Refugee Legal:

Submission to the Senate Legal and Constitutional Affairs Legislation Committee: Migration (Validation of Port Appointment) Bill 2018.

Introduction – Refugee Legal

1. Refugee Legal (formerly the Refugee and Immigration Legal Centre) is a specialist community legal centre providing free legal assistance to refugees, asylum-seekers and disadvantaged migrants in Australia.[1] Since its inception over 30 years ago, Refugee Legal and its predecessors have assisted many thousands of asylum seekers and migrants in the community and in detention. Refugee Legal is the largest provider of free legal assistance to such people in Australia and in the last financial year our total client assistance was over 14,000.

2. Refugee Legal specialises in all aspects of refugee and immigration law, policy and practice. We also play an active role in professional training, community education and policy development. We are a longstanding member the peak Department of Home Affairs/Immigration and Border Protection-NGO Dialogue and the Department's Protection Processes Reference Group. Refugee Legal has substantial casework experience and is a regular contributor to the public policy discourse on refugee and general migration matters.

3. We welcome the opportunity to make a submission to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the Migration (Validation of Port Appointment) Bill 2018 (Cth) (**the Bill**). The focus of our submissions and recommendations reflect our experience and expertise, as briefly outlined above.

Outline of submissions

4. We recommend that the Bill not be enacted. Our principal concerns with the Bill can be summarised as follows:

    (i) It would operate in practice to retrospectively strip those affected of existing fundamental legal rights (including the right to a fair hearing of their case), protections and access to legal remedies;
    (ii) The enactment would be inconsistent with Australia's international obligations;
    (iii) The people that would be affected are some of the most vulnerable members of the Australian community; and
    (iv) No compelling case has been made to justify its proposed retrospective application.

5. Each of these matters is further developed below.

[1] Refugee Legal (Refugee and Immigration Legal Centre) is the amalgam of the Victorian office of the Refugee Advice and Casework Service (RACS) and the Victorian Immigration Advice and Rights Centre (VIARC) which merged on 1 July 1998. Refugee Legal brings with it the combined experience of both organisations. RACS was established in 1988 and VIARC commenced operations in 1989.

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Relevant background

Statutory framework

6. Under the Act, a person who arrives in Australian territory by sea is not taken to have entered Australia until that person has "entered the migration zone"[2]. The term "migration zone" is defined in this context for boat arrivals as including "a port"[3], which is defined for this purpose as "a proclaimed port"[4]. A "proclaimed port" is further defined to include a port appointed by the Minister under subsection 5(5) of the Act[5].

7. On 21 December 2001 the then Minister signed an instrument in purported exercise of his power under s 5(5) of the Act to appoint as a proclaimed port "the area of waters within the Territory of Ashmore and Cartier Islands […]"[6] (**the Appointment**).

8. Prior to 1 June 2013 people who arrived in Australia by boat without a visa at an "excised offshore place"[7] were subject to a statutory bar on applying for a visa[8], including a protection visa.[9] People who arrived at the Australian mainland or otherwise at any other location in Australian territory not specified as an "excised offshore place" prior to this date were generally not legally barred from applying for visas. Relevantly, "excised offshore place" was defined for this purpose to include, among other locations, "the Territory of Ashmore and Cartier Islands".[10]

9. On 1 June 2013 this statutory bar was extended to also include people who arrived in Australia by boat without a visa at *any* location.[11] That is, from this date onwards, irrespective of where a person is taken to have arrived in Australia, if they arrived by boat without a visa they are barred from lodging a valid application for any visa. From this date, these people were defined in s 5AA of the Act as an "unauthorised maritime arrival".[12]

10. On 18 April 2015 the statutory framework governing the Fast Track Assessment (**FTA**) process was inserted in the Act.[13] The FTA applied to all people seeking asylum who arrived in Australia by boat after 13 August 2012 and subject to the statutory bar referred to above. One of the main features of the FTA is that the people subject to it are unable to access merits review by the Administrative Appeals Tribunal (**AAT**) of a decision by a

[2] s 5AA(2) of the Act.
[3] s 5(1) of the Act.
[4] s 5(1) of the Act.
[5] Which provides that the Minister may, by notice published in the Gazette: (a) appoint ports in an external Territory to which this Act extends as proclaimed ports for the purposes of this Act and fix the limits of those ports: s 5(5)(a).
[6] Appointment of a port as a proclaimed port an area of waters within the Territory of Ashmore and Cartier Islands by former Minister Ruddock on 21 December 2001 purportedly pursuant to s 5(5)(a) of the *Migration Act 1958* (Cth), Commonwealth of Australia Gazette No GN 3 on 23 January 2002.
[7] As defined in s 5(1).
[8] See: s 46A.
[9] The Minister has a personal non-compellable discretion to lift this bar under s 46A(2) if "the Minister thinks that it is in the public interest to do so".
[10] Paragraph 5(1)(b) of the definition of "excised offshore place".
[11] *Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Act 2013* (Cth), s.3, sch.1, items 7 and 8.
[12] Ibid.
[13] *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014*, s 3, Schedule 4.

delegate of the Minister for Immigration & Border Protection to refuse to grant them a protection visa. Instead those decisions are referred to the Immigration Assessment Authority (**IAA**) for a very limited form of review. Most critically, the IAA process does not afford an oral hearing and prohibits it from considering new information other than in exceptional circumstances.

Recent judicial authority

11. The Federal Circuit Court of Australia recently held in a number of its decisions that the Appointment (referred to above) was invalid for the reason that the area it describes is not a "port" for the purposes of the Act, including because it lacks the characteristics of a 'port' in the ordinary sense.[14] This reasoning was subsequently upheld by the Full Court of the Federal Court of Australia.[15] In each of these instances the Court held the IAA did not have jurisdiction to review the delegate's decision because the applicant was not subject to the FTA because he/she was not an "unauthorised maritime arrival" under s 5AA of the Act. In each instance the Court reached this conclusion based on the following reasoning:

    (i) The Appointment was invalid for the above reasons;
    (ii) The applicant arrived in Australia *before* 1 June 2013 (when all Australian territory was excised);
    (iii) The first "port" of arrival for the applicant was on the Australian mainland as this is where they were taken after passing through the Territory of Ashmore and Cartier Islands; and
    (iv) At the time of the applicant's arrival at the Australian mainland that location was not an "excised offshore place".

12. Following this, subject to the Minister's application for special leave to the High Court to challenge the above Full Federal Court authority and the passage of the Bill, these and any other people in the same circumstances who have had their application refused by a delegate are entitled to engage the jurisdiction of the AAT by lodging an application for review[16], and the IAA has no jurisdiction to review the delegate's refusal decision.

Ashmore reef transit

13. The Department of Home Affairs (**the Department**) has previously advised the Commonwealth Ombudsman that prior to 1 June 2013 it intentionally transferred asylum seekers intercepted in Australian waters to 'Ashmore Lagoon' for the sole purpose of "rendering them offshore arrivals and thus subject to the s 46A bar".[17] That is, the Australian government intentionally redirected people aboard asylum seeker vessels who would otherwise have arrived in Australia and be legally permitted to lodge a protection visa application, to Ashmore Reef for the purpose of imposing a statutory bar on them

[14] See: *DBC16 v Minister for Immigration & Anor* [2018] FCCA 1802 (11 July 2018); *DBD16 v Minister for Immigration & Anor* [2018] FCCA 1801 (11 July 2018); and *BJO16 v Minister for Immigration & Anor* [2018] FCCA 2376 (27 August 2018).
[15] *DBB16 v Minister for Immigration and Border Protection* (No:NSD354/2017) [judgment not published as at 29 August 2018].
[16] Under s 414, Part 7 of the Act.
[17] Commonwealth Ombudsman, *Investigation into the processing of asylum seekers who arrived on SIEV Lambeth in April 2013*, January 2017, at [2.15], available at: http://www.ombudsman.gov.au/__data/assets/pdf_file/0016/42622/Lambeth-report-final-for-website-A423114.pdf [accessed 29 August 2018].

preventing them from being capable of applying for a visa.

The proposed amendments

14. The Bill proposes three key measures purporting to *retrospectively:*

    (i) provide that the Act has, and is taken always to have had, effect as if the area described in the Appointment were a valid "port";
    (ii) provide that anything previously done under the Act that would have been invalid because of the invalidity of the Appointment, is taken not to be invalid on that basis; and
    (iii) correct a purported error in the Appointment by re-specifying the geographical coordinates of the area of waters within the Territory of Ashmore and Cartier Islands stated in the Appointment.

15. The Bill purports to provide that the provisions proposed for enactment do not apply to cases where judgment has been delivered by a court before the commencement of the provisions but only if the validity of the appointment was at issue in the proceedings and the judgment set aside the appointment or declared it to be invalid. That is, the Bill proposes that the people affected as outlined above are not affected by the proposed provisions if, at the time of commencement[18], they have already obtained an order from a court that the appointment is invalid in respect of them personally.

Retrospective application

16. Refugee Legal is profoundly concerned with the retrospective effect of the proposed provisions and the adverse impact on those people who would, as a consequence of the amendments, be unfairly stripped of fundamental legal rights to due process they currently have under the law.

17. This effect of the provisions proposed by the Bill offends against the longstanding legal principle of the presumption against retrospectivity. Retrospective laws are commonly considered inconsistent with the rule of law as they make the law less certain and reliable. A person who makes a decision based on what the law is, may be disadvantaged if the law is changed retrospectively. It is said to be unjust because it disappoints "justified expectations".[19] Enjoyment of common law rights and freedoms apply not only to citizens, but also to non-citizens.[20] This includes the presumption against retrospective operation of the law, and the requirement for appropriate justification for any such laws.

18. In this regard, we refer to the Senate Standing Committee for the Scrutiny of Bills' findings in relation to the Bill's proposed retrospective operation, including that committee's observation that an important rule of law principle is that the governors are, like the governed, bound by the law and cannot exceed their legal authority, and that retrospective validation of government decisions and actions can undermine this principle.[21]

[18] The entire Act is proposed to commence the day after the Act receives the Royal Assent: Migration (Validation of Port Appointment) Bill 2018, cl 2(4).
[19] HLA Hart, *The Concept of Law* (Clarendon Press, 2nd ed, 1994) 276.
[20] *Bradley v Commonwealth* [1973] HCA 34; 128 CLR 557, at [26].
[21] The Senate Standing Committee for the Scrutiny of Bills, Scrutiny Digest 7 of 2018, Chapter 1, Commentary on Bills, Migration (Validation of Port Appointment) Bill 2018, at [1.6].

19. Further, it is submitted that the proposed retrospective application to strip people of substantive legal rights is contrary to the principle of legality. The principle of legality is a rule of statutory interpretation: if Parliament intends to interfere with fundamental rights or principles, or to depart from the general system of law, then it must express that intention by clear and unambiguous language.[22] This principle sets its face against retrospectivity and provides that Parliament must use clear and unambiguous language to enact a statute "which falsifies, retroactively, existing legal rules upon which people have ordered their affairs, exercised their rights and incurred liabilities and obligations".[23]

Retrospective stripping of legal rights

20. It is submitted that the Bill would operate in practice to retrospectively strip and deny those affected of existing fundamental legal rights (including the right to a fair hearing of their case) and legal remedies.

21. Currently, under Australian law all people who arrived in Australia in these circumstances are not subject to the FTA (including review by the IAA). Consequentially, these people have a legal right to apply to the AAT for merits review of a decision by a delegate to refuse to grant them a protection visa. The Bill purports to retrospectively strip these people of this statutory right to access review by the AAT and replace it with review by the IAA.

22. The IAA's jurisdiction provides only a very limited form of review that is largely undertaken 'on the papers', and critically:

    (i) IAA applicants have no legal right to an oral hearing for their case, unlike the AAT;
    (ii) the IAA is legally prohibited from considering new information in support of an applicant's case other than in extremely limited circumstances, unlike the AAT that must consider all information it considers relevant for an applicant's case;
    (iii) the IAA's statutory mandate is to "pursue the objective of providing a mechanism of *limited review* that is efficient and *quick*" [emphasis added].

23. We also submit that, in addition to retrospectively stripping people of their otherwise existing right to a fair hearing, the Bill also proposes to retrospectively deny people an existing right to legal remedy. Currently, people affected may have been unlawfully subject to the wrong protection visa assessment process and unlawfully denied access to a more favourable protection visa process, including full *de novo* merits review. Also, due to the Department's mistaken view these people were an "authorised maritime arrival", they may have also been:

    (i) incorrectly advised by the Department that they were legally barred from applying for a protection visa without the Minister first inviting them to do so; and/or
    (ii) incorrectly advised by the Department that they were legally barred from applying for a bridging visa to allow them to be released from immigration detention; and/or

[22] *Electrolux Home Products Pty Ltd v Australian Workers' Union* [2004] HCA 40; 221 CLR 309; 209 ALR 116; 78 ALJR 1231 (2 September 2004), per Gleeson CJ at [21].
[23] *Australian Education Union v General Manager of Fair Work Australia* [2012] HCA 19; 246 CLR 117; 86 ALJR 595; 286 ALR 625 (4 May 2012), per French CJ, Crennan and Kiefel JJ at [30].

(iii) incorrectly advised by the Department that they were legally barred from applying for other kinds of visas that they may be have been eligible for; and/or
(iv) prevented from being able to apply for a bridging visa to leave immigration detention; and/or
(v) held in immigration detention on the above basis for extended period, and for a much longer duration than they otherwise would have been if they were correctly identified as not being an "unauthorised maritime arrival"; and/or
(vi) prevented from applying for other visas in Australia; and/or
(vii) prevented from being able to apply for a bridging visa in the community once their earlier bridging visas expire – leading to them spending large periods 'unlawful' in the community; and/or
(viii) incorrectly denied bridging visas with work rights and Medicare.

24. The Bill purports to retrospectively deny people the right to challenge an act or decision under the Act, including those relating to the above, where it was founded on the Appointment.

25. The Explanatory Memorandum to the Bill states that "[t]he effect of the Bill will simply maintain the status quo for unauthorised maritime arrivals and, where relevant, fast track applicants, under the Act who entered Australia via this proclaimed port between 23 January 2002 and 1 June 2013".[24] For the above reasons, we submit that this is a fundamentally incorrect characterisation of the practical effect of the Bill. We note that a similar view was expressed by the Parliamentary Joint Committee on Human Rights.[25]

International obligations

26. It is submitted that the enactment of the Bill would be inconsistent with Australia's international *non-refoulement* obligations.

27. As we previously advised in our submission to the Committee for its inquiry into the Bill that inserted the FTA and IAA legal frameworks into the Act, the limited level of review afforded by the IAA flies in the face of the concept of a fair hearing and represent a fundamental and radical departure from what the rule of law demands in Australia and also how other comparable countries consider and decide protection claims.[26]

28. The Parliamentary Joint Committee on Human Rights has previously opined that the FTA assessment process raises serious human rights concerns, and in particular, the IAA is likely to be incompatible with the obligation of non-refoulement and the right to an effective remedy.[27] This was on the basis that, as the IAA does not provide for full merits review, it is likely to be incompatible with Australia's obligations under the International Covenant on Civil and Political Rights and the Convention against Torture and Other Cruel, Inhuman or

[24] Explanatory Memorandum, Attachment A: Statement of Compatibility with Human Rights, Migration (Validation of Port Appointment) Bill 2018, at [3]. See also: House of Representatives, Migration (Validation of Port Appointment) Bill 2018, Second Reading Speech, Wednesday, 20 June 2018.
[25] Parliamentary Joint Committee on Human Rights, Human Rights Scrutiny Report: Report 7 of 2018, 14 August 2018, at [1.56].
[26] Senate Legal and Constitutional Affairs Legislation Committee, Inquiry into the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014, Refugee and Immigration Legal Centre – submission, at [3.4], available at: https://www.aph.gov.au/DocumentStore.ashx?id=6358cdae-eb7e-48ca-8db4-55f8c1bf2ab1&subId=301613 [accessed 30 August 2018].
[27] Parliamentary Joint Committee on Human Rights, Human Rights Scrutiny Report: Report 7 of 2018, 14 August 2018, at [1.55] and [1.59].

Degrading Treatment or Punishment of ensuring independent, effective and impartial review, including merits review, of non-refoulement decisions.[28] We reiterate this submission.

Vulnerabilities of those affected

29. It is our experience that people affected by this issue are often affected by acute vulnerabilities, including (but not limited to):

    (i) Mental and physical health;
    (ii) Past torture and trauma;
    (iii) Family violence;
    (iv) Long periods in immigration detention;
    (v) Illiteracy and lack of English proficiency;
    (vi) Significant financial hardship, including as a consequence of extended periods in Australia without the right to work and ineligibility to access financial assistance;
    (vii) Long-term separation from immediate family, including spouses and children; and
    (viii) Long periods in Australia without being permitted to engage in any legal process to consider their protection claims, and thereafter long delays in processing of those claims.

30. In this regard, it is submitted that any retrospective stripping of fundamental legal rights and remedies, particularly those relating to the assessment of their protection claims in Australia, would have an additionally detrimental effect on those people affected due to their heightened vulnerability.

Policy rationale

31. We note that the stated policy intent of the Bill is to confirm the validity of the Appointment[29] and reiterate the Government's original intention that the Appointment is, and has always been, valid[30]. However, as the courts successively found in the above instances, the Appointment is not and has never been 'valid'. On this basis, it is submitted that the policy rationale for the proposed amendment has not been stated in the requisite clear and unambiguous language.

32. It is further submitted for this and those other compelling reasons identified above, including: the consequential retrospective stripping of fundamental legal rights and access to legal remedies; the particular vulnerabilities of the people affected; and the significant disadvantage and hardship suffered for many years by the people affected due to them being wrongly deemed an "unauthorised maritime arrival"; no sufficiently compelling policy case has been made by the government to justify the passage of the Bill.

[28] Ibid.
[29] Explanatory Memorandum, Migration (Validation of Port Appointment) Bill 2018, Outline.
[30] Explanatory Memorandum, Attachment A: Statement of Compatibility with Human Rights, Migration (Validation of Port Appointment) Bill 2018, at [3]; and House of Representatives, Migration (Validation of Port Appointment) Bill 2018, Second Reading Speech, Wednesday, 20 June 2018.

Conclusion

For these reasons we submit that the Bill not be passed.

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30 August 2018

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