30 August 2018

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

ASRC
Asylum Seeker Resource Centre
Human Rights Law Program

214-218 Nicholson Street
Footscray VIC 3011 Australia
T 03 9274 9889
F 03 9689 1063
asrc.org.au

Dear Committee Secretary

RE: Submission regarding the Migration (Validation of Port Appointment) Bill 2018

We welcome the opportunity to comment on the Migration (Validation of Port Appointment) Bill 2018 ('the Bill').

1. The Asylum Seeker Resource Centre ('ASRC') is deeply concerned about the impact of the Bill on people seeking asylum and strongly recommends that this Bill not be passed. We share the concerns raised by the Standing Committee for the Scrutiny of Bills and consider that the Bill undermines the rule of law and will cause detriment to a significant number of people seeking asylum.

2. The Bill seeks to retrospectively validate the appointment of the Territory of Ashmore and Cartier Islands as a 'proclaimed port'. This follows a string of court decisions, most recently and authoritatively of the Full Federal Court in *DBB16 v Minister for Immigration and Border Protection* (NSD354/2017), which found that the appointment of the Territory of Ashmore and Cartier Islands as a 'proclaimed port' under s 5(5)(a) of the *Migration Act 1958* (Cth) ('Migration Act') was invalid. It is our submission that the Bill should not be passed as the retrospective removal of rights is a serious infringement upon the proper administration of justice and should be avoided.

3. The Bill will have an adverse impact on a highly vulnerable cohort of people seeking asylum who are or have been wrongly processed under the flawed Fast Track system, or have been unlawfully transferred to regional processing centres where many of them remain.

4. It is estimated that over 1,600 asylum cases have been impacted by the invalid appointment,[1] however this is yet to be confirmed by the Minister or the Department of Home Affairs ('Department'). Despite a request from the Senate Scrutiny of Bills Committee,[2] the Minister for Home Affairs refuses to disclose the number of persons

---

1 Ben Doherty, "Australia sailed asylum seekers to remote reef to prevent them accessing mainland", *The Guardian,* 24 July 2018.

2 Senate Scrutiny of Bills Committee, Scrutiny Digest No. 7 of 2018, pp. 1-4; Senate Scrutiny of Bills Committee, Scrutiny Digest No. 8 of 2018, pp. 43-47.

affected by the invalid appointment, or how many affected persons remain in immigration detention or various stages of processing.

5. The Minister and his Department has also failed to inform the persons affected that their immigration status and legal rights have been impacted by the invalid appointment. Instead, the Government has sought to pass the Bill as swiftly as possible so that persons affected do not have time to exercise their rights before they are retrospectively stripped by the enactment of the Bill.

6. The Minister's response to the Senate Scrutiny of Bills Committee stated that "no persons will suffer a detriment if the validity of the Appointment is confirmed by passage of the Bill".[3] This is blatantly incorrect for the reasons set out in this submission. We wish to bring to the Committee's attention our key concerns regarding retrospectivity in contravention of the rule of law, unlawful detention and offshore processing, unfair effects of Fast Track processing and the impact on the rights of the child.

A Retrospectivity: undermining the rule of law

7. On 23 January 2002, the Minister purported to appoint the Territory of Ashmore and Cartier Islands as a 'proclaimed port' for the purposes of the Migration Act in the Commonwealth of Australia Gazette No GN3. That purported appointment was invalid, and the intention of the Bill is to rectify that error, with retrospective effect.

8. Section 3(2) of the Bill provides that the appointment has, **and is taken to have always had**, effect as if the words of the Bill were substituted for the invalid notice published in the Gazette.

9. Section 4(2) of the Bill seeks to **validate all decisions and things done under the Act** in reliance on the invalid appointment of the 'port'.

10. Through these provisions, the Bill seeks to protect the Minister and his Department from all erroneous and unlawful decisions made and actions taken on the basis of the invalid appointment.

11. This is not a matter of mere technicality. The real life consequences of the Minister and his Department's reliance on the invalid appointment of Ashmore Islands as a 'port' cannot be overstated. The effect for people who arrived at an 'excised offshore place' in Australia seeking protection from persecution is that those people were classified as 'unauthorised maritime arrivals'.

12. 'Unauthorised maritime arrival' is a concept found throughout various provisions of the Migration Act, and the application of this status has ongoing consequential effects for a person's liberty and rights. The status of 'unauthorised maritime arrival' reflects Australia's policy of discriminatory treatment of people seeking asylum based on their mode of arrival.

---

3 Senate Scrutiny of Bills Committee, Scrutiny Digest No. 8 of 2018, p. 44.

13. Those people who first entered Australia through the waters of Ashmore Islands were not 'unauthorised maritime arrivals', because they had entered Australia's migration zone. The consequences of being erroneously deemed 'unauthorised maritime arrivals' are explored in the subsequent sections of this submission, but include unlawful detention, drastically curtailed rights to merits review of visa decisions, and a generational impact on children subsequently born in Australia.

14. For the Government to retrospectively validate these unlawful actions is to sweep under the rug the very real, life-changing consequences for an unknown number of people who arrived in Australia seeking sanctuary. As acknowledged by the Senate Standing Committee for the Scrutiny of Bills, legislation which adversely affects individuals through its retrospective operation should be thoroughly justified, as such legislation can undermine the rule of law.

15. The Standing Committee also observed that *"[a]nother important rule of law principle is that the governors are, like the governed, bound by the law and cannot exceed their legal authority. Retrospective validation of government decisions and actions can undermine this principle*." We endorse this observation and submit that the Government's attempt to retrospectively correct its own mistakes for the sake of convenience, is an unacceptable abuse of power.

16. The former Minister's response to the Standing Committee stated "the government considers it unacceptable for individuals to seek to rely on minor and inadvertent omissions in the wording of the Appointment in an attempt to undermine this policy [regarding people smuggling]".[4] This is particularly offensive given that protection visa applicants, especially 'unauthorised maritime arrivals', are treated harshly and considered to lack credibility should they seek to add or change information about their applications once submitted. 'Unauthorised maritime arrivals' are not afforded the luxury of retrospectively correcting mistakes and the Government ought to be held to the same standard.

17. The Standing Committee was dissatisfied with the justification for retrospectivity provided in the Explanatory Memorandum and sought further information from the Minister. The former Minister, however, failed to address the Standing Committee as to the number of persons affected by the invalid appointment, the number of those who are consequently in offshore detention, and how these persons would have been treated had the 2002 appointment not been made.

18. We submit that the former Minister's reluctance to address these issues serves to highlight their importance. Under the current state of the law, there is an unknown but significant number of people with enforceable rights to a declaration that they are not 'unauthorised maritime arrivals', and the possibility of seeking proper assessment of their protection claims on a legally correct basis. The retrospective impact of this Bill is to strip those people of these rights. The former Minister's claim that "no persons will suffer a detriment" by the passage of the Bill is manifestly false.

---

4 Senate Scrutiny of Bills Committee, Scrutiny Digest No. 8 of 2018, p. 45.

19. Section 5 of the Bill provides that the Bill will not affect the rights of parties who have obtained a declaration from a court prior to the passage of the Bill that the purported appointment was invalid. This carve-out will only protect a small handful of affected people who are fortunate or capable enough to obtain legal representation to urgently seek a declaration from a court. Most will be unable to do so prior to the passage of the Bill, if it is passed.

20. At present, applications for judicial review of a migration decision by the Federal Circuit Court can take three years to be heard and resolved. Anyone seeking the benefit of s 5 of the Bill will therefore need to bring an urgent interlocutory application seeking a declaration on a summary basis, which will be resisted and delayed by the respondent Minister. Even if the Court is inclined to expedite each request for an interlocutory hearing, the Court's current overburdened schedule will not allow for the hearing of all applications for some time. Many affected applicants will simply miss out.

21. The former Minister also failed to adequately respond to the Standing Committee's inquiry as to the fairness of the Bill to persons who have instituted proceedings but not received judgment prior to the commencement of the Act. The Committee noted that such persons may be liable to an adverse costs order.

22. We submit that the retrospective impact of the Bill will affect current court proceedings in an unacceptable manner. Not only will the Bill strip affected persons of their current rights, it will leave some in the significantly worse position of facing a debt to the Commonwealth. Due to the considerations listed at 20 above and the need to bring interlocutory applications for summary judgment, the former Minister is grossly mistaken in stating that it is "highly unlikely" that an adverse costs order would issue from a claim regarding the validity of the appointment alone.

23. There is a general presumption at law against the retrospective application of a statute, and if a change in law is to apply retroactively then Parliament must justify why it is necessary to depart from the rule of law. We submit that there is no acceptable justification for the passage of this retrospective Bill.

B Unlawful detention and offshore processing

24. One of the most severe consequences under the Migration Act for those persons deemed 'unlawful maritime arrivals' is found in s 198AD, which provides that unlawful maritime arrivals must be taken from Australia to a regional processing country as soon as reasonably practicable.

25. Prior to the introduction of the concept of 'unlawful maritime arrival' to the Migration Act in June 2013, the obligation in s 198AD to transfer someone to a regional processing centre applied to 'offshore entry persons', defined in part as a person who entered Australia at an excised offshore place. Ashmore Islands was not a validly excised offshore place.

26. Persons who arrived in Australia at Ashmore Islands were never 'unlawful maritime arrivals' nor 'offshore entry persons'. Section 198AD did not apply, and the Minister

and his Department had no lawful right to transfer persons who arrived at Ashmore Islands to regional processing centres.

27. We can inform the Committee with certainty that there are refugees on Nauru and Manus Island who arrived on boats which passed through Ashmore Islands. The people on these vessels were not 'unauthorised maritime arrivals'. These people were not liable to be subjected to offshore processing. However, these people were transferred, pursuant to an unlawful exercise of power under s 198AD, to regional processing centres where they have been left to languish for years. These people have no realistic prospects of resettlement anywhere under the current Government.

28. Unlawful or arbitrary deprivation of liberty is a serious transgression of Australia's international human rights obligations, and the toll on those left to perish in offshore processing camps has never been more apparent. The crisis recently outlined by whistleblowers who have worked on Nauru and witnessed the impact first hand is dire. Twelve people have died. Children as young as 10 are attempting suicide. Some of these children should lawfully have been processed in Australia, and should now be growing up in an environment of safety and certainty rather than indefinite limbo.

29. The passage of the Bill would be docile acceptance of this Government's failure to find resettlement solutions for the refugees languishing on Nauru and Manus Island, and an endorsement of the gross injustice suffered by those who should never have been transferred there in the first place.

C Unfair processing under the Fast Track regime

30. By incorrectly deeming persons seeking asylum as 'unauthorised maritime arrivals', many people have been unlawfully subjected to the unfair 'Fast Track' process of assessing their claims for protection. As noted by the Senate Scrutiny of Bills Committee, "the question of whether a person is or is not a UMA [unauthorised maritime arrival] is of great significance with respect of how a person's rights and obligations under the Migration Act should be determined and how their applications should have proceeded".[5]

31. According to the Fast Track process established under Part 7AA of the Migration Act, applicants only have access to limited merits review by the Immigration Assessment Authority (IAA) as opposed to the Administrative Appeals Tribunal (AAT). This is significant because the IAA merits review process is vastly inferior to that provided by the AAT. As such, it is much more likely to produce wrong decisions, which can result in the return of people to countries where they face persecution, in breach of Australia's non-refoulement obligations.

32. Notably, the IAA is bound to conduct a review of Department decisions 'on the papers' and may only consider new information regarding applicants' protection claims in 'exceptional circumstances'[6] and this must be provided within the very short timeframe of 21 days from the time of referral. Requests for extensions of time are routinely

5 Senate Scrutiny of Bills Committee, Scrutiny Digest No. 7 of 2018, [1.8].
6 Migration Act 1958 s 473DD.

refused. Given that most applicants are not legally represented, many are unable to provide responses to the IAA within the acceptable form or timeframe. The fact that many applicants are unable to participate in any meaningful way in the review process highlights how the IAA's procedures are fundamentally unfair and can result in substantively unfair, and often wrong, decisions.

33. Applicants' access to full merits review is essential to ensuring that their protection claims are comprehensively and fairly assessed, particularly where an incorrect refusal of a protection visa application could, quite literally, be a matter of life or death. Given the high volume of decisions made by the Department, the checks and balances afforded through the full merits review provided by the AAT are crucial to ensuring that protection claims are properly reviewed.

34. Due to the lack of funded legal assistance available, people seeking asylum are often unrepresented and face significant barriers to effectively presenting their protection claims, such as language barriers and mental health illness as a result of surviving torture and trauma and engaging with the difficult asylum process in Australia. In addition, the relevant law and processes under the Migration Act in relation to protection visas are particularly complex, which make it difficult for applicants to effectively represent themselves. These circumstances create an environment where errors in decision-making are common, therefore highlighting the importance of applicants' access to full merits review before the AAT, as opposed to the limited IAA review process, in order to rectify any errors made during the initial decision-making process.

35. In addition, some categories of people subjected to the Fast Track process can be excluded from merits review altogether, leaving these people with no opportunity for any review of the merit of their need for protection or the reasons for the exclusion, and only extremely limited access to judicial review.[7] Further, those who only have access to merits review under the IAA process are unable to seek ministerial intervention under section 417 of the Migration Act, which provides the Minister with the power to substitute a Tribunal's decision with a more favourable decision. This further curtails the rights of 'Fast Track' applicants to have their protection claims and other humanitarian concerns adequately assessed.

36. People who arrived in Australia via the waters of Ashmore Island were not 'unauthorised maritime arrivals' and should not have been subjected to Fast Track processing. The IAA does and did not have jurisdiction to review these people's claims, and these people should have access to full merits review before the AAT. Passage of this Bill would condemn a significant number of people to an unfair and inferior processing system which seriously limits their rights to fairness and justice.

D Impact on the Rights of the Child

---

7 Exclusion from all merits processes can be applied to those who the Department of Home Affairs has found to have access to a safe third country, those previously refused protection by UNHCR or Australia, those who the Department has found to have manifestly unfounded claims or provided a bogus document and insufficient explanation for doing so. See Migration Act ss.473DC-473DF.

37. A further legal consequence of being incorrectly classified as an 'unauthorised maritime arrival' is that children who are born in the migration zone to a parent who has that status, are also considered to be 'unauthorised maritime arrivals' under s 5AA(1A) of the Migration Act. This is the case regardless of the other parent's visa status.[8] It is, in effect, a status which is inherited and has intergenerational consequences.

38. Children of 'unauthorised maritime arrivals' are not able to make any kind of visa application in Australia unless and until the Minister individually exercises his discretion to lift the statutory bar in s 46A of the Act to allow the child to lodge a protection visa application.[9] This puts children at risk of being deported without ever having had an opportunity to have their claims for protection assessed, contrary to Australia's obligations under the Refugees Convention and in potential violation of non-refoulement obligations under the International Covenant on Civil and Political Rights, the Convention Against Torture and the Convention on the Rights of the Child.[10]

39. The detention of 'unauthorised maritime arrivals' and the effects of the Fast Track process are therefore also felt by the children of those who arrived at Ashmore Island and were incorrectly classified. This is particularly concerning given the widely acknowledged negative impacts of detention on the mental health of children, particularly where they are detained for prolonged periods.[11] The prolonged, arbitrary or unlawful detention of children is also contrary to Australia's obligations under the Convention on the Rights of the Child.[12]

40. Further, where one parent is classified as an 'unauthorised maritime arrival' and the other is not, this may result in children being separated from their parents for the purposes of detention or deportation, which is similarly contrary to Australia's international obligations towards children.[13]

41. It is therefore our submission that if this Bill were passed, it would have serious consequences for children born in the migration zone to parents affected by the invalid appointment. The passage of the Bill would be an endorsement of the treatment of children as 'unauthorised maritime arrivals', and the negative consequences that follow from that status.

E Recommendations

42. The Committee should recommend that the Bill in its entirety is not passed.

---

8 Migration Act s 5AA(1A)(b).
9 Migration Act s 46A(2).
10 *Convention Relating to the Status of Refugees,* art 33; *Convention on the Rights of the Child,* art 3.
11 See the report of the Australian Human Rights Commission on the National Inquiry into Children in Immigration Detention, available at: https://www.humanrights.gov.au/sites/default/files/document/publication/forgotten_children_2014.pdf.
12 *Convention on the Rights of the Child,* art 37.
13 *Convention on the Rights of the Child,* art 9.

43. As outlined, the proposed Bill undermines the principle of the rule of law, and its passage into law will have a serious detrimental impact on affected persons and their children.

Yours faithfully

Kon Karapanagiotidis

OAM, Chief Executive and Founder

Asylum Seeker Resource Centre (ASRC)