citizen or an unlawful non-citizen.

67. The purpose of this amendment is to ensure that a transitory person, who was taken to a regional processing country under Division 7 or 8 of Part 3 of the Maritime Powers Act after 19 July 2013, and was at least 18 years of age at that time, will not be eligible to apply for an Australian visa of any kind. This includes both permanent and temporary visas.

68. If a person in this cohort is an unlawful non-citizen, they will be prevented from applying for a visa. If they hold a visa and are therefore a lawful non-citizen, they will also be prevented from applying for any subsequent visas.

69. New subsection 46B(2AB) provides that if the Minister thinks that it is in the public interest to do so, the Minister may, by written notice given to a transitory person, determine that subsection 46B(2AA) does not apply to an application by the person for a visa of a class specified in the determination.

70. The effect of this provision is that the Minister may decide to "lift" this application bar for individual transitory persons, for a visa of a particular class, where the Minister thinks it is in the public interest to do so.

71. New subsection 46B(2AC) provides that if the Minister thinks that it is in the public interest to do so, the Minister may, by legislative instrument, determine that subsection 46B(2AA) does not apply to an application by a transitory person included in a class of transitory persons specified in the determination for a visa of a class specified in the determination.

72. The effect of this provision is the Minister may decide to "lift" this application bar for a defined class of transitory persons, for a visa of a particular class, where the Minister thinks it is in the public interest to do so.

73. The Minister's power to lift the bar is personal and non-compellable and it is for the Minister to decide what is in the public interest. The Minister may, for example, wish to consider whether to lift the bar in cases where individual circumstances justify special consideration or to ensure that Australia's international obligations are met.

Item 14 Subsection 46B(2A)

74. Item 14 inserts the words ", (2AB) or (2AC)" after the words "subsection (2)" in subsection 46B(2A) of the Migration Act.

75. This item ensures that the operation of the Minister's new powers to "lift" the application bar in new subsection 46B(2AB) and 46B(2AC) are consistent with the existing equivalent power in subsection 46B(2).

76. The effect of this amendment is that a determination under subsection 46B(2AB) or subsection 46B(2AC) may provide that it has effect only for the period specified in the determination and, if it does so, the determination ceases to have effect at the end of the specified period.

Item 15 Subsection 46B(2B)

77. Item 15 inserts the words "under subsection (2), (2AB) or (2AC)" after the word "determination" in subsection 46B(2B).

78. This item ensures that the operation of the Minister's power to "lift" the application bar in new subsection 46B(2AB) and subsection 46B(2AC) are consistent with the existing equivalent power in subsection 46B(2).

79. The effect of this amendment is to make clear that the period specified in a determination under existing subsection 46B(2) or new subsections 46A(2AB) and 46A(2AC) may be different for different classes of transitory persons.

Item 16 Subsection 46B(2C)

80. Item 16 inserts the words "or (2AB)" after the words "subsection (2)" in subsection 46B(2C).

81. This item ensures that the operation of the Minister's new powers to "lift" the application bar in new subsection 46B(2AB) is consistent with the existing equivalent power in subsection 46B(2).

82. The effect of this amendment is that the Minister may, in writing, vary or revoke a determination made under subsection 46B(2AB) if the Minister thinks it is in the public interest to do so.

Item 17 After subsection 46B(2C)

83. Item 17 inserts new subsection 46B(2D) after subsection 46B(2C).

84. New subsection 46B(2D) provides that the Minister may, by legislative instrument, vary or revoke a determination made under subsection 46B(2AC) if the Minister thinks that it is in the public interest to do so.

85. The purpose of new subsection 46B(2D) is to provide the Minister with the power to vary or revoke, by legislative instrument, a determination made under subsection 46B(2AC).

Item 18 Subsection 46B(3)

86. Item 18 omits the words "(2) or (2C)" in subsection 46B(3) of the Migration Act, and substitutes the words "(2), (2AB), (2AC), (2C) or (2D)".

87. This item ensures that the operation of the Minister's power to "lift" the application bar or vary a determination under new subsections 46B(2AB), 46B(2AC) and 46B(2D) is consistent with the existing equivalent powers in subsections 46B(2) and 46B(2C) and can only be exercised by the Minister personally.

88. The effect of this amendment is to make clear that these powers may only be exercised by the Minister personally.

Item 19 Paragraphs 46B(5)(a) and (b)

89. Item 19 omits the words "the transitory" and substitutes the words "a transitory" in paragraphs 46B(5)(a) and 46B(5)(b) of the Migration Act.

90. This amendment is consequential to new subsection 46B(2AC) which is inserted by item 13 above, which enables the Minister to make a determination in relation to a class of transitory persons.

Item 20 Subsection 46B(7)

91. Item 20 inserts ", (2AB)" after "subsection (2)" in subsection 46B(7) of the Migration Act.

92. This item ensures that the operation of the Minister's power to "lift" the application bar in new subsection 46B(2AB) is consistent with the existing equivalent power in subsection 46B(2).

93. The effect of this amendment is to make clear that the Minister does not have a duty to consider whether to determine (or vary or revoke a determination) that the application bar in new subsection 46B(2AA) does not apply to an application for a visa by a transitory person.

Item 21 At the end of section 46B

94. Item 21 adds new subsection 46B(8) at the end of section 46B.

95. New subsection 46B(8) provides that the Minister does not have a duty to consider whether to exercise the power under subsection 46B(2AC) or 46B(2D) in respect of any class of transitory persons, whether the Minister is requested to do so by a transitory person included in such a class or by another person, or in any other circumstances.

96. The effect of this amendment is to make clear that the Minister does not have a duty to consider whether to determine (or vary or revoke a determination) that the application bar in new subsection 46B(2AA) does not apply to an application for a visa by a transitory person included in a class of transitory persons specified in the determination.

Amendments to *Migration Regulations 1994*

Migration Regulations 1994

Item 22 At the end of subregulation 2.07(AA)(2)

97. Item 22 inserts a new paragraph 2.07AA(2)(d) at the end of subregulation 2.07AA(2) of the Migration Regulations.

98. Regulation 2.07AA provides that despite anything in regulation 2.07, for sections 45 and 46 of the Migration Act, an application for a Subclass 600 (Visitor) visa in the Business Visitor stream is taken to have been validly made if the requirements of the regulation are met. This regulation deems certain visa applications to be made in relation to the APEC Business Travel Card Scheme.

99. New paragraph 2.07AA(2)(d) adds a requirement to the regulation that the applicant is not a member of the designated regional processing cohort. The effect of this is that a member of the designated regional processing cohort will not be able to satisfy the requirements of regulation 2.07AA to be deemed to have applied for a Subclass 600 (Visitor) visa in the Business Visitor stream (unless the Minister permits this to occur).

100. This reflects the intention that regulation 2.07AA is not to operate to provide that a person who is a member of the designated regional processing cohort is taken to have applied for a Subclass 600 (Visitor) visa in the Business Visitor stream unless the Minister waives the operation of new paragraph 2.07AA(2)(d); see item 23 of this Bill.

101. The term ***member of the designated regional processing cohort*** will be defined in subsection 5(1) of the Migration Act, as amended by item 1 of this Bill. Under paragraph 13(1)(b) of the *Legislation Act 2003,* the term is to be given the same meaning as the new defined term that is inserted into the Migration Act.

Item 23 After subregulation 2.07AA(2)

102. Item 23 inserts new subregulation 2.07AA(2A) after subregulation 2.07(AA)(2) of the Migration Regulations.

103. New subregulation 2.07AA(2A) provides that the Minister may waive the operation of paragraph 2.07AA(2)(d) in a particular case.

104. The purpose of this amendment is to provide the Minister with the power to waive, if the Minister considers it is appropriate in the particular circumstances, the operation of new paragraph

2.07AA(2)(d) as inserted by item 22 of this Bill. By waiving the operation of new subregulation 2.07AA(2)(d), a member of the designated regional processing cohort will not be prevented from being deemed to have applied for a Subclass 600 (Visitor) Visa in the Business Visitor stream by virtue of being a member of that cohort.

105. The intention is, if the Minister (or his or her delegate) waives the operation of new paragraph 2.07AA(2)(d) and the other requirements in regulation 2.07AA are met, a member of the designated regional processing cohort will be taken to have applied for a Subclass 600 (Visitor) visa in the Business Visitor stream.

106. This waiver power of the Minister is delegable and the exercise of the power may be delegated to senior officers of the department. Whether the power is to be waived in the particular circumstances is entirely at the discretion of the Minister or his or her delegate.

Item 24 After subregulation 2.07AB(1)

107. Item 24 inserts new subregulation 2.07AB(1A) after subregulation 2.07AB(1) of the Migration Regulations.

108. Subregulation 2.07AB(1) provides that for the purposes of sections 45 and 46 of the Migration Act, an application for an Electronic Travel Authority (Class UD) visa that is made in Australia (except in immigration clearance), or outside Australia, is taken to have been validly made if the applicant, when seeking the grant of the visa, satisfies the requirements in the subregulation. This subregulation deems an application for an Electronic Travel Authority (Class UD) visa to be made if particular conditions contained in subregulation 2.07AB(1) are met.

109. New subregulation 2.07AB(1A) provides that subregulation 2.07AB(1) does not apply if the applicant is a member of the designated regional processing cohort. The effect of this is a member of the designated regional processing cohort will not be able to satisfy the requirements of subregulation 2.07AB(1) and will not be deemed to have applied for an Electronic Travel Authority (Class UD) visa (unless the Minister permits this to occur).

110. This reflects the intention that subregulation 2.07AB(1) is not to operate to provide that a person who is a member of the designated regional processing cohort is taken to have applied for an Electronic Travel Authority (Class UD) visa unless the Minister waives the operation of new subregulation 2.07AB(1A); see item 26 of this Bill.

111. The term ***member of the designated regional processing cohort*** will be defined in subsection 5(1) of the Migration Act, as amended by item 1 of this Bill. Under paragraph 13(1)(b) of the *Legislation Act 2003*, the term is to be given the same meaning as the new defined term that is inserted into the Migration Act.

Item 25 At the end of subregulation 2.07AB(2)

112. Item 25 inserts new paragraph 2.07AB(2)(e) at the end of subregulation 2.07AB(2) of the Migration Regulations.

113. Subregulation 2.07AB(2) provides that for the purposes of sections 45 and 46 of the Migration Act, an application for an Electronic Travel Authority (Class UD) visa that is made by the applicant, in person, while in immigration clearance, is taken to have been validly made if the person satisfies requirements in the subregulation. This subregulation deems an application for an Electronic Travel Authority (Class UD) visa to be made if particular conditions contained in subregulation 2.07AB(2) are met.

114. New paragraph 2.07AB(2)(e) adds a requirement to the subregulation that the applicant is not a member of the designated regional processing cohort. The effect of this is a member of the designated regional processing cohort will not be able to satisfy the requirements of subregulation 2.07AB(1) and will not be deemed to have applied for an Electronic Travel Authority (Class UD) visa (unless the Minister permits this to occur).

115. This reflects the intention that subregulation 2.07AB(2) is not to operate to provide that a person who is a member of the designated regional processing cohort is taken to have applied for an Electronic Travel Authority (Class UD) visa unless the Minister waives the operation of new paragraph 2.07AB(2)(e); see item 26 of this Bill.

116. The term ***member of the designated regional processing cohort*** will be defined in subsection 5(1) of the Migration Act, as amended by item 1 of this Bill. Under paragraph 13(1)(b) of the *Legislation Act 2003*, the term is to be given the same meaning as the new defined term that is inserted into the Migration Act.

Item 26 At the end of regulation 2.07AB

117. Item 26 adds new subregulations 2.07AB(5) and 2.07AB(6) at the end of regulation 2.07AB of the Migration Regulations.

118. New subregulation 2.07AB(5) provides that the Minister may waive the operation of new subregulation 2.07AB(1A) in a particular case. New subregulation 2.07AB(6) provides that the Minister may waive the operation of new paragraph 2.07AB(2)(e) in a particular case.

119. The purpose of this amendment is to provide the Minister with the power to waive, if the Minister considers it is appropriate in the particular circumstances, the operation of new subregulation 2.07AB(1A) or new paragraph 2.07AB(2)(e) as inserted by items 24 and 25 of this Bill. By waiving the operation of new subregulation 2.07AB(1A) or new paragraph 2.07AB(2)(e), a member of the designated regional processing cohort will not be prevented from being deemed to have applied for an Electronic Travel Authority (Class UD) visa by virtue of being a member of that cohort.

120. The intention is, if the Minister (or his or her delegate) waives the operation of new subregulation 2.07AB(1A) or new paragraph 2.07AB(2)(e), and the other requirements in those provisions are met, a member of the designated regional processing cohort will be taken to have applied for an Electronic Travel Authority (Class UD) visa.

121. These waiver powers of the Minister are delegable and the exercise of the power may be delegated to senior officers of the department. Whether the power is to be waived in the particular circumstances is entirely at the discretion of the Minister or his or her delegate.

Item 27 At the end of regulation 2.07AM

122. Item 27 adds new subregulation 2.07AM(6) at the end of current regulation 2.07AM of the Migration Regulations.

123. Regulation 2.07AM provides that for subsection 46(2) of the Migration Act, an application for a Refugee and Humanitarian (Class XB) visa is taken to have been validly made by a person if the relevant requirements in the regulation or item 1402 of Schedule 1 to the Migration Regulations have been met. New subregulation 2.07AM(6) provides that the Minister may waive the operation of paragraph 1402(3)(bb) of Schedule 1 in a particular case. Item 36 of this Bill will insert new

paragraph 1402(3)(bb) into item 1402 of Schedule 1 which will provide that the applicant must not be a member of the designated regional processing cohort.

124. The purpose of this amendment is to provide the Minister with the power to waive, if the Minister considers it is appropriate in the particular circumstances, the operation of new paragraph 1402(3)(bb) of Schedule 1 as inserted by item 36 of this Bill. By waiving the operation of new paragraph 1402(3)(bb), a member of the designated regional processing cohort will not be prevented from being deemed to have applied for a Refugee and Humanitarian (Class XB) visa on the basis of satisfying item 1402 of Schedule 1 by virtue of being a member of that cohort.

125. The intention is, if the Minister (or his or her delegate) waives the operation of new paragraph 1402(3)(bb) of Schedule 1, and the other relevant requirements are met, a member of the designated regional processing cohort will be taken to have applied for a Refugee and Humanitarian (Class XB) visa.

126. This waiver power of the Minister is delegable and the exercise of the power may be delegated to senior officers of the department. Whether the power is to be waived in the particular circumstances is entirely at the discretion of the Minister or his or her delegate.

Item 28 At the end of paragraph 2.08A(1)(da)

127. Item 28 adds the word "and" at the end of current paragraph 2.08A(1)(da) of the Migration Regulations.

128. This is a small consequential amendment to item 29 of this Bill.

Item 29 After paragraph 2.08A(1)(da)

129. Item 29 inserts new paragraph 2.08A(1)(db) after paragraph 2.08A(1)(da) of the Migration Regulations.

130. Regulation 2.08A provides that if certain requirements set out in the regulation are met, an additional applicant can be added to certain applications for permanent visas. If a person satisfies the requirements of the regulation, the additional applicant is taken to have made a combined application with the original applicant. This regulation deems certain persons to have applied for certain permanent visas.

131. New paragraph 2.08A(1)(db) adds a requirement to the regulation that the applicant is not a member of the designated regional processing cohort. The effect of this is a member of the designated regional processing cohort will not be able to satisfy the requirements of regulation 2.08A to be deemed to have a combined visa application to have been made (unless the Minister permits this to occur).

132. This reflects the intention that regulation 2.08A is not to operate to provide that a person who is a member of the designated regional processing cohort is taken to have applied for certain permanent visas under this regulation unless the Minister waives the operation of paragraph 2.08A(1)(db); see item 30 of this Bill.

133. The term ***member of the designated regional processing cohort*** will be defined in subsection 5(1) of the Migration Act, as amended by item 1 of this Bill. Under paragraph 13(1)(b) of the *Legislation Act 2003*, the term is to be given the same meaning as the new defined term that is inserted into the Migration Act.

Item 30 At the end of regulation 2.08A

134. Item 30 adds new subregulation 2.08A(3) at the end of regulation 2.08A of the Migration Regulations.

135. New subregulation 2.08A(3) provides that the Minister may waive the operation of new paragraph 2.08A(1)(db) in a particular case.

136. The purpose of this amendment is to provide the Minister with the power to waive, if the Minister considers it is appropriate in the particular circumstances, the operation of new paragraph 2.08A(1)(db) as inserted by item 29 of this Bill. By waiving the operation of new paragraph 2.08A(1)(db), a member of the designated regional processing cohort will not be prevented from being deemed to have made a combined application for certain permanent visas with the original applicant by virtue of being a member of that cohort.

137. The intention is, if the Minister (or his or her delegate) waives the operation of new paragraph 2.08A(1)(db), and the other requirements in regulation 2.08A are met, a member of the designated regional processing cohort will be taken to have made a combined application for certain permanent visas.

138. This waiver power of the Minister is delegable and the exercise of the power may be delegated to senior officers of the department. Whether the power is to be waived in the particular circumstances is entirely at the discretion of the Minister or his or her delegate.

Item 31 At the end of paragraph 2.08AAA(1)(g)

139. Item 31 adds the word "and" at the end of current paragraph 2.08AAA(1)(g) of the Migration Regulations.

140. This is a small consequential amendment to item 32 of this Bill.

Item 32 After paragraph 2.08AAA(1)(g)

141. Item 32 inserts new paragraph 2.08AAA(1)(ga) after paragraph 2.08AAA(1)(g) of the Migration Regulations.

142. Regulation 2.08AAA provides that if certain requirements set out in the regulation are met, an additional applicant can be added to certain applications for temporary protection visas and safe haven enterprise visas. If a person satisfies the requirements of the regulation, the additional applicant is taken to have made a combined application with the original applicant. This regulation deems certain persons to have applied for temporary protection visas and safe haven enterprise visas.

143. New paragraph 2.08AAA(1)(ga) adds a requirement to the regulation that the applicant is not a member of the designated regional processing cohort. The effect of this is a member of the designated regional processing cohort will not be able to satisfy the requirements of regulation 2.08AAA to be deemed to have a combined visa application to have been made (unless the Minister permits this to occur).

144. This reflects the intention that regulation 2.08AAA is not to operate to provide that a person who is a member of the designated regional processing cohort is taken to have applied for temporary protection visas and safe haven enterprise visas under this regulation unless the Minister waives the operation of paragraph 2.08AAA(1)(ga); see item 33 of this Bill.

145. The term ***member of the designated regional processing cohort*** will be defined in subsection 5(1) of the Migration Act, as amended by item 1 of this Bill. Under paragraph 13(1)(b) of the *Legislation Act 2003*, the term is to be given the same meaning as the new defined term that is inserted into the Migration Act.

Item 33 At the end of regulation 2.08AAA

146. Item 33 adds new subregulation 2.08AAA(3) at the end of regulation 2.08AAA of the Migration Regulations.

147. New subregulation 2.08AAA(3) provides that the Minister may waive the operation of new paragraph 2.08AAA(1)(ga) in a particular case.

148. The purpose of this amendment is to provide the Minister with the power to waive, if the Minister considers it is appropriate in the particular circumstances, the operation of new paragraph 2.08AAA(1)(ga) as inserted by item 32 of this Bill. By waiving the operation of new paragraph 2.08AAA(1)(ga), a member of the designated regional processing cohort will not be prevented from being deemed to have made a combined application for temporary protection visas and safe haven enterprise visas with the original applicant by virtue of being a member of that cohort.

149. The intention is, if the Minister (or his or her delegate) waives the operation of new paragraph 2.08AAA(1)(ga), and the other requirements in regulation 2.08AAA are met, a member of the designated regional processing cohort will be taken to have made a combined application for temporary protection visas and safe haven enterprise visas.

150. This waiver power of the Minister is delegable and the exercise of the power may be delegated to senior officers of the department. Whether the power is to be waived in the particular circumstances is entirely at the discretion of the Minister or his or her delegate.

Item 34 Regulation 2.11A (note)

151. Item 34 omits the words “Section 46A” and substitutes the words “Subsection 46A(1)” in the note that follows current regulation 2.11A of the Migration Regulations.

152. This is a consequential amendment that is required as a result of item 4 of this Bill and reflects that regulation 2.11A relates only to the bar in subsection 46A(1) of the Migration Act.

Item 35 Regulation 2.11B (note)

153. Item 35 omits the words “Section 46B” and substitutes the words “Subsection 46B(1)” in the note that follows current regulation 2.11B of the Migration Regulations.

154. This is a consequential amendment that is required as a result of item 13 of this Bill and reflects that regulation 2.11B relates only to the bar in subsection 46B(1) of the Migration Act.

Item 36 After paragraph 1402(3)(ba) of Schedule 1

155. Item 36 inserts new paragraph 1402(3)(bb) after current paragraph 1402(3)(ba) of Schedule 1 to the Migration Regulations.

156. Item 1402 sets out the requirements that must be satisfied for a person to lodge a valid application for a Refugee and Humanitarian (Class XB) visa. Subregulation 2.07AM(2) provides that an application for a Refugee and Humanitarian (Class XB) visa is taken to have been validly made by a person only if the requirements in subregulation 2.07AM(3) or item 1402 of Schedule 1

have been met. This means that if the person satisfies the requirements of item 1402 of Schedule 1, the person will be deemed to have applied for a Refugee and Humanitarian (Class XB) visa.

157. New paragraph 1402(3)(bb) of Schedule 1 adds a requirement to the item to provide that the applicant must not be a member of the designated regional processing cohort. The effect of this is that a member of the designated regional processing cohort will not be able to satisfy the requirements of regulation 2.07AM or item 1402 of Schedule 1 to be deemed to have applied for a Refugee and Humanitarian (Class XB) visa (unless the Minister permits this to occur).

158. This reflects the intention that a person who is a member of the designated regional processing cohort cannot be taken to have applied for a Refugee and Humanitarian (Class XB) visa under regulation 2.07AM if they satisfy item 1402 of Schedule 1, unless the Minister waives the operation of paragraph 1402(3)(bb); see item 27 of this Bill.

159. The term ***member of the designated regional processing cohort*** will be defined in subsection 5(1) of the Migration Act, as amended by item 1 of this Bill. Under paragraph 13(1)(b) of the *Legislation Act 2003,* the term is to be given the same meaning as the new defined term that is inserted into the Migration Act.

Item 37 At the end of subitem 1402(3) of Schedule 1

160. Item 37adds a new note at the end of subitem 1402(3) of Schedule 1 to the Migration Regulations.

161. The new note directs the reader to subregulation 2.07AM(6), which provides that the Minister may waive the operation of paragraph 1402(3)(bb) of subitem 1402(3) in a particular case.

162. The purpose of this note is to direct the reader to the waiver provision that is contained in regulation 2.07AM.

Item 38 After Part 53 of Schedule 13

163. Item 38 inserts new part 53A after Part 53 in Schedule 13 to the Migration Regulations.

164. Schedule 13 of the Migration Regulations contains the transitional arrangements for amendments to the Migration Regulations. New part 53A will insert into Schedule 13 the transitional amendments for amendments made by the *Migration Legislation Amendment (Regional Processing Cohort) Act 2019*.

165. The title of the insertion is "Part 53A – Amendments made by the Migration Legislation Amendment (Regional Processing Cohort) Act 2019". New clause 5301A inserts 6 subclauses that set out transitional arrangements for amendments made to various regulations.

166. New subclause 5301A(1) provides that paragraph 2.07AA(2)(d) of the Migration Regulations (as amended by Schedule 1 to the *Migration Legislation Amendment (Regional Processing Cohort) Act 2019*) applies in relation to a visa application if the conditions mentioned in paragraphs 2.07AA(2)(a) to 2.07AA(2)(c) of the Migration Regulations are satisfied in relation to the application after the commencement of that Schedule. This is to reflect the intention that new paragraph 2.07AA(2)(d) will operate prospectively in relation to a visa application from commencement of Schedule 1.

167. New subclause 5301A(2) provides that subregulation 2.07AB(1A) of the Migration Regulations (as amended by Schedule 1 to the *Migration Legislation Amendment (Regional Processing Cohort) Act 2019*) applies in relation to a visa application if the applicant provides the

applicant's passport details (as mentioned in subregulation 2.07AB(1) of the Migration Regulations) after the commencement of that Schedule. This is to reflect the intention that new subregulation 2.07AB(1A) will operate prospectively in relation to a visa application from commencement of Schedule 1.

168. New subclause 5301A(3) provides that paragraph 2.07AB(2)(e) of the Migration Regulations (as amended by Schedule 1 to the *Migration Legislation Amendment (Regional Processing Cohort) Act 2019*) applies in relation to a visa application if the applicant asks for the visa (as mentioned in paragraph 2.07AB(2)(d) of the Migration Regulations) after the commencement of that Schedule. This is to reflect the intention that new paragraph 2.07AB(2)(e) will operate prospectively in relation to a visa application from commencement of Schedule 1.

169. New subclause 5301A(4) provides that paragraph 2.08A(1)(db) of the Migration Regulations (as amended by Schedule 1 to the *Migration Legislation Amendment (Regional Processing Cohort) Act 2019*) applies in relation to a request made by the original applicant under paragraph 2.08A(1)(b) of the Migration Regulations if the request is made after the commencement of that Schedule. This reflects the intention that paragraph 2.08A(1)(db) will operate prospectively in relation to a request from commencement of Schedule 1.

170. New subclause 5301A(5) provides that paragraph 2.08AAA(1)(ga) of the Migration Regulations (as amended by Schedule 1 to the *Migration Legislation Amendment (Regional Processing Cohort) Act 2019*) applies in relation to a request made by the original applicant under paragraph 2.08AAA(1)(c) of the Migration Regulations if the request is made after the commencement of that Schedule. This reflects the intention that paragraph 2.08AAA(1)(ga) will operate prospectively in relation to a request from commencement of Schedule 1.

171. New subclause 5301A(6) provides that paragraph 1402(3)(bb) of Schedule 1 to the Migration Regulations (as amended by Schedule 1 to the *Migration Legislation Amendment (Regional Processing Cohort) Act 2019*) applies in relation to a visa application if the application is made after the commencement of Schedule 1 to that Act. This is to reflect the intention that new paragraph 1402(3)(bb) will operate prospectively in relation to a visa application from the commencement of Schedule 1.

Part 2 – Application provisions

Item 39 Application – sections 46A and 46B of the *Migration Act 1958*

172. Item 39 deals with the application of new subsections 46A(2AA) and 46B(2AA) of the Migration Act as inserted by Schedule 1 of this Bill.

173. The title of item 39 is "Application – sections 46A and 46B of the *Migration Act 1958*"

174. Subitem 39(1) provides for the application of new subsections 46A(2AA) and 46B(2AA) to applicants outside Australia. It provides that subsections 46A(2AA) and 46B(2AA) of the *Migration Act 1958* (as amended by this Act) apply in relation to a visa application made when the applicant was outside Australia if:

- The application is made after the commencement of this item; or
- The application:

- was made before the commencement of this item but after the time when the Bill that became the *Migration Legislation Amendment (Regional Processing Cohort) Act 2019* was introduced into the House of Representatives; and

- was not finally determined before the commencement of this item.

175. This application provision reflects the intention that in addition to new subsections 46A(2AA) and 46B(2AA) applying prospectively from time of commencement, they will also apply to a visa application made from the time the Bill was introduced into the House of Representatives where that application was not finally determined before the commencement of this item.

176. 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.

177. This means that if a person who is a member of the designated regional processing cohort lodges a visa application from outside Australia after the time of introduction of the Bill, and that application is not finally determined before the commencement of Schedule 1, new subsections 46A(2AA) and 46B(2AA) will operate to retrospectively invalidate that application. As the application will no longer be a valid application for a visa, the Minister will not be permitted to consider it.

178. The retrospective application of subsections 46A(2AA) and 46B(2AA) will not apply to a visa application that was made after the time of introduction of the Bill but was finally determined before the commencement of the item. This is to ensure new subsections 46A(2AA) and 46B(2AA) do not operate to invalidate a visa that may have been granted prior to commencement of Schedule 1.

179. Subitem 39(2) provides for the application of new subsections 46A(2AA) and 46B(2AA) to applicants in Australia. It provides that subsections 46A(2AA) and 46B(2AA) of the Migration Act (as amended by this Act) apply in relation to a visa application made when the applicant was in Australia if:

- the application is made after the commencement of this item; and

- no determination was made under subsection 46A(2) or 46B(2) of the Migration Act in relation to the application before the commencement of this item.

180. This application provision reflects the intention that new subsections 46A(2AA) and 46B(2AA) will apply prospectively to onshore applications made by persons who are members of the designated regional processing cohort. If a member of the designated regional processing cohort is in Australia (for example, they were transferred to Australia for medical reasons) before commencement of Schedule 1, they will be prevented from making a valid visa application, by either current subsections 46A(1) or 46B(1), or both, unless permitted to do so by the Minister. It is therefore unnecessary for the new amendments to apply retrospectively to members of the cohort in Australia because they would not be permitted to make an application for a visa under the current bars unless permitted to do so by the Minister.

181. However, it is still necessary for new subsections 46A(2AA) and 46B(2AA) to apply prospectively to applications made by persons in Australia who are members of the designated regional processing cohort. This is because in the future, it is possible that the Minister may have permitted a member of that cohort to apply for or be granted a particular visa to travel to Australia, and when in Australia that person may not be prevented by current subsections 46A(1) or 46B(1) from lodging a further application for a visa. The prospective application of new subsections 46A(2AA) and 46B(2AA) will operate to prevent a further application for a visa to be made by a person from the cohort in this situation, unless the Minister permits them to do so.

182. This application provision also excludes the operation of new subsections 46A(2AA) and 46B(2AA) from applications made by persons in Australia who are members of the designated regional processing cohort if, before the commencement of Schedule 1, the Minister had already lifted the bar under subsections 46A(2) or 46B(2) to permit such a person to make a valid application for a visa. This is to ensure that the new provisions will not prevent an onshore member of the designated regional processing cohort in Australia from making a valid application for a visa if, before commencement of Schedule 1, the Minister had permitted them to make an application for a visa but the person had not, at the time of commencement, made that application.

Attachment A

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Migration Legislation Amendment (Regional Processing Cohort) Bill 2019

This Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Bill

The Migration Legislation Amendment (Regional Processing Cohort) Bill 2019 (the Bill) amends the *Migration Act 1958* (the Migration Act) to create a new visa application bar at section 46A(2AA) which will prevent non-citizens who were taken to a regional processing country after 19 July 2013 (the 'designated regional processing cohort') from making a valid application for an Australian visa. The Bill also makes a number of associated amendments to the Migration Act and the *Migration Regulations 1994* (Migration Regulations) to give effect to the intention to prevent visa applications being made by this cohort.

The proposed bar would apply to unauthorised maritime arrivals (UMAs) who:

- after 19 July 2013 have been taken, or are taken in future, to a regional processing country under section 198AD of the Migration Act; and

- were or are at least 18 years of age on the first or only occasion after 19 July 2013 when taken to a regional processing country.

The Bill also amends section 46B of the Migration Act to include an additional visa application bar for transitory persons who, after 19 July 2013, have been taken, or are taken in future, to a regional processing country under Division 7 or 8 of Part 3 of the *Maritime Powers Act 2013*. These provisions allow a person to be taken to a regional processing country in circumstances where they have not first entered Australia.

These new application bars will apply to visa applications made both in Australia and outside Australia.

The designated regional processing cohort includes non-citizens currently in Nauru and Papua New Guinea under regional processing arrangements, those who have returned home or been removed to their home country, those who have been resettled in a third country, and transitory persons in Australia (who are already subject to statutory visa application bars).

The regional processing centres in Papua New Guinea (PNG) and Nauru are central elements of the Government's border protection strategy. Preventing UMAs in the designated regional processing cohort from applying for a visa to enter Australia will strengthen the Government's ability to reduce the risk of non-citizens circumventing Australia's migration laws. It will also prevent non-citizens undermining the Australian Government's return and reintegration assistance packages and resettlement arrangements. The measure is also consistent with the Regional Resettlement Arrangement between Australia and Papua New Guinea (PNG), which was signed on 19 July 2013. The effect of this arrangement was that any UMA entering Australia after this date, who is found to be a refugee, would be resettled in PNG or another participating regional processing country. These people would not be resettled in Australia. This is aimed at further discouraging persons from

attempting hazardous boat journeys with the assistance of people smugglers and encouraging them to pursue regular migration pathways instead.

In recognition of the fact there may be circumstances where it is desirable to allow a non-citizen in the designated regional processing cohort to apply for a visa, the proposed legislative amendments will include flexibility for the Minister to personally lift the bar where the Minister thinks it is in the public interest to do so. This may include cases where individual circumstances justify special consideration or to ensure that Australia's international obligations are met.

In addition, the amendments prevent grant, by operation of law, of Special Purpose Visas to members of this cohort and also prevent applications to be deemed to have been made by members of this cohort. A waiver is available in these instances that can be used to take account of individual circumstances that justify special consideration, relevant international obligations and other instances in which it is appropriate for the person to be granted a visa or be deemed to have made an application.

Human Rights implications

This Statement of Compatibility addresses the potential human rights implications that may result from this Bill. Some human rights contain express limitation clauses which set out the specific parameters within which these rights may be limited. These clauses include prescribed purposes that may justify the limitation of the right, such as national security, public order, public health, public safety, public morals, and the protection of the rights and freedoms of others. The amendments in this Bill are aimed at maintaining the integrity of the migration program.

Respect for the family and children

Rights relating to respect for the family and children are contained in Articles 17(1), 23(1), and 24 of the International Covenant on Civil and Political Rights (ICCPR).

> *Article 17 ICCPR*
>
> *1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.*
>
> *Article 23 ICCPR*
>
> *1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.*
>
> *Article 24 ICCPR*
>
> *1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.*

In addition, Article 3 of the Convention on the Rights of the Child (CRC) provides:

> *1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.*

Further, article 10 of the CRC provides:

> *1. In accordance with the obligation of States Parties under article 9, paragraph 1, applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner. States Parties shall further ensure that the submission of such a request shall entail no adverse consequences for the applicants and for the members of their family.*

This Bill will introduce a statutory bar preventing certain non-citizens who were taken to a regional processing country from making a valid application for a visa to come to or remain in Australia. Where the non-citizen has family members who have been granted a visa to enter or remain in Australia, this may result in separation, or the continued separation, of a family unit. However, the proposed legislative amendments will include flexibility for the Minister personally to 'lift' the bar where the Minister thinks it is in the public interest to do so. This consideration could occur in circumstances involving Australia's human rights obligations towards families and children, allowing a valid application for a visa on a case by case basis and in consideration of the individual circumstances of the case, including the best interests of affected children. In addition, such matters can be considered when deciding to exercise the waiver to allow a Special Purpose Visa to be granted by operation of law, or to allow an application for certain subclasses of visas to be deemed to have been made.

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 the above CRC and ICCPR obligations.

In addition, the visa application bar does not apply to persons who were under 18 at the time they were taken to a regional processing country. This recognises that children may not be able to make decisions on their own behalf and may have been subject to regional processing through the decisions of their parents to travel illegally to Australia by boat.

<u>Australia's non-refoulement obligations</u>

Australia has obligations under the ICCPR and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) not to return a person to a country in certain circumstances.

Article 3(1) of the CAT states:

> *No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.*

Articles 6 and 7 of the ICCPR also impose on Australia an implied *non refoulement* obligation. Article 6 of the ICCPR states:

> *Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.*

Article 7 of the ICCPR states:

> *No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.*

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.

Right to equality and non-discrimination

The amendment in this Bill will exclude a cohort of non-citizens who have previously arrived in Australia as a UMA or attempted to enter Australia by boat and been taken to regional processing country, or who are taken to a regional processing country in the future, from applying for a visa to enter or remain in Australia. The bar will continue to apply to non-citizens in this cohort after they achieve third country settlement or citizenship.

Article 26 of the ICCPR states:

> *All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*

The continued differential treatment of a group of non-nationals (namely, the designated regional processing cohort) could amount to a distinction on a prohibited ground under international law on the basis of 'other status'.

In its General Comment 18, the UN Human Rights Committee stated:

> *The Committee observes that not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.*

The Government is of the view that this continued differential treatment is for a legitimate purpose and based on relevant objective criteria and that is reasonable and proportionate in the circumstances. This measure is 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 UMA from applying for a visa to enter Australia. This measure is also aimed at further discouraging persons from attempting hazardous boat journeys with the assistance of people smugglers in the future and encouraging them to pursue regular migration pathways instead.

Right to security of the person and freedom from arbitrary detention

The right to security of the person and freedom from arbitrary detention is contained in Article 9 of the ICCPR.

Article 9 states:

> *1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.*

This Bill is unlikely to result in an increase in the number of non-citizens in Australia who will be ineligible to apply for a visa and subsequently liable for detention under the Migration Act. This is because the non-citizens in Australia to whom the bar will apply are already subject to application

bars while in Australia in most circumstances. In any event, the amendments do not limit the ability of the Minister to grant a visa to a person in immigration detention and, combined with the Minister's ability to allow a visa application to be made, will allow person in the affected cohort to be managed in the same way as other unlawful non-citizens. That is, held detention will be maintained only where there is a risk to the safety of the Australian community. Detention in these circumstances is consistent with the above ICCPR obligations.

Conclusion

The measures proposed in the Bill are compatible with human rights. Any limitations on the rights of persons in the designated regional processing cohort 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.

The Hon. Peter Dutton MP, Minister for Home Affairs