Law Council
OF AUSTRALIA

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

**Senate Legal and Constitutional Affairs Legislation Committee**

**16 August 2019**

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# About the Law Council of Australia

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The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

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- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
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The Secretariat serves the Law Council nationally and is based in Canberra.

# Acknowledgement

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# Executive Summary

1. The Law Council welcomes the opportunity to provide the following comments to the Senate Legal and Constitutional Affairs Legislation Committee (**the Committee**) in respect of its inquiry (**the Inquiry**) into the Migration Legislation Amendment (Regional Processing Cohort) Bill 2019 (**the Bill**).

2. The Law Council, as the peak body of the Australian legal profession, is non-partisan. In accordance with its mandate and constitution,[1] it has focused its examination of the Bill on particular key issues affecting the rule of law in the public interest,[2] and the administration of justice and development and improvement of law throughout the Commonwealth.[3] The comments and recommendations made in this submission relate to the legal construction of the Bill and its compatibility with existing law.

3. The Bill forms part of the Australian Government's suite of border management measures[4] and its impact is directed toward refugees and asylum seekers who have sought Australia's protection.

4. The primary effect of the Bill would be to invalidate any visa application made by a person who has been, or may in future be, taken to a regional processing country after 19 July 2013, and who was an adult at that time. The validity bar would apply to such persons irrespective of their current location and would encompass all Australian visa types.

5. The Bill raises a number of concerns, including the following.

*A lack of justification, necessity and proportionality*

6. The measures introduced by the Bill are unnecessary to achieve its stated of objective of preventing asylum seekers and refugees who arrive by boat without prior authorisation from settling in Australia.

7. Extensive powers to decline visa applications on a case-by-case basis (including where there is any indication of visa fraud) are already provided by the *Migration Act 1958* (**the Act**) and the Migration Regulations 1994 (**the Regulations**). Limitations already restrict the ability of unauthorised maritime arrivals[5] (**UMAs**) and transitory persons[6] in Australia to make valid visa applications.

8. Even so, the Bill exceeds what is necessary for that purpose, and bars the making of a valid application for any visa type, including from outside Australia. In addition to permanent visas and visas providing a pathway to permanency, the Bill also bars short term visits for any purpose (including visits to family), as well as visas which may be required for the good management of the migration program, such as bridging and special purpose visas.

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[1] Law Council of Australia, 'Constitution of Law Council of Australia Limited' (Adopted 16 April 2003, last amended 1 December 2018) <https://www.lawcouncil.asn.au/resources/corporate-documents/constitution-of-law-council-of-australia-limited>.
[2] Ibid cl 2.1(a).
[3] Ibid cl 2.1(f).
[4] The Senate Legal and Constitutional Affairs Legislation Committee, *Migration Legislation Amendment (Regional Processing Cohort) Bill 2016 [Provisions]* (22 November 2016) describes the 2016 Bill as 'part of a comprehensive suite of related measures': [2.31].
[5] *Migration Act 1958* (Cth) s 5AA(1) ('*Migration Act*').
[6] Ibid s 5(1).

9. The Bill is disproportionate with respect to its potentially profound impact on the people whom it affects, and it is arbitrary in its application to certain groups.

10. The use of the measures within the Bill to effectively penalise one group of people in order to 'send a message' to third parties (that is, smugglers and people considering travelling to Australia by boat) is fundamentally unjust.

*Conflicts with Australia's international legal obligations*

11. The Bill conflicts with Australia's international legal obligations in several important respects.

12. It discriminates on grounds which do not meet the required threshold of being 'reasonable and objective', and with the likely result of significant detriment to the fundamental rights and freedoms of those affected. The Bill fails to identify or address a legitimate purpose under international law.

13. The Bill also conflicts with international law in that it seeks to impose a penalty on asylum seekers and refugees on account of what it characterises as their illegal arrival by boat.

14. Further conflicts with Australia's international legal obligations relate to the impacts of the Bill on family unity and the rights of the child, which are protected under multiple instruments to which Australia is a party.

*Contrary to the rule of law*

15. The Bill is contrary to the rule of law, which requires that the law must be readily known and available, certain and clear. These principles are central to the fairness and integrity of Australian law and underpin community confidence in its administration.

16. The retrospective imposition of what is effectively a civil penalty conflicts with the requirement that, as a matter of fairness, people should be able to know in advance the implications of their actions.

17. The Bill also creates significant uncertainty about whether and, if so, when former asylum seekers living legally in the Australian community may be brought within its provisions.

*Insufficient safeguards*

18. While the Bill provides for Ministerial discretion to waive the operation of its provisions in respect of individuals or classes of individuals, these powers are personal, non-compellable and subject to limited review. They do not provide a sufficient safeguard against disproportionate impacts on individuals or breaches of international legal obligations.

*Costly and complex to implement*

19. Finally, the Bill may be costly and complex to implement. It will potentially require numerous changes to visa processing systems and documentation in light of the continued operation of its provisions for the life of people affected by it.

20. On the above grounds, the Law Council recommends against passage of the Bill.

# Prior Committee consideration

21. The Law Council notes that, with the exception of some minor additional provisions,[7] the Bill replicates the Migration Legislation Amendment (Regional Processing Cohort) Bill 2016 (**the 2016 Bill**). The Committee previously inquired into the 2016 Bill and received 84 submissions, all of which voiced concerns regarding the 2016 Bill. The Department of Immigration and Border Protection, appearing before the Committee at its public hearing on 15 November 2016 provided the only voice in support of the 2016 Bill. The Committee tabled its report on 22 November 2016[8] (**the Committee Report**), with the majority recommending that the 2016 Bill be passed.

22. Separately, in 2017, both the Senate Standing Committee for the Scrutiny of Bills (**the SSCSB**) and the Parliamentary Joint Committee on Human Rights (**the PJCHR**) adopted final scrutiny reports[9] addressing the 2016 Bill. The SSCSB reiterated its concerns regarding the retrospective application of the 2016 Bill, which it considered were not ameliorated by the discretionary and non-compellable power available to the Minister to waive the effect of the 2016 Bill's provisions.[10] The PJCHR also identified significant concerns, noting that it was unable to conclude that the 2016 Bill was compatible with the right to equality and non-discrimination, the right to protection of the family, and the rights of the child. It concluded that the objective of the 2016 Bill 'cannot be a legitimate objective for the purpose of limiting human rights under international law.'[11]

23. As a result of the almost complete replication by the Bill of its 2016 predecessor, the analyses made by the SSCSB and PJCHR, as well as the submissions made in response to the inquiry into the 2016 Bill remain valid and applicable. The Government did not respond to the substantive concerns of the PJCHR in regard to the 2016 Bill, and the 2019 Explanatory Memorandum does not adequately address the issues. The PJCHR has recently reaffirmed the applicability of its earlier analysis to the 2019 version of the Bill.[12]

24. The Law Council's present submission draws substantially on its previous submission to the Committee regarding the 2016 Bill.[13] However, it also raises additional points, including key concerns relevant to the Committee Report's findings in reaching its 2016 recommendation. It strongly encourages the Committee to reconsider the Bill afresh, having regard to its likely impacts, costs and unintended consequences.

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[7] The content of items 31-33 of sch 1 to the Bill were not included in the 2016 Bill, nor was new sub-reg 5301A(5), inserted by item 38.
[8] Senate Legal and Constitutional Affairs Legislation Committee, *Migration Legislation Amendment (Regional Processing Cohort) Bill 2016 [Provisions]* (22 November 2016).
[9] Senate Standing Committee for the Scrutiny of Bills, 'Scrutiny Digest 1 of 2017' (8 February 2017) 87; Parliamentary Joint Committee on Human Rights, 'Human Rights Scrutiny Report' (Report 2 of 2017, 21 March 2017) 85.
[10] Senate Standing Committee for the Scrutiny of Bills, 'Scrutiny Digest 1 of 2017' (8 February 2017) [2.153].
[11] Parliamentary Joint Committee on Human Rights, 'Human Rights Scrutiny Report' (Report 2 of 2017, 21 March 2017) [2.121].
[12] Parliamentary Joint Committee on Human Rights, 'Human Rights Scrutiny Report' (Report 3 of 2019, 30 July 2019) 15.
[13] Law Council of Australia, *Migration Legislation Amendment (Regional Processing Cohort) Bill 2016 [Provisions]* (14 November 2016) <https://www.lawcouncil.asn.au/docs/768ddde6-9faf-e611-80d2-005056be66b1/3207_-_Migration_Legislation_Amendment_Regional_Processing_Cohort_Bill_2016.pdf>.

# Overview of the proposed changes

## Bar on valid visa applications

25. The Bill amends the Act and the Regulations to prevent certain UMAs and transitory persons from ever making a valid application for any Australian visa.

26. This bar operates with respect to refugees and asylum seekers[14] who have sought Australia's protection and fall within the circumstances below. Paraphrased for clarity, it includes:

    (a) persons who

        (i) entered Australia by sea[15] without holding a valid visa[16] (in other words, UMAs); or

        (ii) were either born in the Australian migration zone[17] or born in a regional processing country[18] to parents, at least one of whom was a UMA; and

        (iii) were taken by Australia to a regional processing country[19] after 19 July 2013; and

        (iv) were at least 18 years of age at the time of that transfer; and

    (b) persons who

        (i) were intercepted at sea (including outside the Australian migration zone);[20] or

        (ii) were either born in the Australian migration zone[21] or born in a regional processing country[22] to parents, at least one of whom was a transitory person; and

        (iii) were taken[23] by Australia to a regional processing country after 19 July 2013 (in other words, transitory persons); and

        (iv) were at least 18 years of age at the time of that transfer.

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[14] 'An asylum seeker is someone who is seeking international protection but whose claim for refugee status has not yet been determined. In contrast, a refugee is someone who has been recognised under the *1951 Convention relating to the Status of Refugees* to be a refugee': Parliamentary Library, 'Asylum Seekers and Refugees: What are the Facts?', *Research Paper Series, 2014-15* (Updated 2 March 2015) 4 <https://www.aph.gov.au/about_parliament/parliamentary_departments/parliamentary_library/pubs/rp/rp1415/asylumfacts>.
[15] *Migration Act* s 5AA(1)(a).
[16] Ibid ss 13, 14.
[17] Ibid s 5AA(1A).
[18] Ibid s 5AA(1AAA).
[19] Ibid s 198AB(1).
[20] *Maritime Powers Act 2013* (Cth) pt 3, divs 7-8.
[21] Ibid s 5(1)(e), definition of 'transitory person'.
[22] Ibid s 5(1)(d), definition of 'transitory person'.
[23] *Migration Act* s 198AD.

27. The Bill operates by amending sections 46A and 46B of the Act to insert new provisions stipulating that an application for a visa 'is not a valid application'[24] if it is made by a person meeting the above criteria.

28. These proposed provisions are not limited by time or visa class and, consequently, permanently prevent a person within the Cohort from validly applying for any Australian visa (other than by the exercise of a Ministerial discretion).

29. Further, the Bill creates a new definition in sub-section 5(1) of the Act, defining a person who meets the above criteria as a 'member of the designated regional processing cohort' (**the Cohort**). With reference to that definition, it makes numerous minor amendments to the Act and Regulations to address situations where persons within the Cohort may otherwise be:

    (a) deemed to have been granted a special purpose visa[25] to allow a non-citizen to enter and remain temporarily in Australia;[26]

    (b) deemed to have applied (validly) for certain visitor visas (business visitor and electronic travel authority);[27] and/or

    (c) permitted to be added to applications[28] for certain permanent, temporary protection, and safe haven enterprise visas where those applications have been made by others.[29]

## Ministerial waiver

30. The Bill provides a Ministerial discretion for the bar under proposed subsections 46A(2AA) and 46B(2AA) to be lifted 'if the Minister thinks that it is in the public interest to do so'.[30] The Minister may lift the bar with respect to an individual,[31] or with respect to a class of individuals.[32]

31. This power is personal and non-compellable.[33] It is left to the Minister to decide what is in 'the public interest', which is not defined by the Act.

## Application provisions

32. The application provisions of the Bill set out when it will come into effect.[34]

33. The Bill will come into effect retrospectively with regard to visa applications lodged by persons included in the Cohort who are outside of Australia. As of its commencement, any application dating back to 4 July 2019 (the date of the Bill's introduction) and not yet concluded will be automatically invalidated.

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[24] Migration Legislation Amendment (Regional Processing Cohort) Bill 2019 (Cth) ss 46A(2AA), 46B(2AA).
[25] In accordance with section 33 of the *Migration Act*.
[26] Migration Legislation Amendment (Regional Processing Cohort) Bill 2019 (Cth) sch 1 items 2-3.
[27] Ibid sch 1 items 22-26.
[28] *Migration Regulations 1994* (Cth) regs 208A, 208AAA ('*Migration Regulations*').
[29] Migration Legislation Amendment (Regional Processing Cohort) Bill 2019 (Cth) sch 1 items 28-33.
[30] Ibid ss 46A(2AB), (2AC), 46B(22B), (2AC), sch 1 items 5-12, 14-21.
[31] Ibid ss 46A(2AB), 46B(2AB).
[32] Ibid ss 46A(2AC), 46B(2AC).
[33] Ibid ss 46A(8), 46B(8).
[34] Ibid item 39.

34. With regard to applications lodged by persons within Australia, the provisions of the Bill will come into effect as of the date of its commencement.

# Existing provisions

35. The Act contains wide-ranging powers by which visa applications may be barred or declined, and by which visas may be cancelled or revoked.

36. Bars already exist which prevent many UMAs and transitory persons from validly applying for visas. This includes persons transferred from regional processing countries to Australia for medical or other purposes (for instance, under the 'medevac' law).[35]

37. The Act provides for a bar on valid visa applications by UMAs who are in Australia and either unlawful non-citizens or holding a bridging or prescribed temporary visa.[36] [37] The Minister may 'lift the bar' if he thinks it is in the public interest to do so.[38] This power is personal and non-compellable.[39]

38. Similarly, the Act provides for a bar on valid visa applications by transitory persons in Australia who are either unlawful non-citizens or the holder of a bridging or prescribed temporary visa.[40] [41] The Minister may lift the bar if he thinks it is in the public interest,[42] and this power is personal and non-compellable.[43]

# Justification, necessity and proportionality

39. Minister Dutton stated in his second reading speech that:

> *The purpose of [the Bill] is to reinforce the Coalition's longstanding policy that people who travel here illegally by boat will never be settled in Australia* (emphasis added).[44]
>
> *This legislation sends a strong message to people smugglers and those considering travelling illegally to Australia by boat: Australia's borders are now stronger than ever*.[45]

[35] *Migration Act* pt 2, div 8, sub-divs C, D.
[36] Ibid s 46A(1).
[37] The relevant visa classes are prescribed by regulation 2.11A of the *Migration Regulations*, and include: temporary safe haven (class UJ) visas, temporary (humanitarian concern) (class UO) visas, subclass 785 (temporary protection) visas granted before 2 December 2013, and safe haven enterprise (class XE) visas. Note also that subsection 46A(1A) of the *Migration Act* provides exceptions to the bar, where a visa applicant, in addition to other criteria, either holds a safe haven enterprise (SHEV) visa, or has previously held one and is a lawful non-citizen. Regulation 2.06AAB of the *Migration Regulations* prescribes the visa types which an applicant meeting those criteria may apply for.
[38] *Migration Act* s 46A(2).
[39] Ibid ss 46A(2C), 46A(3), 46A(7).
[40] Ibid s 46B(1).
[41] The relevant visa classes are prescribed by regulation 2.11B of the *Migration Regulations*, and include: temporary safe haven (class UJ) visas, temporary (humanitarian concern) (class UO) visas, subclass 785 (temporary protection) visas granted before 2 December 2013, and safe haven enterprise (class XE) visas.
[42] *Migration Act* s 46B(2).
[43] Ibid ss 46B(3), 46B(7).
[44] Commonwealth, *Parliamentary Debates*, House of Representatives, 4 July 2019, 40 (Peter Dutton, Minister for Home Affairs).
[45] Ibid 41.

40. However, all evidence suggests that the Bill is an unnecessary piece of legislation which does not address the objectives stated by the Minister, and which may incur significant costs to implement. This is further explored below.

## Excessive and unnecessary to prevent settlement

41. The Bill is excessive and unnecessary to achieve the stated objective of reinforcing Government policy that people who arrive by boat will never be settled in Australia.

42. Settlement relates to the permanent re-establishment of refugees and other forcibly displaced persons in the Australian community. The Bill far exceeds what is necessary to deprive members of the Cohort of that opportunity. In addition to barring applications for permanent residency, and visas which would provide an avenue to attain permanent residency, the Bill bars every visa type, including for the purposes of tourism, visits to family members, study, employment, business, or diplomatic and consular functions. It also bars (save by Ministerial waiver) visas types which may conceivably be required for use by the Government, such as special purpose and bridging visas.

43. A case study provided by the Human Rights Law Centre[46] (**HRLC**) illustrates the disproportionate impact of the Bill in this regard. The HRLC records that Nayser fled persecution in Burma together with his wife and children; however, they arrived in Australia on different dates and he was taken to Manus Island, while his wife and children were granted visas to remain in Australia. On that basis, not only does the Bill prevent Nayser's children from living with their father, it extends further and prevents him from ever visiting them.

44. By way of further example, had an equivalent of the Bill, combined with the current legislative approach to irregular migration, been applied in earlier years, renowned orthopaedic surgeon Associate Professor Munjed Al Muderis would not only have been refused settlement in Australia, he would also be permanently barred from visiting to practise or teach, even as a visiting lecturer.

45. While the Bill is excessive in its reach, it is also unnecessary in its entirety. As set out below, the Act and Regulations already provide the Minister with a very broad range of powers to decline or exclude otherwise valid visa applications. Included in these are bars already in place which specifically prevent the majority of UMAs[47] and transitory persons[48] from making a valid visa application (other than by Ministerial waiver). As discussed below, reliance on Ministerial waivers may not be an effective use of the Minister's time and resources.

## Unnecessary to prevent visa fraud

46. It was also suggested by the Government in relation to the 2016 Bill that the legislation may be necessary to prevent people from entering Australia illegitimately, through (for

[46] Human Rights Law Centre, Submission No 25 to the Senate Legal and Constitutional Affairs Legislation Committee, *Review of the Migration Legislation Amendment (Regional Processing Cohort) Bill 2016 (Cth)* (15 November 2016) 2.
[47] *Migration Act* s 46A.
[48] Ibid s 46B.

example) faking marriages with Australians[49] or by arriving to Australia on tourist visas.[50]

47. In the Law Council's experience, visas are routinely refused or cancelled where the applicant is considered not to be of good character, to present a risk to the Australian community, or not to merit the visa requested. This includes situations where an applicant may have had an ulterior purpose in making the application.

48. For example, in the subclass 309 partner visa pathway, a visa applicant and their Australian sponsor must prove at the time of application for the visa as well as the time of decision on the application that the relationship is genuine and continuing. This involves stringent checks of documentary evidence as well as interviews with a Departmental Officer if necessary. To obtain a permanent subclass 100 partner visa, the couple's relationship is examined again more than 2 years after the time of initial visa application. Similarly, any application for a tourist visa is assessed against 'genuine temporary entrant' criteria by which applicants must demonstrate to the Department of Home Affairs that they are genuine visitors and will return to their home country at the expiry of their visa.

49. An asylum seeker who applies for a subclass 866 protection visa, subclass 785 temporary protection visa, or subclass 789 safe haven enterprise visa undergoes a highly rigorous assessment. Among other requirements, the applicant must:

    (a) not have been assessed by the Australian Security Intelligence Agency (**ASIO**) to be indirectly or directly a risk to security;[51]

    (b) not be considered by the Minister to be a danger to Australia's security or, due to a prior conviction for a particularly serious crime, a danger to the Australian community;[52]

    (c) not be considered by the Minister to have committed a crime against peace, a war crime, a crime against humanity, a serious non-political crime, to have acted contrary to the purpose and principles of the United Nations, or to be a person who is a danger to Australia's security or, due to a prior conviction for a particularly serious crime, to the Australian community;[53]

    (d) have taken 'all possible steps' to avail himself or herself of any right to enter and reside in (whether temporarily or permanently) any country apart from Australia (other than where this would expose the person to persecution or significant harm);[54]

[49] Helen Davidson, 'Peter Dutton's 'Sham Relationships' Claim Questioned by Migration Experts', *The Guardian* (online, 3 November 2016) <https://www.theguardian.com/australia-news/2016/nov/03/peter-duttons-sham-relationships-claim-questioned-by-migration-experts>.
[50] Australian Associated Press, 'Turnbull to Propose Law that Bans Boat Asylum Seekers from Australia Permanently', *News.com.au* (online, 31 October 2016) <https://www.news.com.au/national/turnbull-to-propose-law-that-bans-boat-asylum-seekers-from-australia-permanently/news-story/793919195011e35c15471918b007c8a1>.
[51] *Migration Act* s 36(1B). 'Security' is within the meaning of section 4 of the *Australian Security Intelligence Organisation Act 1979* (Cth).
[52] Ibid s 36(1C).
[53] Ibid s 36(2C).
[54] Ibid ss 36(3)-(5A).

(e) if seeking protection as a refugee, demonstrate a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion;[55]

(f) demonstrate that there are no reasonable steps the person could take to modify his or her behaviour so as to avoid a real chance of persecution;[56]

(g) have undergone a medical examination and chest x-ray to assess whether the person has any disease or condition which may be a threat to public health or a danger to the Australian community;[57]

(h) pass the character test (which, among other things, permits assessment of the person's 'past and present general conduct');[58] and

(i) not be determined by the Foreign Minister to be a person whose presence in Australia may be associated with the proliferation of weapons of mass destruction.[59]

50. A failure to meet any of the above conditions will result in the rejection of the visa application. The Law Council's purpose in stating these visa conditions is to illustrate the level of scrutiny which is applied and the range of grounds on which such an application might be declined.

51. As above, the Law Council notes that the Migration Act already contains extensive powers and safeguards to ensure that visas of any kind are obtained legitimately. Additionally, the Explanatory Statement and second reading speech give no explanation or evidence of why this Cohort of people may present a higher risk of attempted visa fraud than any other within the migration program. To the contrary, asylum seekers and refugees coming to Australia by boat have historically been very clear about their intention to claim asylum, and have in general approached authorities to that effect at the earliest opportunity. This integrity is further borne out by recognition rates, which have historically demonstrated that a significantly higher proportion of asylum seekers arriving by boat are subsequently found to be refugees than those arriving by air.[60]

## Arbitrary application

52. It should first be noted that members of the Cohort have committed no illegal action by virtue of coming to Australia by boat for the purpose of seeking asylum. Seeking

[55] Ibid ss 5H-J.
[56] Ibid s 5J(3).
[57] *Migration Regulations* sch 2, cls 866.223-224B.
[58] *Migration Act* s 501, applied by sch 2, cl 866.225, sch 4, cl 4001 of the *Migration Regulations*.
[59] *Migration Regulations* sch 2, cl 866.225, sch 4, cl 4003A.
[60] For further discussion of recognition rates between 2008 and 2013, see Parliamentary Library, 'Asylum Seekers and Refugees: What are the Facts?', *Research Paper Series, 2014-15* (Updated 2 March 2015) 9.

asylum is legal in both international[61] and Australian law.[62] The Parliamentary Library has summarised the legal position in Australia as follows:

> *Asylum seekers irrespective of their mode of arrival, like others that arrive in Australia without a valid visa, are classified by Australian law to be 'unlawful non-citizens'. However, the term 'unlawful' does not mean that asylum seekers have committed a criminal offence. There is no offence under Australian law that criminalises the act of arriving in Australia or the seeking of asylum without a valid visa*.[63]

53. Accordingly, the Bill mischaracterises people as having travelled 'illegally' and is incorrect and misleading in this assertion.

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

55. Further, the Bill seeks to exempt minors, presumably on the grounds that they may have had little personal responsibility for, or agency over, the decisions made on their behalf by their parents or guardians. The Bill again fails to respond appropriately to this issue. The threshold age used by the Bill is determined as at the time the person is taken to a regional processing country, and not upon arrival in Australia. As a result, a child—or potentially a baby—who remained for any reason in Australia (either in detention or in the community) for a lengthy period of time before being taken to Nauru or Manus Island would nevertheless be subject to the bar if he or she had turned 18 in the interim.

56. A second case study provided by the HRLC[64] documents one instance in which this happened. The HRLC reports that 'Hussein' fled Afghanistan and arrived in Australia (where he has family) as an unaccompanied child. He was detained following his arrival, and then transferred to Nauru three months after turning 18. As a result, despite arriving as a child, Hussein is deemed by the operation of the Bill to have had the same level of culpability as an adult undertaking the same voyage.

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[61] Article 14(1) of the *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1948) records the recognition by the international community of a universal right to 'seek and enjoy in other countries asylum from persecution'. Article 33 of the *Convention relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954), established what has arguably become a norm of customary international law that a State must not expel or return (*refouler*) a refugee to a place of persecution.

[62] Section 228B of the *Migration Act* defines 'circumstances in which a non-citizen has no lawful right to come to Australia' but does not create any offence. Separately, Australia retains the subclass 866 (Protection) visa, which allows an applicant in Australia to seek asylum, subject to conditions set out in the *Migration Regulations*.

[63] Parliamentary Library, 'Asylum Seekers and Refugees: What are the Facts?', *Research Paper Series, 2014-15* (Updated 2 March 2015) 4 <https://www.aph.gov.au/about_parliament/parliamentary_departments/parliamentary_library/pubs/rp/rp1415/asylumfacts>.

[64] Human Rights Law Centre, Submission No 25 to the Senate Legal and Constitutional Affairs Legislation Committee, *Review of the Migration Legislation Amendment (Regional Processing Cohort) Bill 2016 (Cth)* (15 November 2016) 2.

## Sending a message

57. The Law Council submits that the objective that the Bill should send 'a strong message to people smugglers and those considering travelling illegally to Australia'[65] is fundamentally unjust and is unlawful under international law.

58. This objective proposes that one group of people (that is, member of the Cohort) should be penalised in order to influence the future behaviour of a different group of people (that is, smugglers and people who may attempt boat journeys in future). This is unfair and cannot be a proportionate response. It does not provide a solution to the long-term problems associated with offshore detention and visa uncertainty for this Cohort.

59. Dissuading people from seeking asylum by violating the rights of asylum seekers and refugees who are already in a country is not a legitimate purpose under the ICCPR that can justify a restriction of those people's rights. The Law Council notes that a similar conclusion has been stated independently by the PJCHR.[66]

60. Regardless, the Bill is unnecessary to achieve this objective. The Law Council is aware of no evidence to support the claim that the Bill is required to act as a deterrent. Indeed, the UN Refugee Agency (**UNHCR**) has observed that 'such restrictive measures do not prove effective in practice in deterring movement by people fleeing conflict, persecution and serious human rights violations.'[67] In any event, there are many other legislative and public relations tools available to (and in use by) the Government capable of ensuring its strong border protection policies are well known and understood internationally.

## Complex and costly to implement

61. Implementation of the Bill is likely to be costly given that the bar is applied for life to the Cohort, and given that it applies to all visa types. Electronic visa systems and all forms will need to be adapted to identify such persons, noting that many of these people will likely change place of residency, legal status and even citizenship over time. Currently, no paper application forms or electronic forms include questions relating to this cohort. While biometric records are held by the Government for all members of the Cohort, not all visa types require the collection of biometrics from applicants. If a waiver of the bar is sought, this adds another cost in the process and potentially increases 'red tape'.

62. Further, the implementation of the Bill is likely to be subject, to an extent, to the agreement and cooperation of other states. Refugees recognised on Nauru hold temporary visas which are extended upon the agreement of the Government of Nauru. If Nauru were to withdraw from that agreement, Australia's *non-refoulement* obligations (among others) may compel it, notwithstanding the Bill, to transfer refugees there back to Australia. This would result in their indefinite detention, at significant expense and in breach of human rights including the right to freedom from arbitrary

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[65] Commonwealth, *Parliamentary Debates*, House of Representatives, 4 July 2019, 41 (Peter Dutton, Minister for Home Affairs).
[66] Parliamentary Joint Committee on Human Rights, 'Human Rights Scrutiny Report' (Report 2 of 2017, 21 March 2017) [2.114], [2.121].
[67] United Nations High Commissioner for Refugees, Submission No 27 to the Senate Legal and Constitutional Affairs Legislation Committee, *Review of the Migration Legislation Amendment (Regional Processing Cohort) Bill 2016 (Cth)* (16 November 2016) [10].

detention,[68] and past experience suggests that this may lead to serious mental health impacts. In any event, refugees recognised in regional processing countries remain in need of durable solutions. If those are not provided by the regional processing country and Australian visas are barred, then the support of third countries to provide settlement must be sought.

63. It also puts increasing pressure, as discussed below, on the Minister to make decisions personally. In light of the significant and increasing demands of the relevant Ministerial portfolio, this seems an ill-judged allocation of the Minister's time and resources.

# International legal obligations

## Discriminatory effect

64. Principles of the rule of law require that the 'law should be applied to all people equally and should not discriminate between people on arbitrary or irrational grounds.'[69] This is reflected in international human rights law, by which Australia is bound. Article 26 of the *International Covenant on Civil and Political Rights* (**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*.[70]

65. Although 'discrimination' is not defined by the ICCPR, the jurisprudence of the UN Human Rights Committee (**UNHRC**) clarifies that:

> *the term "discrimination" as used in the [ICCPR] should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms*.[71]

66. The UNHRC goes on to say 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*.[72]

67. It is clear that the Bill serves to define a specific group of people—the Cohort—who are thereby barred access to Australian visas. This amounts to discrimination.

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[68] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, art 9(1).
[69] Ibid principle 2.
[70] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171.
[71] Human Rights Committee, *General Comment No 18: Non-Discrimination*, 37th sess, UN Doc HRI/GEN/1/Rev.9 (Vol I) (10 November 1989) [7].
[72] Ibid [13].

## Grounds for discrimination

68. The Bill does not expressly define the Cohort on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property or birth. As the PJCHR observed in relation to the 2016 Bill, however, it may:

> *have a disproportionate negative effect on individuals from particular national origins; nationalities; or on the basis of race, which gives rise to concerns regarding indirect discrimination on these grounds*.[73]

69. This arises because of the close link between the Bill and refugees and asylum-seekers. UNHCR monitors forced displacement (as a result of persecution, conflict, violence or human rights violations) and reports that, as at the end of 2018, more than two thirds of the 20.4 million refugees under its mandate came from just five countries.[74] People originating from a limited number of countries, where there is a high incidence of forced displacement, will comprise the majority of the Cohort upon the commencement of the Bill. Similarly, those national origins are likely to continue to be overrepresented should any new arrivals in future be brought within the Cohort.

70. The ICCPR also prohibits discrimination on grounds of 'other status'.[75] No exhaustive definition of this ground has been established in international law, and the UNHRC has preferred to consider on a case-by-case basis whether a given complaint raises a relevant ground of discrimination.[76] The case of *Van Oord v the Netherlands*[77] gives some guidance. In it, the UNHRC found that 'a differentiation based on reasonable and objective criteria does not amount to a prohibited discrimination within the meaning of article 26' (emphasis added).[78]

71. When viewed with reference to the Minister's statements of purpose, the Law Council considers that the grounds for discrimination by the Bill fall short of being 'reasonable and objective'.

72. Discrimination on the grounds that those within the Cohort have travelled 'illegally by boat', is not reasonable, because in fact no illegal act is committed by coming to Australia by boat for the purpose of seeking asylum. To the extent that the Bill seeks to address unauthorised boat arrivals, it remains an unreasonable discrimination against the Cohort, because it does not accurately target that group of people.

## Significant effect on rights and freedoms

73. A further key consideration in regard to whether discrimination is permissible is whether that discrimination may significantly affect the recognition, enjoyment or exercise of fundamental rights and freedoms. In this instance, the Law Council

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[73] Parliamentary Joint Committee on Human Rights, 'Human Rights Scrutiny Report' (Report 2 of 2017, 21 March 2017) [2.106].
[74] Those countries are the Syrian Arab Republic, Afghanistan, South Sudan, Myanmar and Somalia: United Nations High Commissioner for Refugees, *Global Trends in Forced Displacement 2018* (19 June 2019) 3 <https://www.unhcr.org/en-au/statistics/unhcrstats/5d08d7ee7/unhcr-global-trends-2018.html>.
[75] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, art 26.
[76] Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (Oxford University Press, 3rd ed, 2013) [23.27].
[77] Human Rights Committee, *Views: Communication No. 658/1995*, 60th sess, UN Doc CCPR/C/60/D/658/1995 (23 July 1997) ('*Van Oord v Netherlands*').
[78] Ibid [8.5].

submits that there is strong evidence to suggest that the Bill may have that impact. Three hypothetical examples are put forward by way of illustration:

(a) In the first example, the Bill may result in families, including spouses, being effectively separated from each other, or children being separated from their parents or families. That outcome is in breach of international law protections of the family[79] and the right of the child to be cared for by his or her parents as far as possible.[80] It also has other flow on effects, particularly in relation to mental health, as has been documented on Nauru and Manus Island.[81] [82]

(b) A second example may occur where a member of the Cohort is in Australia and cannot be removed to any other country (perhaps by reason of Australia's *non-refoulement* obligations).[83] Here, the effect of the Bill would be that that person must remain in detention indefinitely with no prospect of release into the community on any form of visa. That outcome is contrary to the international law prohibition on arbitrary detention.[84]

(c) In a third example, a member of the Cohort has been recognised as a refugee in Nauru. Australia and Nauru have joint responsibility to ensure that international human rights and refugee law obligations are met.[85] The refugee has a legal entitlement to the rights and protections set out in the *Convention relating to the Status of Refugees* (**Refugee Convention**),[86] including (among others) protection from *refoulement*,[87] freedom of movement,[88] and family reunification.[89] However, each of these rights may not always be respected in practice in Nauru: a lack of permanent residency raises the risk that, once temporary visas expire, the refugee may be subject to expulsion and

[79] *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, UNTS 993 3 (entered into force 3 January 1976), art 10(1).
[80] *Convention on the Rights of the Child*, opened for signature 20 November 1989, UNTS 1577 3 (entered into force 2 September 1990), art 7(1).
[81] See, eg, Médecins Sans Frontières, *Indefinite Despair: The Tragic Mental Health Consequences of Offshore Processing on Nauru* (December 2018) <https://www.msf.org.au/sites/default/files/attachments/indefinite_despair_3.pdf>; United Nations High Commissioner for Refugees, 'Medical Expert Mission Papua New Guinea 10 to 16 November 2017' (18 December 2017) <https://www.unhcr.org/en-au/publications/legal/5a3b0f317/unhcr-medical-expert-mission-to-papua-new-guinea-10-16-november-2017.html>.
[82] The scale of medical need experienced in regional processing countries is also illustrated by the number of medical evacuations which have taken place. According to Senator Abetz: 'during the period of the medevac bill, over 900 people have been brought to Australia for particular medical treatment' (emphasis added): Commonwealth, *Parliamentary Debates*, Senate, 24 July 2019, 70 (Senator Abetz).
[83] See, eg, *Convention against Torture*, opened for signature 10 December 1984, UNTS 1465 85 (entered into force 26 June 1987), art 3(1); *Convention relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954), art 33(1).
[84] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, art 9(1).
[85] It is generally recognised in international law that 'a State has jurisdiction, and consequently is bound by relevant international refugee and human rights law obligations if it has *de jure* and/or effective *de facto* control over a territory or persons. This includes situations were a State exercises jurisdiction outside its territory, including either at sea or on another State's territory.' See United Nations High Commissioner for Refugees, 'Bilateral and/or Multilateral Arrangements for Processing Claims for International Protection and Finding Durable Solutions for Refugees' (Position Paper, 20 April 2016) [8(b)], n5 <https://www.refworld.org/docid/5915aa484.html>.
[86] *Convention relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954).
[87] Ibid art 33.
[88] Ibid art 26 (freedom of movement), 28 (travel documents, to be read in conjunction with *International Covenant on Civil and Political Rights* art 12(2)).
[89] Ibid Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, cl IV, B.

*refoulement*; certain refugees in need of medical evacuation have reportedly been denied departure by Nauruan authorities;[90] and needs for reunification of immediate family members remain unmet.[91] In this situation, the effect of the Bill may be to abrogate Australia's continuing responsibility toward refugees it has transferred offshore.

## Lack of legitimate purpose

74. Finally, with regard to discrimination, it must be considered whether the discriminatory effect of the Bill can be considered to be for a purpose that is legitimate under international law.

75. The Statement of Compatibility with Human Rights[92] (**Statement of Compatibility**) in fact goes some way to recognising the concerns set out here by the Law Council. It states:

> *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'*.[93]

76. It references the relevant UNHRC General Comment[94] and goes on to state:

> *The Government is of the view that this continued differential treatment is for a legitimate purpose and based on relevant objective criteria and that it is reasonable and proportionate in the circumstances*.

77. This response fails to address the requirement that the 'legitimate purpose' must be one which is legitimate under the ICCPR.[95] The Statement of Compatibility mentions two purposes:

    (a) …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;[96] and

    (b) …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.[97]

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[90] See, eg, the case of *CEU19 v Minister for Immigration, Citizenship and Multicultural Affairs*, VID600/2019, Federal Court of Australia, in which Mortimer J's orders of 5 July 2019 were necessitated by a refusal or reluctance on the part of the Government of Nauru to allow a refugee to be medically evacuated.
[91] Family separations are documented, in part, through actions such as that of the Human Rights Law Centre, seeking the intervention of the UN Human Rights Committee: see Human Rights Law Centre, 'Refugee Families Ripped Apart by Australian Government Take Their Case to The United Nations' (Web Page, 16 October 2018) <https://www.hrlc.org.au/news/2018/10/15/refugee-families-ripped-apart-by-australian-government-take-their-case-to-the-united-nations>.
[92] Explanatory Memorandum, Migration Legislation Amendment (Regional Processing Cohort) Bill 2019 (Cth), Attachment A 'Statement of Compatibility with Human Rights'.
[93] Ibid 25.
[94] Human Rights Committee, *General Comment No 18: Non-discrimination*, 37th sess, UN Doc HRI/GEN/1/Rev.9 (Vol I) (10 November 1989).
[95] Ibid [13].
[96] Explanatory Memorandum, Migration Legislation Amendment (Regional Processing Cohort) Bill 2019 (Cth), Attachment A 'Statement of Compatibility with Human Rights', 25.
[97] Ibid.

78. The first of these seriously mischaracterises the asylum process[98] but does not—nor does it appear to attempt to—reflect any legitimate purpose under the ICCPR. The second reflects in part the Minister's statement regarding sending a message to people smugglers and prospective asylum seekers. As discussed above, this is a flawed objective in the context of the Bill; however, it also fails to provide a legitimate purpose under international law.

## Imposition of a penalty

79. Article 31(1) of the Refugee Convention states:

> *The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.*

80. The Bill is expressly intended to identify and subject asylum seekers and refugees to what amounts to a penalty on account of their 'illegal' entry. It is inconsistent with international law in this respect.

81. The Cohort is defined by proposed subsection 5(1) of the Act and includes those taken to a regional processing country as described by proposed subsections 46A(2AA) and 46B(2AA). This represents a subset of asylum seekers and refugees who, as described by the Minister, 'travel here illegally by boat'.[99]

### A penalty is imposed

82. The bar on visa applications under proposed subsections 46A(2AA) and 46B(2AA) is a penalty within the terms of article 31(1).

83. 'Penalty' is not defined by the Refugee Convention; however, it is accepted that a broad interpretation—extending beyond criminal sanctions and encompassing measures such as arbitrary detention or procedural bars on applying for asylum—best reflects the object and purpose of the article.[100] [101]

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[98] People coming to Australia, whether by boat or plane, for the purpose of claiming asylum do not seek to circumvent Australia's migration programme by doing so. States parties to the Refugee Convention have legal obligations to assess asylum claims and ensure the rights contained in that Convention are respected. This is reflected in the fact that seeking asylum in Australia, including without prior authorisation, does not constitute any offence under Australian law. In contrast to the asylum system, Australia's offshore humanitarian program, while importantly providing resettlement and other solutions to many refugees, does not arise from any legal obligation and is an entirely discretionary program. The offshore humanitarian program does not substitute for Australia's asylum obligations.

[99] Commonwealth, *Parliamentary Debates*, House of Representatives, 4 July 2019, 40 (Peter Dutton, Minister for Home Affairs).

[100] See, eg, Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (Oxford University Press, 3rd Ed, 2007), 266; Andreas Zimmerman (Ed), *The 1951 Convention relating to the Status of Refugees and its 1967 Protocol: A Commentary* (Oxford University Press, 2011), 1262.

[101] Human Rights Committee, Views: *Communication No R.12/50*, UN Doc Supp No 40A/37/40 (25 July 1980) 150 ('*Van Duzen v Canada')*, in which the UNHRC considered that term in the context of article 15(1) of the *International Covenant on Civil and Political Rights*, supports that conclusion: 'Whether the word 'penalty' in article 15(1) should be interpreted narrowly or widely, and whether it applies to different kinds of penalties, 'criminal' and 'administrative', under the Covenant, must depend on other factors. Apart from the text of article 15(1), regard must be had, inter alia, to its object and purpose'.

84. The UK judgment of Brown LJ in *R v Uxbridge Magistrates Court & Another Ex Parte Adimi*[102] (***Adimi***) at paragraphs 15 and 16 provides further guidance:

> *15. What, then, was the broad purpose sought to be achieved by Article 31? Self-evidently it was to provide immunity for genuine refugees whose quest for asylum reasonably involved them in breaching the law. In the course of argument my Lord suggested the following formulation: 'Where the illegal entry or use of false documents or delay can be attributed to a bona fide desire to seek asylum whether here or elsewhere, that conduct should be covered by Article 31' …*
>
> *16. That Article 31 extends not merely to those ultimately accorded refugee status but also to those claiming asylum in good faith (presumptive refugees) is not in doubt.*

85. The Law Council also notes that the text of Article 31(1) makes it clear that it is not particular types of penalties that are forbidden; instead, Article 31(1) prohibits the imposition of penalties (in general) in a particular context, namely as a result of unlawful entry or presence. Article 31(1) of the *Vienna Convention on the Law of Treaties* states that:

> *A treaty shall be interpreted in good faith in accordance with the ordinary meaning given to the terms of the treaty in their context and in light of its object and purpose.*

86. Based upon these assessments, it is clear that the bar imposed by the Bill constitutes a penalty, imposed on certain individuals as a consequence of their mode of arrival, and irrespective of whether or not they are later found to be refugees.

## Refugees coming directly

87. The protection of article 31 is afforded by the Refugee Convention to refugees 'coming directly' from a territory where they were under threat. This phrase is also considered by Brown LJ in the *Adimi* case:

> *I am persuaded by the applicants' contrary submission, drawing as it does on the travaux préparatoires, various Conclusions adopted by UNHCR's executive committee (ExCom), and the writings of well-respected academics and commentators … that some element of choice is indeed open to refugees as to where they may properly claim asylum. I conclude that any merely short term stopover en route to such intended sanctuary cannot forfeit the protection of the Article, and that the main touchstones by which exclusion from protection should be judged are the length of stay in the intermediate country, the reasons for delaying there (even a substantial delay in an unsafe third country would be reasonable were the time spent trying to acquire the means of travelling on), and whether or not the refugee sought or found there protection de jure or de facto from the persecution they were fleeing.*[103]

88. The 'touchstones' set out in *Adimi* have subsequently been applied in various jurisdictions.[104] The protection of article 31 is not limited only to refugees who travel

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[102] *R v Uxbridge Magistrates Court & Another Ex Parte Adimi R v Crown Prosecution Services Ex Parte Sorani R v Secretary of State for Home Department Ex Parte Sorani R v Secretary of State for Home Department and Another Ex Parte Kaziu* [1999] EWHC Admin 765 (29 July 1999).
[103] Ibid [18].
[104] Andreas Zimmerman (ed), *The 1951 Convention relating to the Status of Refugees and its 1967 Protocol: A Commentary* (Oxford University Press, 2011) 1255.

immediately to Australia from their home country. Rather, protections still apply to refugees who transit through other countries on their way to Australia, where those other countries do not offer effective protection, including recognition of legal status. In many of the countries transited by asylum seekers and refugees prior to reaching Australia, there is no legal recognition of refugee status and such people remain vulnerable to exploitation and/or expulsion at any time.

89. Some members of the Cohort may have come immediately from their country of origin (for instance Sri Lankans). However, many will have transited other countries for such periods as were necessary to arrange passage onwards: this falls within the scope of the phrase 'coming directly'. International law recognises 'the fact that asylum seekers and refugees are often forced to enter safe countries in an irregular or 'illegal' manner due to their experiences of persecution and flight'.[105]

90. While any penalty in this context is contrary to Australia's international law obligations, the Law Council makes the additional observation that the nature of this particular penalty—which may result in the permanent separation of children and families, and may increase the vulnerability of already highly vulnerable people to other breaches of international refugee and human rights—is particularly serious.

## Human Rights of the Family and Children under CRC, ICESCR and ICCPR

91. It is important to take account of the broader impacts of the Bill in its effect on families and children. Given that, as the Statement of Compatibility notes, '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.'[106]

92. Human rights relating to respect for the family and children are contained in the CRC, ICESCR and ICCPR. Those rights which are engaged by the Bill include:

93. Article 3(1) of the CRC:

> *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.*

94. Article 10(1) of the CRC:

> *In accordance with the obligation of States Parties under article 9, paragraph 1, applications by a child or his parents to enter of leave a State Party for the purposes of family reunification shall be dealt with by States Parties in a positive, human 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.*

95. Article 10(1) of ICESCR, which is not referred to in the Statement of Compatibility, provides:

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[105] United Nations High Commissioner for Refugees, Submission No 27 to the Senate Legal and Constitutional Affairs Legislation Committee, *Review of the Migration Legislation Amendment (Regional Processing Cohort) Bill 2016 (Cth)* (16 November 2016) [6].
[106] Explanatory Memorandum, Migration Legislation Amendment (Regional Processing Cohort) Bill 2019 (Cth), Attachment A 'Statement of Compatibility with Human Rights', 24.

> *The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children.*

96. Article 17(1) of the ICCPR:

> *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.*

97. Article 23 of the ICCPR:

> *The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.*

98. Article 24(1) of the ICCPR:

> *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.*

99. The Law Council is of the view that the Bill breaches Australia's human rights obligations under the CRC, ICESCR and the ICCPR with regards to the family and children. For those within the Cohort who have family members living in Australia, an effect of the Bill is to prevent not only lasting reunification, but also any short-term visits. Neither preservation of the family unit nor the best interests of the child are accorded weight by the Bill.

100. Additionally, the Bill operates to disadvantage family members who are Australian citizens or permanent residents, as it effectively also bars them from sponsoring spouses, children or other family members through family migration or humanitarian programs available to other people in comparable circumstances.

# Rule of Law

101. The Law Council submits that the Bill conflicts with key principles of the rule of law and, as such, has the potential to erode, or contribute to an erosion of, key principles of fairness and accountability on which the Australian legal system rests.

## Retrospectivity

102. The law must be both readily known and available, and certain and clear.[107] In this respect, the Rule of Law Principles state that, in particular, 'people must be able to know in advance whether their conduct might attract criminal sanction or civil penalty.'[108] For that reason, the Law Council considers that legislation which creates penalties should not be retrospective in its operation.

103. The Bill operates prospectively with regard to any future arrivals who may at a later time fall within the Cohort. It effectively places those people on notice, prior to seeking

[107] Law Council of Australia, 'Policy Statement: Rule of Law Principles' (March 2011), Principle 1, <https://www.lawcouncil.asn.au/docs/f13561ed-cb39-e711-93fb-005056be13b5/1103-Policy-Statement-Rule-of-Law-Principles.pdf>.
[108] Ibid 2.

to come to Australia, that doing so in this manner may result in permanent ineligibility for an Australian visa.

104. The Bill will, however, operate retrospectively in regard to people who fall within the Cohort upon its commencement. For those people, the Bill 'is prospective, but it imposes new results in respect of a past event.'[109] A person's past action in seeking to come to Australia will have the new, and immediate, result of permanent ineligibility for any visa.

105. With regard to this group, the SSCSB observed (in relation to the 2016 Bill) that

> *the bill does not place them on notice in a similar way. Rather, the bill prevents people within the cohort who were taken to a regional processing country prior to the commencement of the bill from making a valid visa application. Those people cannot avoid the adverse consequences that apply through the operation of the bill and were not aware that this law was applicable at the time they sought to make this journey to Australia.*
>
> *It is a basic value of the rule of law that, in general, laws should only operate prospectively (not retrospectively). This is because people should be able to guide their actions on the basis of fair notice about the legal rules and requirements that will apply to them*.[110]

106. A further element of retrospectivity, as observed above in relation to the application provisions, is that visa applications already lodged prior to the commencement of the Bill will be affected in some cases. Applications lodged after 4 July 2019 (that is, the date of the Bill's introduction) by applicants who are offshore, and which have not been concluded by the time the Bill commences will be automatically and retrospectively invalidated.

107. Australian common law has a presumption that civil laws are not intended operate retrospectively[111] unless a clear statement to the contrary is made.[112] The Victorian Bar Human Rights Committee has described 'Retrospective laws [as] generally inconsistent with the rule of law'.[113] However, to assess whether on a case-by-case basis a retrospective law may be justified, the Australian Law Reform Commission (**ALRC**) has observed that

> *the proportionality principle may be relevant—that is, laws should have a legitimate objective, and the means chosen to achieve that objective should be rationally connected with that objective. Thus, a retrospective law is more likely to be justified if its retrospective nature is necessary to achieve its objective*.[114]

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[109] Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws* (Report 129, 2 March 2016) 365, quoting EA Dreidger, 'Statutes: Retroactive Retrospective Reflections' (1978) *56 Canadian Bar Review* 264, 268.
[110] Senate Standing Committee for the Scrutiny of Bills, 'Scrutiny Digest 1 of 2017' (8 February 2017) [2.142]-[2.143].
[111] Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws* (Report 129, 2 March 2016) 359.
[112] *Maxwell v Murphy* [1957] HCA 7, [7] (Dixon CJ).
[113] Victorian Bar Human Rights Committee, Submission No 64 to the Senate Legal and Constitutional Affairs Committee, *Inquiry into the Migration Legislation Amendment (Regional Processing Cohort) Bill 201*6 (14 November 2016) [27].
[114] Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws* (Report 129, 2 March 2016) 384.

108. In accordance with its analysis above, the Law Council submits that the Bill is neither necessary nor proportionate to its objectives and its retrospective operation is accordingly unjustified.

## Certainty

109. Rule of law principles require clarity and certainty of the law. The Bill also raises concerns in this respect, particularly with regard to its potential future impact on asylum seekers and refugees in Australia who have never been taken to a regional processing country. The ANU College of Law has previously observed that the Bill:

> *will apply to persons who are unauthorised maritime arrivals, but who were subsequently permitted to enter and remain lawfully in Australia.*
>
> *Asylum-seekers in Australia who are part of the Asylum Legacy Caseload, (including those who arrived as minors) who may be sent to a regional processing country in the future will become a 'member of the designated regional processing cohort'.*
>
> *Many of these minors are now young adults. They received correspondence from the Department of Immigration and Border Protection in 2013 stating that they*
>
> *"…may be taken to a regional processing country if and when it becomes practicable to do so".*[115]

110. According to its definition in section 5AA of the Act, UMA status does not expire once the legal or other circumstances of the person change. Consequently, any person who was once a UMA and who for any reason in the future is detained under section 189 of the Act, will become liable to being taken to a regional processing country and thereby be brought within the definition of the Cohort.

111. This could happen, for instance, if a person who arrived by boat after 13 August 2012[116] is living in the Australian community on a temporary protection visa and is unable to finalize the issue of a new visa prior to the expiry of the old one. The person would become an unlawful non-citizen at that time—despite having been the holder of a visa and being in the process of seeking a renewal—and become liable to detention and transfer to a regional processing country.

112. Other people lawfully in the Australian community could be brought under the Bill at the discretion of the Government, as indicated by the correspondence cited by the ANU College of Law.

113. For people in such circumstances to remain uncertain indefinitely about whether they might in future be placed within the Cohort and thereafter lose any right to reside in, or even visit, Australia would be a fundamentally unjust outcome and contrary to principles of the rule of law.

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[115] ANU College of Law, Submission No 19 to the Senate Legal and Constitutional Affairs Committee, *Inquiry into the Migration Legislation Amendment (Regional Processing Cohort) Bill 201*6 (14 November 2016) 3.
[116] *Migration Act* s 198AD note 2.

# Ministerial discretion

114. The Law Council believes that the power provided by the Bill to the Minister to lift the bar on valid applications in the public interest does not provide a safeguard sufficient to offset the concerns outlined in this submission.

115. As stated above, 'public interest' is not defined by the Act, and its content is therefore susceptible to different interpretation by different Ministers on opaque grounds. Further, the discretion is personal, non-compellable and subject only to limited review. Wide discretion is granted to the Minister to vary, revoke or change any decision.

116. There are numerous other broad, non-compellable Ministerial discretions in the Migration Act, including sections 46A (lifting the bar on valid onshore visa applications by UMA's), 351 (intervention following decision by Tribunal where it is in the public interest), 417 (humanitarian intervention following decision of a Tribunal) and 195A (power to grant a visa to a detainee).

117. The Minister routinely issues written guidelines to his officers when considering the use of these powers, however, in the experience of the Law Council, such broad discretion and usage of these guidelines are problematic for a number of reasons. The process is time consuming, results in sometimes lengthy delays, and arguably does not represent the most valuable use of a Minister's time and resources.

118. The exercise of Ministerial discretions has also been subject to judicial scrutiny with regard to the requirement that he give proper, genuine and realistic consideration to the merits of the given case.[117] The volume of such matters requiring the personal consideration of the Minister may make it very difficult for him to meet this standard. The Full Federal Court found by majority decision in the case of *Chetcuti v Minister for Immigration and Border Protection*[118] that it was probable that the Minister had spent no more than eleven minutes considering the material relevant to the exercise of his discretion in that instance. The Court found that period of time to be 'insufficient… to allow an active intellectual process to be directed to the relevant material'[119] and ordered that the relevant decision of the Minister be quashed.

119. The Department of Home Affairs may be able to inform the Committee as to how many applications for the Minister to use his personal power (including to lift application bars) are currently before the Minister, and how many such applications have been brought before the Minister in the last financial year. This information would assist the Committee to understand the time requirements and the demands on the Minister's resources.

120. The Law Council considers that procedural fairness may be undermined in the exercise of Ministerial discretions with limited transparency or review, leading in some instances to unjust outcomes with no reasons provided for adverse decisions. In addition, the administrative burden of the Minister being personally involved in all visa making decisions is costly and leads to delays in processing, is not transparent and, as noted above, may be an inefficient use of the Minister's time.

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[117] See, eg, *Carrascalao v Minister for Immigration and Border Protection* (2017) 347 ALR 173; *Chetcuti v Minister for Immigration and Border Protection* [2018] FCA 477.
[118] [2018] FCA 477.
[119] Ibid [99].

121. As the application bars in proposed subsections 46A(2AA) and 46B(2AA) operate as a bar on making a valid application, no decision will be made on such applications. For that reason, the Bill prevents any review of adverse decisions.

122. Likewise, no right of review is provided in respect of the exercise by the Minister of his discretion. In contrast to a visa refusal decision, which may be reviewed and is subject to some levels of oversight by the Administrative Appeals Tribunal and Federal Courts, personal Ministerial decisions are not reviewable. This further contravenes the principle of the rule of law, which stipulates that the use of executive powers should be subject to meaningful parliamentary and judicial oversight.[120]

# Conclusions

123. The effect of this Bill is to penalise a group of extremely vulnerable people indefinitely, on the grounds of their mode of arrival and in response to their exercise of the internationally recognised right to seek asylum from persecution. Indeed, the Bill targets some of the most vulnerable people within this group: people who, in addition to experiencing the trauma of forced displacement, have also been taken to and remained for substantial periods of time in regional processing locations that have been documented as having a 'disastrous mental health impact'.[121]

124. It is also unclear that actual visa applications made to date by persons targeted by the Bill justify the measures contained within the Bill.

125. The Law Council submits that the Bill is unnecessary and disproportionate, and that it raises significant risks of breaching Australia's international refugee and human rights law obligations. The availability of a Ministerial discretion does not sufficiently address those risks.

126. In particular, however, the Law Council calls upon the Committee to give careful consideration to the implications of the Bill for the rule of law in Australia.

127. Legislation which operates retrospectively, without full clarity or certainty, with limited scope for oversight or judicial review, and which disadvantages a group of people on arbitrary and unjustified grounds, has the potential to diminish the confidence of the Australian community in, and to contribute to an erosion of the fairness and integrity of, Australian law.

[120] Law Council of Australia, 'Policy Statement: Rule of Law Principles' (March 2011), Principle 6, <https://www.lawcouncil.asn.au/docs/f13561ed-cb39-e711-93fb-005056be13b5/1103-Policy-Statement-Rule-of-Law-Principles.pdf>.

[121] Médecins Sans Frontières, 'Nauru: New MSF Report Shows the Disastrous Mental Health Impact of Australia's Offshore Processing Policy (Press statement, 3 December 2018) <https://www.msf.org.au/article/statements-opinion/nauru-new-msf-report-shows-disastrous-mental-health-impact-australia%E2%80%99s>. MSF documents its findings in full in its report: *Indefinite Despair: The Tragic Mental Health Consequences of Offshore Processing on Nauru* (December 2018) <https://www.msf.org.au/sites/default/files/attachments/indefinite_despair_3.pdf>.

# Recommendation

- **The Bill is not passed.**