Responses from legislation proponents — Report 11 of 2018

The Hon Christian Porter MP
Attorney-General

MC18-010188

27 SEP 2018

Mr Ian Goodenough MP
Chair
Parliamentary Joint Committee on Human Rights
Parliament House
CANBERRA ACT 2600
human.rights@aph.gov.au

Dear ~~Mr Goodenough~~

Thank you for your email of 12 September 2018 on behalf of the Parliamentary Joint Committee on Human Rights in relation to the *Court and Tribunal Legislation Amendment (Fees and Juror Remuneration) Regulations 2018* (the Regulations). You referred to the Committee's Human Rights Report 9 of 2018, which requested my advice in relation to the Regulations.

The Regulations implement a 17.5 per cent increase in High Court of Australia court fees. In the report, the Committee queries whether the measure is compatible with the rights to a fair hearing and effective remedy.

Firstly, it is worth noting that the Productivity Commission's 2014 report into *Access to Justice Arrangements* found that court fees on average comprise one tenth of a party's legal costs. The Commission also notes that empirical studies found that court fees are not a significant source of financial concern to litigants. The Commission also found that further increases in court fees could be undertaken without unreasonably impeding access to justice.

As the Committee acknowledged, this increase to High Court of Australia court fees is for the purpose of allowing for enhanced security measures of the court, including capital works. This followed from a review of the Court's security needs. The Australian Government considers that ensuring the safety of court users, visitors and staff of the High Court is of fundamental importance, and as such views this measure as proportionate to a legitimate objective.

The range of safeguards and exemptions in place further confirm the proportionality of this measure, and that the measure is compatible with the right to a fair hearing and effective remedy.

As the statement of compatibility and the Committee described, there are hearing fee and filing fee exemptions for a range of circumstances for litigants who would be considered to be in financial hardship. These exemptions ensure that those who may otherwise have limited right to an effective remedy have access to justice.

For example, this includes holders of Commonwealth health concession cards, which means that recipients of Australian Government income support payments are exempt from filing and hearing fees. The effect of this is that a person earning a modest income would not be required to pay filing and hearing fees because of the cut out income limits that apply to income support payments.

In addition, and as also identified by the Committee, the Registrar of the High Court may also defer the payment of fees in circumstances where there is urgency that overrides the requirement to pay the fee immediately.

Furthermore, High Court fees are structured so as to distinguish between litigants on the basis of capacity to pay, with the 'financial hardship' category of fees being a third of the general filing fee. As such, the increase of 17.5 per cent to the 'financial hardship' category of fees is an increase from a significantly lower base, while also maintaining the 3:1 ratio with the general filing fee.

I will also add that hearing fees are not payable in the following circumstances:

- in proceedings for which an international convention to which Australia is party provides that no fee is payable, in relation to interlocutory proceedings,
- the majority of interlocutory proceedings, and
- if the sole purpose of the hearing is for the delivery of a reserved judgment.

The Committee also raised the issue of fee waivers not applying to document or service fees. It is worth noting that document and service fees represent only a very small component of the fees raised by the High Court, and as such are only expected to have a marginal impact for High Court litigants. This is reflected in the small change in the cost of these fees. For example, the majority of document or service fees received by the High Court in 2016-17 were for searching or inspecting a document (Item 201) and for a litigation search for a person involved in proceedings (Item 208). The increase in the cost of each of these items as a result of this measure is $5.

Given the combination of the fee exemptions that apply for High Court litigants, the additional safeguards available to the Registrar, the continuation of a significantly lower fee category for applicants, and the small impact of changes to document and service fees, the Government considers that this measure represents the least rights-restrictive option available, and ensures the ongoing right to a fair hearing, as well as continuing to provide the right to effective remedy.

Thank you for the Committee's correspondence on this matter.

Yours sincerely

The Hon Christian Porter MP
Attorney-General

THE HON DAVID COLEMAN MP
MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS

Ref No: MS18-005102

Mr Ian Goodenough MP
Chair
Parliamentary Joint Committee on Human Rights
S1.111
Parliament House
CANBERRA ACT 2600

Dear Mr Goodenough

Thank you for your letter of 15 August 2018 in which further information was requested on the Migration (IMMI 18/046: Determination of Designated Migration Law) Instrument 2018.

I have attached the response to the Parliamentary Joint Committee on Human Rights' Report 7 of 2018 as requested in your letter.

Thank you for raising this matter.

Yours sincerely

David Coleman

10 / 9 / 2018

Migration (IMMI 18/046: Determination of Designated Migration Law) Instrument 2018

Parliamentary Joint Committee on Human Rights – *Report 7 of 2018*
Department Response

1.43 The committee seeks further information from the minister as to the compatibility of the measure with the right to liberty, including:

- ***whether, and to what extent, a computer program will be used to exercise the minister's personal powers in subdivision AF of Part 2, Division 3 of the Migration Act; and***
- ***whether 'public interest' considerations by the minister could be exempted from the 'designated migration law'.***

Bridging visas (BVs) were introduced in 1994 as part of the *Migration Reform Act 1992* to supplement the legislative requirement for mandatory detention of unlawful non-citizens. BVs provide an interim or 'bridging' lawful immigration status to non-citizens, until they reach a durable immigration outcome – either grant of a substantive visa or departure from Australia.

Migration (IMMI 18/046: Determination of Designated Migration Law) Instrument 2018, remakes the previous Migration Instrument (IMMI07/091), which allowed the Minister to arrange for the use of a computer program to grant a BV to applicants who have made valid applications for certain substantive visas.

If a lawful non-citizen makes a valid application while in Australia for a substantive visa, they will in nearly all cases be granted a Bridging visa A (BVA) in association with the substantive visa application. BVAs are automatically granted through departmental computer systems at the same time a valid substantive visa application is made. A BV will only come into effect if an individual's substantive visa expires before a decision is made on the new substantive visa application.

Importantly, the computer program can only grant a BV and cannot make a decision to refuse. In instances where the online application 'hits' against risk systems, or where binary responses provided by an applicant do not support an immediate auto-grant decision, the computer program will refer the BV application to a departmental decision maker to manually decide upon the application.

The computer program is designed to grant BVs in association with substantive applications in the majority of straightforward cases. Instances in which the BV application cannot be immediately granted by the computer program, including where there are public interest considerations, are always considered by a delegate or the Minister.

The Minister's personal decision-making powers are not automated through departmental computer programs. The public interest power in section 72 of the *Migration Act 1958* (the Migration Act) can only be exercised by the Minister personally and is incapable of being decided by a computer program. The Minister's personal power involves considering any applicable legal obligations.

1.44 If a computer program will be used to exercise the minister's personal power in subdivision AF of Part 2, Division 3 of the Migration Act, the committee seeks further information about the compatibility of this measure with the right to liberty, including:

- ***the existence of adequate and effective safeguards to ensure a person is not deprived of liberty where it is not reasonable, necessary and proportionate; and***
- ***whether less rights restrictive alternatives are reasonably available.***

A computer program is not being used to exercise the Minister's personal power in subdivision AF of Part 2, Division 3 of the Migration Act.

THE HON PETER DUTTON MP
MINISTER FOR HOME AFFAIRS

MS18-005112

Mr Ian Goodenough MP
Chair
Parliamentary Joint Committee on Human Rights
Parliament House
CANBERRA ACT 2600

Ian,

Dear Mr Goodenough

Thank you for your letter of 15 August 2018 in which further information was requested on the Migration (Validation of Port Appointment) Bill 2018.

I have attached my response to the Parliamentary Joint Committee on Human Rights' Report 7 of 2018 as requested in your letter.

I trust the information provided is helpful.

Yours sincerely

PETER DUTTON 31/08/18

Parliament House Canberra ACT 2600 Telephone: (02) 6277 7860 Facsimile: (02) 6273 4144

Migration (Validation of Port Appointment) Bill 2018:
Response to the Parliamentary Joint Committee on Human Rights

Extent of the impact of the validation on Australia's obligations, including:

- ***how individuals arriving at the area of waters within the Territory of Ashmore and Cartier Islands would have been treated if the 2002 appointment had not been made;***
- ***the extent of any detriment to individuals if the 2002 appointment is validated;***
- ***how many persons who entered the area of waters within the Territory of Ashmore and Cartier Islands without a valid visa during the relevant period:***
  - ***are yet to have their claims for asylum or applications for protection visas determined (either in Australia or offshore immigration detention);***
  - ***have had their applications refused under the 'fast track' process (including how many are present in Australia, are present in offshore immigration detention and how many have been subject to removal or return);***
- ***any other information relevant to the compatibility of the measure with the obligation of non-refoulement.***

The appointment of a proclaimed port in the Territory of Ashmore and Cartier Islands was published in the Commonwealth of Australia Gazette No. GN 3 on 23 January 2002. The appointment excised certain waters of the Territory of Ashmore and Cartier Islands for the purposes of the *Migration Act 1958* (the Act). The intended effect of the appointment was to make unauthorised boat arrivals who entered the designated 'excised offshore place', 'offshore entry persons' (now 'unauthorised maritime arrivals' (UMAs)) under the Act.

The Bill seeks to validate the appointment and maintains the status quo in relation to the processing of UMAs who entered Australia via this proclaimed port between 23 January 2002 and 1 June 2013. Enactment of the Bill will ensure that there was a properly proclaimed port in the Territory of Ashmore and Cartier Islands at all relevant times and that actions or decisions which relied on the appointment, have been valid and effective.

If the appointment had not been made, the affected persons would not be UMAs under the Act. However, the affected persons would be unlawful non-citizens subject to immigration detention.

All affected persons have had the opportunity to seek protection and have their claims assessed.

Compatibility of the measure with the right to a fair hearing, including:

- ***whether the measure is aimed at achieving a legitimate objective for the purposes of human rights law;***
- ***how the measure is effective to achieve (that is, rationally connected to) that objective; and***
- ***whether the limitation is a reasonable and proportionate measure to achieve the stated objective (including whether it is the least rights restrictive approach and the scope of individuals likely to be affected), particularly in light of the fact that the 2002 appointment has been found to be invalid.***

Government policy around the management of UMAs has been highly effective in responding to the enduring threat of maritime people smuggling and protecting the integrity

of Australia's migration framework. In order to maintain public confidence in our border protection arrangements, it is imperative that we uphold the original intent of the appointment. For these reasons it is appropriate for the Bill to apply to persons who have instituted proceedings but where judgment has not been delivered before the provisions commence.

By reinstating the validity of the appointment, the Bill does not impose any new obligations on affected persons. Instead, it maintains the status quo in relation to the processing of UMAs and, where relevant, fast track applicants under the Act who entered Australia via this proclaimed port between 23 January 2002 and 1 June 2013.

The Australian Government is committed to efficiently assessing each protection claim, on its individual merits, on a case-by-case basis, with reference to up-to-date information on conditions in the asylum-seeker's home country. Principles of procedural fairness apply at all stages of visa decision making.

The Government is of the view that there is no express requirement under the International Covenant on Civil and Political Rights (ICCPR) or the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) to provide merits review in the assessment of *non-refoulement* obligations. To the extent that obligations relating to review are engaged in the context of immigration proceedings, the Government is of the view that these obligations are satisfied where either merits review or judicial review is available. Although merits review may be an important safeguard, there is no obligation to provide merits review where judicial review is available.

Article 13 of the ICCPR states:

> *An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.*

The Government's position in relation to Article 13 is that the obligation only applies to persons considered to be lawfully in the territory of Australia. Where persons are considered to be lawfully in the territory, the obligation is satisfied by the provision of a robust, open and transparent assessment of *non-refoulement* obligations by the department followed by either review by the Administrative Appeals Tribunal (AAT) or, in the case of fast track applicants, the Immigration Assessment Authority (IAA). In all cases, applicants have the opportunity to seek judicial review in the case of an adverse decision.

Article 14 of the ICCPR expressly relates only to persons facing criminal charges or suits of law and may not be directly applicable to the administrative assessment of *non-refoulement* obligations. However, as discussed previously in responses to the Committee regarding the fast track assessment process, to the extent that Article 14 may be engaged, the Government is of the view that the fast track assessment process is compatible with Article 14.

All fast track applicants, like other non-citizens seeking Australia's protection, receive a full and comprehensive assessment of their claims for protection. Most fast track applicants who

are found to not engage Australia's protection obligations are automatically referred to the IAA for an independent and impartial merits review. While the IAA generally conducts a merits review based on information provided by the applicant as part of their protection visa application, it has the discretion to consider new information and conduct an interview in exceptional circumstances, for example, where there is a change in circumstances or new information which suggests that there is an increased risk to the applicant.

In *Plaintiff M174 v Minister for Immigration and Border Protection – High Court – M174/2016*, the High Court confirmed the robustness of the fast track process. It affirmed that the IAA, "when conducting a review of a fast track reviewable decision, is not concerned with the correction of error on the part of the Minister or delegate but is engaged in a *de novo* consideration of the merits of the decision that has been referred to it". The IAA considers "the application for a protection visa afresh and to determine for itself whether or not it is satisfied that the criteria for the grant of the visa have been met."

As discussed above, it is the view of the Government that there is no express requirement under the ICCPR or the CAT to provide merits review in the assessment of *non-refoulement* obligations. Consistent with this position, the Government considers that the obligation in Article 14 of the ICCPR, where it is engaged, would be satisfied if either merits review or judicial review is available to an applicant. Although merits review may be an important safeguard, there is no obligation to provide merits review where judicial review is available. The Executive Committee of the UNHCR has expressed the view that asylum processes should satisfy basic requirements including the ability to seek a reconsideration of a protection status determination decision from either an administrative or a judicial body.

It is therefore the view of the Government that the fast track assessment process is compatible with Article 14 of the ICCPR as, following a robust and fair assessment of their protection claims, all fast track applicants have the ability to seek judicial review. In addition, the fast track assessment process provides the further safeguard, for the majority of fast track applicants, of access to merits review conducted by the IAA.

By extension, and to the extent that immigration proceedings may engage articles 13 or 14 of the ICCPR, the validation of the appointment as set out in the Bill is compatible with these obligations.

Compatibility of the measure with the right to an effective remedy (including how individuals who arrived at the area of waters within the Territory of Ashmore and Cartier Islands would have been treated if the 2002 appointment had not been made and the effect of the validation on the ability of individuals to seek remedies in relation to possible violations of human rights).

As discussed above, by reinstating the validity of the appointment, the Bill does not impose any new obligations on affected persons. Instead, it maintains the status quo in relation to the processing of UMAs who entered Australia via this proclaimed port between 23 January 2002 and 1 June 2013.

To the extent that obligations relating to review under Article 2 of the ICCPR or Article 14 of the ICCPR may be engaged in immigration proceedings, the Government's position is that these obligations are also satisfied where access to judicial review is available. Similarly, there is no express procedural obligation in Article 3 of the CAT to provide merits review

where *non-refoulement* obligations have been considered and properly assessed by the department and where judicial review is available.

Where the State Party elects to provide merits review in the assessment of *non-refoulement* obligations, there is no express obligation to provide a full de novo review of the initial decision. Both the ICCPR and the CAT permit the State Party to determine the appropriate mechanism for merits review where sufficient safeguards are in place.

As discussed above, the affected persons entered Australia without a visa that was in effect, thereupon becoming unlawful non-citizens subject to immigration detention.

SENATOR LINDA REYNOLDS CSC
ASSISTANT MINISTER FOR HOME AFFAIRS

MS18-006323

Mr Ian Goodenough MP
Chair
Parliamentary Joint Committee on Human Rights
Parliament House
CANBERRA ACT 2600

Dear Mr Goodenough

Thank you for your letter of 22 August 2018 in which further information was requested on the Modern Slavery Bill 2018.

I have attached the response to the Parliamentary Joint Committee on Human Rights' Report 8 of 2018 as requested in your letter.

Thank you for raising this matter.

Yours sincerely

LINDA REYNOLDS

12 / 9 / 2018

Department of Home Affairs response to the Parliamentary Joint Committee on Human Rights regarding the Modern Slavery Bill 2018

Committee comment

1.79 The preceding analysis indicates that the measures may engage and limit the right to privacy.

1.80 The committee therefore seeks the advice of the minister as to whether the measures are a reasonable and proportionate means of achieving the stated objective (including any safeguards in place against the disclosure of personal information, or information that could identify the victim or potential victim of modern slavery).

Department of Home Affairs response

The objective of the Modern Slavery Bill 2018 (the Bill) is to strengthen Australia's approach to modern slavery by equipping and enabling Australia's business community to respond effectively to modern slavery and develop and maintain responsible and transparent supply chains. The Department considers that the measures in the Bill are a reasonable, necessary and proportionate means of achieving this objective.

The Department considers that the measures in the Bill are reasonable and proportionate to respond effectively to modern slavery and to develop and maintain responsible and transparent supply chains. This is because the Bill does not directly seek to collect or disclose personal information and does not contain any measures that require or encourage reporting entities to provide personal information, including information that could identify potential victims.

The Bill also has sufficient safeguards to ensure personal information is not disclosed. As noted by the Committee, the Statement of Compatibility identifies a range of important and relevant safeguards to address any risk that reporting entities may inadvertently disclose personal information. These safeguards include the provision of detailed guidance on what information should be reported; the publicly accessible nature of the legislation; and the wording of the reporting criteria, which do not require disclosure of personal information.

The Bill does not expressly empower the relevant Minister to redact or refuse to publish a Modern Slavery Statement (statement) that may contain personal information, as this would require the Department to undertake detailed and resource intensive scrutiny of over 3,000 statements annually. However, the Department will monitor the overall quality of statements and the relevant Minister could request a reporting entity to revise or redact its statement if the Department, civil society or the business community identify that statement as including personal information.

The Department considers that these safeguards are sufficient in view of the low risk that the Bill will result in the disclosure of personal information. Similar legislation in the United Kingdom[1] and California[2] does not include specific safeguards to address the right to privacy and the Department is not aware of any cases where personal information has been

[1] Modern Slavery Act 2015

[2] Transparency in Supply Chains Act 2010

disclosed as part of these regimes. The Department also consulted extensively with Australian businesses and civil society during the development of the Bill, including organisations that support modern slavery victims. These consultations did not identify any privacy concerns.

The Department has also carefully assessed other approaches, including amending the Bill to include an express requirement that statements not contain personal or other identifying information. The Department does not consider that this approach would be more effective than providing detailed information about privacy issues in guidance material, which could include case studies and comprehensive advice.