REFUGEE ADVICE & CASEWORK SERVICE

30 August 2018

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

By Email: legcon.sen@aph.gov.au

Dear Committee Secretary,

Inquiry into the Migration (Validation of Port Appointment) Bill 2018

The Refugee Advice & Casework Service (**RACS**) is a dedicated refugee legal centre and has been assisting people seeking safety in Australia on a not-for-profit basis since 1988.

RACS welcomes the opportunity to provide this submission to the Inquiry into the Migration (Validation of Port Appointment) Bill 2018. Our comments on this matter are drawn from our extensive practice experience with clients seeking Australia's protection including those people who arrived by boat in 2012 and 2013.

1. This Retrospective Bill Further Undermines the Rule of Law

1.1 Between 13 August 2012 and 30 June 2013, it was lawful for a person to arrive to Australian mainland and apply, validly, for a protection visa. Dragging boats through Ashmore Reef, in order to purport that they arrived at an excised offshore place was a ploy designed to prevent a valid protection visa application, until such time as the Minister permitted a valid visa application by "lifting the bar" in section 46A. Dragging boats across the seas, was itself an example of an action that undermines the rule of law as it was at that time.

1.2 Following judicial analysis, which to date, has considered that the appointment of the port was invalid, this Bill would retrospectively make the port appointment valid. RACS is opposed to this Bill on the grounds it would be contrary to the rule of law as it is retrospective and as it validates the actions of dragging boats through arbitrary locations that were themselves designed to undermine the impact of the law at that time.

1.3 We endorse the following comments of the Standing Committee for the Scrutiny of Bills:

> The committee expects that legislation which adversely affects individuals through its retrospective operation should be thoroughly justified in the explanatory memorandum. **Such legislation can undermine values associated with the rule of law.**

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1.4 We endorse the following comments of The Parliamentary Joint Committee on Human Rights:

> 1.53 Given that the 2002 appointment has been found to have been invalidly made, this will have a range of consequences. Specifically, the effect of the 2002 appointment being invalid may be that persons who entered the area of waters within the Territory of Ashmore and Cartier Islands without a valid visa may not have been correctly classified as 'offshore entry persons' (now UMAs).
> 1.54 The classification of a person as an UMA significantly affects how their rights and obligations under the Migration Act are to be determined and how their applications for a visa may be processed. For example, persons who entered the area of waters within the Territory of Ashmore and Cartier Islands between 13 August 2012 and 1 June 2013 without a valid visa and were classified as UMAs became 'fast track applicants' under the Migration Act. This would have resulted in the 'fast track' process applying to the assessment and review of their claims for refugee status and applications for protection visas.
> 1.55 However, the committee has previously considered that the 'fast track' assessment process raises serious human rights concerns. In particular, the committee has found elements of **the 'fast track' assessment process are likely to be incompatible with the obligation of non-refoulement** and the right to an effective remedy. This was on the basis that as **the 'fast track' assessment process does not provide for full merits review** it is likely to be incompatible with Australia's obligations under the ICCPR and the CAT of ensuring independent, effective and impartial review, including merits review, of non-refoulement decisions.

1.5 RACS recommends that the Senate Legal and Constitutional Affairs Committee oppose the Bill.

2. The Transitional Provisions Cause Legal Uncertainty for Pending Cases

Pending Cases at the AAT Migration and Refugee Division (MRD)

2.1 RACS is concerned about the confusion that this Bill will cause certain people going through review at the MRD at the moment.

2.2 It is possible for someone to have already been to the Immigration Assessment Authority (IAA), for the Department of Home Affairs to decide to re-notify the person of its decision according to law and provide a person an opportunity to file a review at the MRD, and then for a person to have a pending case at the MRD. We are concerned if this Bill is passed as is, it is possible that some of these people who have not had a judgement from a court will lose their current review at the AAT as the AAT will no longer have jurisdiction. If the Bill is passed, we would expect that the Department of Home Affairs would consider that such persons are fast track review applicants again, and should then be re-notified again of their initial decision and the Department of Home Affairs should then re-refer such cases to the IAA.

2.3 This would be a confusing state of affairs, particularly as people in this situation may not have a lawyer or registered migration agent to guide them through a confusing process given that funding for most people seeking asylum has been cut, especially at the review stage.

2.4 It is also a confusing state of affairs as any evidence or new information that the person correctly and lawfully submitted to the MRD may then be unfairly excluded by the IAA's restrictive rules on "new information" under section 473DD of the *Migration Act 1958* (Cth) as it was not before the original decision maker at the Department of Home Affairs.

2.5 RACS recommends that the transitional provisions in the Bill, if it is passed, should protect people that have filed a case at the MRD to allow the MRD to continue to have jurisdiction to finalise the review.

Pending Cases at Court

2.6 We are concerned that there may be a number of cases whereby a person has been refused by the IAA and appealed to Court, however they have not received a judgment from the court. We recommend that anyone who has started a case at Court on the grounds that the Ashmore and Cartier Islands are not a port, should be protected in the transitional provisions of the Bill and allowed to continue to progress their case at court without interference from this Bill.

2.7 Already, the transitional provisions as currently drafted would protect the limited number of people who have a judgement from a court, and RACS recommends this be extended to people that have made an application to the court due to this port validity issue.

Pending Cases at the Department of Home Affairs

2.8 There are innumerable cases at the moment where the Department of Home Affairs must process a pending Temporary Protection Visa application or Safe Haven Enterprise Visa application according to the regular rules. Such cases should not be processed according to the "fast track applicant" processing rules.

2.9 People who are not fast track applicants are entitled to expect on the current law that they will have their case reviewed by the MRD not the IAA. The IAA provides an inferior and unsatisfactory form of review, and people should not be forced to have reviews at the IAA due to this Bill and its retrospective provisions.

2.10 We recommend that the transitional provisions of the Bill require that current cases before the Department of Home Affairs continue without people being retrospectively declared fast track applicants.

3. False Imprisonment

3.1 RACS maintains its opposition to offshore processing and submits that any person transferred to offshore processing due to being a purported unauthorised maritime arrival (or offshore entry person) when in fact they were an onshore arrival, should be appropriately compensated according to law.

Please do not hesitate to contact us for further information on 02 8317 6500.

Sincerely,

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