Australian Government

Department of Home Affairs

Submission to the inquiry into the Migration Amendment (Regional Processing Cohort) Bill 2019

Senate Legal and Constitutional Affairs Legislation Committee

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1. Introduction

1.1.1. The Department of Home Affairs (Home Affairs) welcomes the opportunity to provide a submission to the Senate Legal and Constitutional Affairs Legislation Committee inquiry into the Migration Legislation Amendment (Regional Processing Cohort) Bill 2019 (the Bill), following the introduction of the Bill into the House of Representatives on 4 July 2019.

1.1.2. This submission provides a response to the reason for referral and principal issues of concern, and briefly explains key measures of the Bill.

2. Reason for referral and principal issues of concern

2.1.1. The Bill was referred to the Committee by the Senate Selection of Bills Committee in its Report No. 2 of 2019, on 4 July 2019. The reason for referral is to inquire into the contents of the Bill and allow stakeholders to inform the Committee of detailed concerns; and Human rights laws and obligations.

3. Home Affairs' submission

3.1. Purpose of the Bill

3.1.1. The Migration Legislation Amendment (Regional Processing Cohort) Bill 2019 was introduced to further strengthen Australia's maritime border protection arrangements.

3.1.2. The Bill achieves this by amending the *Migration Act 1958* and the *Migration Regulations 1994* to prevent unauthorised maritime arrivals and transitory persons who were at least 18 years of age at the time of transfer to a regional processing country on or after 19 July 2013 from being able to make a valid application for an Australian visa.

3.1.3. The provisions in the Bill supports the Department's actions to respond to the maritime people smuggling threat present throughout our region and will assist activities to keep our borders secure. People smuggling continues to be an enduring threat, with smugglers continuing to market ventures to Australia. Entry to Australia, whether temporary or permanent, is marketed by people smugglers to encourage vulnerable people to get on boats to Australia. Limiting this option will assist the Department manage and respond to the people smuggling threat.

3.1.4. The Bill reinforces the Government's long standing policy that unauthorised maritime arrivals who have been sent to a regional processing country, that is Papua New Guinea and Nauru at present, will never be settled permanently in Australia.

3.2. Background of the Bill

3.2.1. The Migration Legislation Amendment (Regional Processing Cohort) Bill was first introduced into the House of Representatives by Minister Dutton on 8 November 2016 and was passed by the House of Representatives on 9 November 2016. The Bill was introduced into the Senate on 10 November 2016 and lapsed at the dissolution of Parliament on 11 April 2019.

- The Bill was reintroduced by Minister Dutton into the House of Representatives on 4 July 2019.

3.2.2. Without this Bill, a person who is settled from Papua New Guinea or Nauru to a third country could apply for and be granted a visa which would allow them to settle in Australia. The Bill was developed in response to concerns that this 'back-door' to Australia could be marketed by people smugglers to encourage people to get on boats to Australia.

3.2.3. This amendment forms part of the broader measures that entrench in legislation a protective shield to deter people from attempting dangerous boat journeys with people smugglers.

3.3. The target cohort and exemptions

3.3.1. The amendment will prevent persons in the designated regional processing cohort from making valid applications for temporary or permanent visas, regardless of whether the visa application was made in or outside Australia.

3.3.2. The legislative amendment will apply to unauthorised maritime arrivals who:

- are currently in a regional processing country;
- have left a regional processing country and are in another country (whether resettled, returned or removed);
- are in Australia pending transfer back to a regional processing country;
- are taken to a regional processing country in the future.

3.3.3. According to Home Affairs operational data, between 19 July 2013 and 30 June 2019, there has been a total of 3,127 initial transfers to regional processing countries.

3.3.4. The Bill will not apply to unauthorised maritime arrivals who were under 18 years of age at the time they were first transferred to a regional processing country, or to minors born in regional processing countries, or children of a parent to whom the provisions apply. This recognises that children may not be able to make decisions on their own

behalf and may have been subject to regional processing through the decisions of their parents to travel illegally to Australia by boat.

3.3.5. The Bill will not apply in cases where a person has already been permitted by the Minister to make an application for a visa in Australia.

3.3.6. The amendments confer a personal non-compellable power for the Minister to lift the bar to allow an application to be made by an individual or a group, if found to be in the public interest to do so. This allows a valid application for a visa on a case by case basis and in consideration of the individual circumstances of the case, including relevant international obligations, the best interests of affected children and/or their age at the time a decision to travel illegally to Australia was made.

- This may include the Minister allowing an application from a medical professional or a leading international researcher (who has been resettled from a regional processing country to a third country) where it would be in the public interest to do so.

3.3.7. The Minister or their delegate can further exercise the power to waive the requirement in this amendment which would prevent the deemed grant of a Special Purpose visa or a deemed application for certain subclasses of visas being made.

3.4. Application of amendments

3.4.1. The new bars created by the Bill will apply retrospectively to applications that are made by a member of the designated regional processing cohort outside Australia after introduction of the Bill into Parliament and are undecided when the legislation commences. This element of the legislation was made clear in the Explanatory Memorandum that accompanied the Bill. This is to prevent members of the designated regional processing cohort from circumventing the Government's policy by making a visa application before the Act commences.

3.4.2. The bar applies to illegal unauthorised maritime arrivals who were transferred after 19 July 2013 because those persons have been on notice following an announcement made by former Prime Minister Kevin Rudd on that date that they will never be settled in Australia. The bar will also apply prospectively to applications made by this cohort of persons after the legislation commences, whether they are inside or outside Australia.

3.5. The impact on Australia's human rights obligations

3.5.1. It is the Government's view that the proposed amendments are consistent with Australia's obligations under international law. The measures contained in the Bill are compatible with the right to equality and non-discrimination, the Convention on the Rights of the Child, the International Covenant on Civil and Political Rights, the

Refugees Convention and Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

3.5.2. The Bill prevents valid visa applications from a cohort of non-citizens who are defined as being unauthorised maritime arrivals or transitory persons who were over 18 years old when transferred to a regional processing country after 19 July 2013. The measures are therefore based on reasonable and objective criteria for identifying people in the affected cohort. Personal characteristics such as race, ethnicity, nationality (other than not being an Australian citizen), religion, gender or sexual orientation are not criteria for identifying non-citizens in the affected cohort.

3.5.3. While the continued differential treatment of a group of non-citizens (namely, the designated regional processing cohort) could amount to a distinction on a prohibited ground under international law on the basis of 'other status', the Government is of the view that this continued differential treatment is for a legitimate purpose. It is based on relevant objective criteria for identifying people in the affected cohort and is reasonable and proportionate in the circumstances.

3.5.4. The measures contained in the Bill have been further circumscribed to provide sufficient flexibility as required to minors and other individuals and groups. Namely the measures will not apply to unauthorised maritime arrivals who were under 18 years of age at the time they were first transferred to a regional processing country, or minors born in a regional processing country, or children of a parent to whom the provisions apply. The Bill includes the ability for the Minister to permit a visa application to be made by an individual or a group, where the Minister thinks it is in the public interest. This may include cases where individual circumstances justify special consideration, or to ensure Australia's international obligations are met.

3.5.5. Consideration of a person's individual circumstances, their relationship with family members and the best interests of any affected children allows the Government to ensure that it acts consistently with obligations under the Convention on the Rights of the Child and the International Covenant on Civil and Political Rights.

3.5.6. The measures contained in the Bill are consistent with Australia's non-refoulement obligations under the International Covenant on Civil and Political Rights and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The Government recognises that these *non-refoulement* obligations (not to return a person to a country in certain circumstances) are absolute and does not seek to resile from or limit Australia's obligations. Any person who is in the designated regional processing cohort and who is in Australia now or in the future will not be removed from Australia in breach of Australia's *non-refoulement* obligations.

3.5.7. These amendments are not likely to result in an increase in the number of non-citizens in Australia liable for detention under the Migration Act. For those non-citizens in this

cohort that are in Australia, application bars already exist in the Migration Act which prevent the lodgement of a valid application by those transferred to Australia.

3.5.8. In any event, the amendments do not limit the ability of the Minister to grant a visa to a person in immigration detention and, combined with the Minister's ability to allow a visa application to be made, will allow persons in the affected cohort to be managed in the same way as other unlawful non-citizens. That is, held detention will be maintained only where there is a risk to the safety of the Australian community. Detention in these circumstances is consistent with the Article 9 of the International Covenant on Civil and Political Rights obligations.

4. Conclusion

4.1.1. The measures in this Bill gives full effect to the Government's policy that people who arrive illegally by boat and are transferred to a regional processing country, will never settle in Australia. These changes are compatible with Australia's international obligations and will play a key role in strengthening the Government's ability to reduce the risk of non-citizens circumventing Australia's migration laws. The Bill will further discourage people from attempting hazardous boat journeys with the assistance of people smugglers and will encourage people to pursue regular migration pathways instead.