



29 August 2018

Committee Secretary  
Senate Legal and Constitutional Affairs Committee  
PO Box 6100  
Parliament House  
Canberra ACT 2600

Dear Committee members

**Migration (Validation of Port Appointment) Bill 2018**

We are writing to make a submission to the inquiry into the Migration (Validation of Port Appointment) Bill 2018 (the Bill).

***About SCALES and the Murdoch Clinical Program***

The Southern Communities Advocacy Legal and Education Service Inc. (SCALES) is a community legal centre providing free legal advice, information and representation to low income people and provides a state wide service in the area of immigration. It has a strong track record in a human rights based approach to legal practice. This approach and the work that SCALES does, has been recognised in a number of awards and commendations including a National Australian Human Rights Award. Murdoch School of Law in collaboration with SCALES, runs a clinical legal education program in which students are able to work alongside SCALES's legal practitioners and Migration Agents to assist clients and contribute to law reform.

***Unreasonable timeframe for submissions***

First and foremost we write to express disappointment with the limited timeframe given for making submissions to this review. Nine calendar days is an inadequate amount of time for detailed submissions to be prepared.

***Impact of retrospective application of the Bill***

We note from the *Statement of Compatibility with Human Rights* for this Bill, the impact of the Bill is to "maintain the status quo". In our respectful view, this is not an accurate representation of the impact of the Bill.

The current status quo, as outlined by the Federal Court in a number of decisions, is that asylum seekers who arrived through or were intercepted in the territory of the Ashmore and Cartier Islands between 23 January 2002 and 1 June 2013 are entitled to:

- make a valid visa application under the *Migration Act 1958* and apply for permanent rather than temporary protection;
- have their claim for protection determined in Australia; and
- access the Administrative Appeals Tribunal for a review of any unfavourable decision.

The Bill, in seeking to retrospectively validate that which is not currently valid at law, will retrospectively take away these rights. This is not an insignificant action to be taken by the Government.

This view was also shared by Senate Standing Committee for the Scrutiny of Bills which stated that 'persons should be able to order their affairs on the basis of the law as it stands'.<sup>1</sup> This Committee requested the Minister to answer the following questions:

- the basis of the legal challenges to the validity of the appointment notice and the arguments raised by the applicants in such cases;
- the number of people who have entered the waters of the Territory of Ashmore and Cartier Islands since 23 January 2002, and details as to the status or outcome of their applications for asylum;
- how such persons would have been treated if the 2002 appointment had not been made, and the detriment they might suffer if the 2002 appointment is retrospectively validated; and
- the fairness of applying the Bill to persons who have instituted legal proceedings, but where judgment is not delivered before commencement of the Act.<sup>2</sup>

The Minister's reported response<sup>3</sup> did not properly address these important questions. Subsequent to the Minister's response, it is understood that the Committee "reiterated its concern about the Bill's retrospective operation, stating: 'a fundamental principle of the rule of law is that the governors, like the governed, are bound by the law and cannot exceed their legal authority'".<sup>4</sup>

#### ***Alleged conduct of Government in creating "unauthorised maritime arrivals"***

It is also submitted that, in considering the legality of this Bill, the Committee should also look at the Government's practices in when intercepting their boats at sea. It is understood from solicitors involved in the Federal Court appeals that gave rise to this Bill, asylum seeker boats intercepted at sea were taken to the territory by Customs and Border Force vessels rather than bringing them directly to the mainland so as to forcibly impose this legal fiction of unauthorised maritime arrival upon them.<sup>5</sup> Such action does not demonstrate good faith on the part of the Government in the protection of human rights given that the legal reality of being declared an unauthorised maritime arrival is a significant curtailment of rights.

#### ***Other human rights contraventions***

Beyond the impact of the retrospective application of the law, the law that the Bill is seeking to validate has itself a number of impacts on the human rights of asylum seekers.

Firstly, the right to the equal protection of the law and non-discrimination contained in Article 26 of the ICCPR is arguably infringed by these laws. The excise of the Ashmore and Cartier Islands, if validated, significantly alters the treatment of persons arriving by boat in this region, and other asylum seeker arrivals, chiefly those arriving by air. Those arriving through the Ashmore and Cartier Islands region will be liable to be sent to offshore processing countries, quite likely for many years. Those who arrive by air, for example, are able to apply for protection visas in Australia.

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<sup>1</sup> As cited in Parliamentary Library, BILLS DIGEST NO. 13, 2018–19, 6.

<sup>2</sup> Ibid.

<sup>3</sup> Ibid, 7.

<sup>4</sup> Ibid.

<sup>5</sup> RNZ, *When a lagoon is not a port - appeal's defeat exposes Australia's asylum process* accessed at <https://www.radionz.co.nz/international/pacific-news/364081/when-a-lagoon-is-not-a-port-appeal-s-defeat-exposes-australia-s-asylum-process> .

Secondly, article 31 of the Refugee Convention prohibits the penalising of asylum seekers on the basis of their mode of arrival. The validation of this law arguably contravenes this provision of the Refugee Convention.

In our view there are other human rights concerns associated with the Bill that warrant consideration and reporting on by the Committee, some of which were highlighted by the Parliamentary Joint Committee on Human Rights.<sup>6</sup> Unfortunately due to the unreasonably short timeframe allocated for the making of submissions, it is not possible to set all of these concerns out in detail at this point in time. Therefore, in the interests of Australia's enduring commitment to human rights, as stated in Australia's address to the President of the General Assembly in its bid for a seat on the Human Rights Council,<sup>7</sup> it is respectfully requested that the Committee seek an extension of time to report to the Senate on this Bill and allow for more substantial submissions to be made.

Thank you for your consideration of this material.

Yours sincerely

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Director of Clinical Legal Programs  
On behalf of the Human Rights Law Clinic

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<sup>6</sup> Parliamentary Joint Committee on Human Rights, Human rights scrutiny report, 7, 2018, Canberra, 14 August 2018, pp. 15–22.

<sup>7</sup> General Assembly Seventy-second session Item 115 (d) of the provisional agenda - Elections to fill vacancies in subsidiary organs and other elections: election of fifteen members of the Human Rights Council A/72/212