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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 Legislation Amendment (Regional Processing Cohort) Bill 2019 [Provisions]

Australian Lawyers for Human Rights (**ALHR**) is grateful for the opportunity to provide this submission to the Senate Legal and Constitutional Affairs Legislation Committee (**Committee**) in respect of its inquiry into the provisions of the *Migration Legislation Amendment (Regional Processing Cohort) Bill 2019* (**Bill**).

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1. Summary

1.1. This submission reiterates ALHR's concerns raised in the submission to Committee's inquiry in relation to the *Migration Legislation Amendment (Regional Processing Cohort) Bill 2016*.

1.1. ALHR is of the view that this Bill should not be passed and should be withdrawn. In our view the Bill is seriously flawed. Legally, the proposed legislation breaches Australia's international obligations and, socially, it undermines the principles of family unity, cohesion and multiculturalism that are fundamental to Australia's identity.

2. The Proposed Legislation

2.1. The Bill seeks to amend the *Migration Act 1958* (Cth) (***Migration Act***) and the *Migration Regulations 1994* (Cth) (***Migration Regulations***) to prevent 'unauthorised maritime arrivals' and 'transitory persons' who were taken to a regional processing country after 19 July 2013 and who were at least 18 years of age (the 'designated regional processing cohort') from making a valid application for an Australian visa.[1]

2.2. This means that this cohort will not be permitted to enter Australia, even if they have been resettled to a third country and have acquired permanent residence or citizenship of that country.

2.3. The statutory bar on making a valid visa application can be lifted by the Minister exercising his personal and non-compellable powers, if he considers it to be in the 'public interest'.[2]

3. 2016 Bill

3.1. ALHR notes that the substantive provisions of the Bill were originally proposed via the *Migration Legislation Amendment (Regional Processing Cohort) Bill 2016* (**2016 Bill**). The 2016 Bill was introduced into Parliament on 8 November 2016 and passed the House of Representatives on 10 November 2016. On 10 November 2016, the Senate referred the 2016 Bill to the Committee for inquiry and report by 22 November 2016.

3.2. Despite a very short time frame to make submissions with the closing day for submissions being 14 November 2016, more than 80 public submissions were made in relation to the enquiry, each of them raising concerns about the 2016 Bill. The Parliamentary Joint Committee on Human Rights and the Senate Standing Committee for the Scrutiny of Bills also raised concerns about the 2016 Bill.[3]

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[1] *Migration Legislation Amendment (Regional Processing Cohort) Bill 2019* (Cth) sch 1 amending ss 46A(2) and 46B(2).
[2] Ibid.
[3] Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, Scrutiny Digest (Digest No 1 of 2017, 8 February 2017) 87; Parliamentary Joint Committee on Human Rights, Parliament of Australia, Human rights scrutiny report (Report 2 of 2017, 21 March 2017) 85.

3.3. The Committee published its report on 22 November 2016. Despite the extensive opposition and concerns raised about the 2016 Bill, the majority of the Committee recommended the Bill be passed, with the Labor Senators and the Australian Greens providing dissenting reports.[4]

3.4. The Bill lapsed on 1 July 2019.

4. The Bill is excessive and unnecessary

4.1. The Explanatory Memorandum states that the Bill aims to:

(a) strengthen the Government's ability to reduce the risk of non-citizens circumventing Australia's migration laws;

(b) prevent non-citizens undermining the Australian Government's return and reintegration assistance packages and resettlement arrangements; and

(c) discourage people from attempting hazardous boat journeys with the assistance of people smugglers.

4.2. As the Law Council of Australia noted in its submission to the 2016 Bill, the *Migration Act* already contains extensive powers and safeguards to ensure that visas of any kind are obtained legitimate and genuine reasons without the additional provisions of this Bill.[5]

4.3. ALHR also considers there is insufficient evidence to support the necessity of banning people who have ultimately obtained permanent protection elsewhere. As Professors McAdam, Saul et al pointed out in their submission to the 2016 Bill, 'If people have found permanent protection elsewhere – including as citizens of another country – and subsequently seek to travel to Australia, they would have no basis on which to remain here beyond the term of their visitor (or other) visa.'[6]

4.4. Given the serious consequences which a lifetime ban could have for individuals and their families, it is incumbent upon the Government to provide evidence and justification as to why the proposed measures are a necessary and proportionate response to the identified objective of the Bill.

[4] Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, Migration Legislation Amendment (Regional Processing Cohort) Bill 2016 [Provisions] (Report, 22 November 2016).
[5] Ibid, 10 [36].
[6] Professors McAdam, Saul et al, Submission to the Inquiry into the Migration Legislation Amendment (Regional Processing Cohort) Bill 2016 (11 November 2016) 3.

5. Human rights implications of the Bill

5.1. ALHR notes the Bill's Statement of Compatibility with Human Rights states that the Bill is compatible with human rights and freedoms set out in international human rights instruments ratified by Australia.

5.2. However, ALHR has serious concerns about the human rights implications of the Bill, in particular that it violates:

(a) international refugee law; and

(b) rights of family and children.

5.3. ALHR considers that Australia owes human rights obligations to people subject to offshore processing because of Australia's effective control of this group of people.

5.4. International refugee law

5.4.1. As a signatory to the 1951 UN *Convention Relating to the Status of Refugees* and its *1967 Protocol* (Refugee Convention), Australia has undertaken to provide protection for those who seek asylum in Australia and who are found to be refugees. Article 31(1) prohibits states from imposing a 'penalty' on asylum seekers who come directly to its territory 'illegally' (i.e. by boat) provided that they present themselves without delay to the authorities and show good cause for their illegal entry'.[7]

5.4.2. This proposed legislation does exactly that: it penalises those who arrive by boat by preventing them from ever entering Australia. It would create different classes of refugees by discriminating between those who come by boat and those who arrive by plane.

5.4.3. ALHR agrees with the UNHCR that this bifurcated and differentiated system of treatment for asylum seekers arriving by sea accords lower rights and standards of treatment than to those arriving by other means and thus discriminates unfairly against refugees on the basis of their manner of arrival and is at variance with international law.[8]

5.4.4. We refer you to the previous submission of Professors McAdam, Saul et al for a comprehensive explanation of the international law aspects of this Bill.[9]

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[7] *1951 Refugee Convention,* art 31(1).

[8] UNHCR, Submission to the Inquiry into the *Migration Legislation Amendment (Regional Processing Cohort) Bill 2016* (16 November 2016) [10].

[9] Professors McAdam, Saul et al, Submission to the Inquiry into the *Migration Legislation Amendment (Regional Processing Cohort) Bill 2016* (11 November 2016) 2-3.

5.5. Rights of families and children

5.5.1. As the Statement of Compatibility notes: 'Where the non-citizen has family members who have been granted a visa to enter or remain in Australia, this may result in separation, or the continued separation, of a family unit.'[10]

5.5.2. Indeed, many of the recognised refugees on Manus Island and Nauru already have family residing in Australia. Denying these refugees their right to family reunification breaches Australia's obligations under the Convention on the Rights of the Child,[11] the International Covenant on Civil and Political Rights,[12] and the International Covenant on Economic, Social and Cultural Rights.[13]

5.5.3. It will cause further mental anguish for those on Manus Island and Nauru. We find it difficult to reconcile the government's move to facilitate family reunification in other areas of the migration program (for example, through the Sponsored (Temporary) Parent visa for the parents of Australian citizens, Australian permanent residents and eligible New Zealand citizens)[14] with these measures, which seek to deprive refugees of the very same opportunities. If it is recognised that the family is a fundamental unit of society,the right to family reunification must be available to all, without discrimination.

6. Radical departure from current law and policy

6.1. The proposed lifetime ban for refugees is a radical departure from the current law and policy. Existing migration law provides that a person who has had their visa cancelled in Australia on character grounds, and has been removed from Australia, can be permanently excluded from re-entering Australia.[15] We note that there can be some good public policy justifications in these cases, such as where this is necessary to protect public safety. By contrast, the refugees to whom the proposed legislation applies have not committed any crime. It is not a crime to seek asylum under international law. The proposed legislation unfairly categorises genuine refugees as 'criminals'. On the contrary, refugees have made and continue to make a significant contribution to Australia's economic, social and cultural wellbeing.

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[10] Explanatory Memorandum, *Migration Legislation Amendment (Regional Processing Cohort) Bill 2019*, 24.
[11] *International Convention on the Rights of the Child*, arts 3, 8.
[12] *International Covenant on Civil and Political Rights*, art 23.
[13] *International Covenant on Economic, Social and Cultural Rights*, art 10.
[14] Department of Home Affairs, 'Commencement of the Sponsored Parent (Temporary) visa (subclass 870)', Bringing partner or family (Web Page, 1 July 2019) https://immi.homeaffairs.gov.au/visas/bringing-someone/bringing-partner-or-family/five-year-temporary-sponsored-parents-visa.
[15] See 'special return criterion' 5001, in Schedule 5 to the *Migration Regulations 1994* (Cth). The criterion is relevant to almost any application for a visa. The effect is that, unless the Minister decides otherwise, another visa cannot be granted to a person who has had a previous visa cancelled under s 501 (character cancellation).

7. Ministerial discretion is an inadequate safeguard

7.1. The Bill contains provisions to allow the Minister to 'lift the bar' and allow a refugee to make a valid application for a visa, where the Minister considers that it is in the 'public interest'. According to the Statement of Compatibility with Human Rights that accompanies the Bill, the discretionary power to lift the bar affords flexibility 'in circumstances involving Australia's human rights obligations towards families and children'.[16] With respect, this is woefully inadequate. Given the Australian Government's consistent and strong statement of its policy that no person arriving by boat will ever be resettled to Australia, it is difficult to trust that the Minister would exercise this discretionary power in a sensible manner that is consistent with Australia's international obligations.

8. Undermining of international and regional support for refugee protection

8.1. The Australian Government has argued that this legislation is necessary to send a strong message to people smugglers and to prevent people from undertaking dangerous boat journeys. If it is serious, the government must recognise that people undertake such journeys because of a lack of effective protection within our region and a lack of legal pathways to enter Australia. A sustainable and effective refugee policy must involve Australia working in cooperation with other countries in the region and must be premised on upholding the rights of refugees under international human rights and refugee law. Punishing refugees in this manner is not the answer.

9. Recommendations

9.1. ALHR recommends that this Bill should not be passed and should be withdrawn.

10. Conclusion

10.1. ALHR respectfully submits that the measures proposed by the Bill are incompatible with Australia's obligations under international human rights and refugee law. Further, the Bill is unnecessary, undermines efforts to build genuine regional and international cooperation on refugee protection, and is a radical departure from current law and policy. The Bill should therefore not be passed.

10.2. ALHR is available to appear before the Committee or to provide any further information or clarification in relation to the above if the Committee so requires.

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[16] Explanatory Memorandum, *Migration Legislation Amendment (Regional Processing Cohort) Bill 2019*, 24.

Yours faithfully

Kerry Weste
President
Australian Lawyers for Human Rights

ALHR was established in 1993 and is a national association of Australian solicitors, barristers, academics, judicial officers and law students who practise and promote international human rights law in Australia. ALHR has active and engaged National, State and Territory committees and specialist thematic committees. Through advocacy, media engagement, education, networking, research and training, ALHR promotes, practices and protects universally accepted standards of human rights throughout Australia and overseas.