Refugee Council of Australia

SENATE LEGAL AND CONSTITUTIONAL AFFAIRS COMMITTEE

SUBMISSION ON INQUIRY INTO THE MIGRATION (VALIDATION OF PORT APPOINTMENT) BILL 2018

The Refugee Council of Australia (RCOA) is the national peak body for refugees, people seeking asylum and the organisations and individuals who work with them, representing over 190 organisations. RCOA promotes the adoption of humane, lawful and constructive policies by governments and communities in Australia and internationally towards refugees, people seeking asylum and humanitarian entrants. RCOA consults regularly with its members, community leaders and people from refugee backgrounds and this submission is informed by their views.

RCOA welcomes the opportunity to express its strong opposition to this Bill. This Bill is a shameful attempt to retrospectively authorise repeated unlawful actions by the Australian Government, in an attempt to evade its international human rights obligations. Such actions are directly contrary to one of the most fundamental principles of the rule of law, the rule against retrospectivity.

This flagrant breach of the rule of law is even more egregious because it will directly affect the legal rights, and potentially the very lives, of what is likely to be over 1,600 highly vulnerable people, who have been in Australia now for over five years trying to seek protection, as is their fundamental human right. This Bill will prolong the limbo these people have been living in for the past five years.

1 The rule of law

1.1 The rule of law is fundamental to a just system of law. Under the rule of law, people can order their lives according to the law, and can be justly punished for breaches of the law, because they can be reasonably taken to know the law at the time they act. The rule of law, in essence, is what distinguishes a system governed by laws from tyranny, where one can be imprisoned or have legal rights taken away without warning by the caprice of the King (or in our modern constitutional system, the executive branch). It has long been acknowledged as a fundamental constitutional principle in Australia.

1.2 One of the longstanding elements of that principle is that laws, especially punitive laws, should not be retrospective. Retrospective laws make what was unlawful lawful, and what was lawful unlawful, after someone has already done the act subject to the law. If people cannot know in advance what is lawful and unlawful, they cannot be justly expected to order their lives on this basis.

1.3 In general, the principle against retrospectivity is well respected in practice in Australian law, even though it is not well protected in the law itself. The glaring exception to this, of course, is in the case of people seeking asylum. Time and again, the Australian Parliament has, on a bipartisan basis, retrospectively authorised all kinds of legislation in relation to people seeking asylum, such as the actions taken on the Tampa in 2001 and the retrospective authorisation of expenditure on the policy of offshore processing.

Sydney office:
Suite 4A6, 410 Elizabeth Street
Surry Hills NSW 2010 Australia
Phone: (02) 9211 9333 ● Fax: (02) 9211 9288
admin@refugeecouncil.org.au
Web: www.refugeecouncil.org.au ●Twitter: @OzRefugeeCounc

Melbourne office:
Level 6, 20 Otter Street
Collingwood VIC 3066 Australia
Phone: (03) 9600 3302
admin@refugeecouncil.org.au
Incorporated in ACT ● ABN 87 956 673 083

1.4 The passing of such legislation is only possible because the people involved cannot vote and do not have political power. Yet the very purpose of the rule of law is to protect us all equally, especially those who might be unpopular with the executive.

1.5 It is the constitutional purpose of the Australian Parliament to provide a check on executive powers. To some extent, the reports of both the Standing Committee for the Scrutiny of Bills and the Joint Standing Committee on Human Rights have at least discharged their function of scrutinising the exercise of executive power, although neither Committee allows for an opportunity for others to comment. The Scrutiny Committee clearly expressed its concerns that the retrospective effect of this Bill undermined the rule of law, but its concerns were not properly addressed by the Minister.

1.6 Instead, the Minister charactered this Bill as merely seeking to correct a "minor and inadvertent" drafting error. With respect, it is not hard to see that a reef is not a port, and it was always well within the Government's power to seek to amend the legislation itself. More importantly, the law has never been what the Minister believes was intended, but what was written down. That is a fundamental and basic principle of statutory interpretation and ultimately the rule of law, for the simple reason (and constitutional principle) that people are bound by the objective law, not the subjective intent of the drafter or the Government.

1.7 We note that this Bill was not referred to this Committee, until after it had passed the House. This is unusual, and especially disconcerting given this Committee's crucial role in scrutinising legislation that infringes on the rights of people. Although this Bill has now been referred, there has been an exceptionally short deadline to provide submissions to this Committee, and there was no chance for a substantive discussion on the merits of the Bill before the major parties had already adopted their position.

1.8 This breach of the rule of law is especially egregious because of the context. Here, the Australian Government was dragging boats across the seas for the sole purpose of evading an Australian law. These were boats with people who had already been through dangerous journeys, who were highly vulnerable, and were fleeing danger and, in many cases, death. Because of these action, hundreds of people have been forced to live through the disconcerting limbo created by five years of chaotic asylum policy, many of whom are finally on the brink of receiving protection after five years or more.

1.9 The Minister also sought to characterise this Bill as not affecting anyone's substantive rights. This is both misleading and patently incorrect. As the report of the Joint Standing Committee on Human Rights makes clear, the difference can in some cases mean the difference between life or death. Because these people will be designated at arriving at an excised port they will be designated as an 'unauthorised maritime arrival'. An 'unauthorised maritime arrival' is subject to an unfair 'fast tracking' assessment, which creates a very real risk of non-refoulement (return to persecution or other serious harm). That assessment process removes a critical safeguard of an independent review of the merits of the claim and, among other issues, applies a different definition of refugee than that which applies under the Refugee Convention and imposes an arbitrary deadline on the submission of evidence.

1.10 The consequence is that, by processing some people under the fast-track process who should have been processed under the regular refugee status determination process, decisions will be made using an incorrect definition and relying on incomplete information, by people who are not independent of the executive and who have every incentive to refuse their claim for protection.

1.11 There can be few starker examples of a breach of the rule of law than when a government unlawfully detains helpless and frightened people on a boat and moves them around for the sole purpose of avoiding its own laws and, when caught in this deceptive act, tries to erase its error through retrospective validation. There can be few more dramatic consequences to such a breach than to send someone back to danger and, potentially, death.

1.12 We therefore strongly oppose this Bill's retrospective validation of the Australian Government's unlawful actions, and its consequent stripping away of rights from the people who most need them.

Recommendation 1

This Committee should oppose this Bill and uphold the principle against retrospectivity that underpins the rule of law.

2 Clarity and certainty

2.1 Another fundamental principle of the rule of law is that the law should be certain, so that people know what will happen to them. This is especially important in the context of people seeking asylum who have been in a protracted limbo for five years or more, while various governments have changed the rules repeatedly. In this case, creating more uncertainty carries with it great risks to the safety and indeed lives of those affected.

2.2 The transitional provisions of this Bill create this risk of uncertainty. As is explained by the Refugee Advice and Casework Service (RACS) in its submission, it is unclear what will happen to affected people if they have lodged claims at the Administrative Appeals Tribunal (AAT), or are awaiting a decision in the courts or by the Department of Home Affairs.

2.3 We note the irony that the Government has pleaded poor drafting in the original legislation, but has not drafted this Bill with sufficient precision to ensure certainty for the very people in Australia who need it the most. At the very least, the Government should minimise the confusion it has created by protecting the expectations of those who are already midway through the processes of review or decision.

Recommendation 2

This Committee should recommend that the transitional provisions be redrafted to ensure clarity as to what will happen to affected people, by protecting the expectations of those already waiting for decisions through the refugee status determination process.