Australian Human Rights Commission

Migration (Validation of Port Appointment) Bill 2018

Australian Human Rights Commission
Submission to the Senate Legal and Constitutional Affairs Legislation Committee

2 September 2018

ABN 47 996 232 602
Level 3, 175 Pitt Street, Sydney NSW 2000
GPO Box 5218, Sydney NSW 2001
General enquiries 1300 369 711
Complaints info line 1300 656 419
TTY 1800 620 241

Australian Human Rights Commission
www.humanrights.gov.au

Contents

1 Introduction

1. The Commission makes this submission to the Senate Legal and Constitutional Affairs Legislation Committee in relation to the Migration (Validation of Port Appointment) Bill 2018 (Cth) (the Bill) introduced by the Australian Government.

2 Summary

2. The Commission welcomes the opportunity to make a submission in relation to this Bill.

3. The Bill seeks to retrospectively validate a legislative instrument issued by the then Minister for Immigration in 2002. The instrument was declared invalid on 11 July 2018 in two proceedings heard by Smith J in the Federal Circuit Court. A declaration in the same terms has since been made by the Full Court of the Federal Court in a separate proceeding. One effect of the invalidity of the instrument is that asylum seekers who arrived in Australia at Ashmore Reef between 23 January 2002 and 31 May 2013 were not 'unauthorised maritime arrivals'. However, since their arrival they have been treated as though they were unauthorised maritime arrivals.

4. The Bill aims to change the status quo and validate past acts by the Commonwealth that were taken based on the then understanding that this cohort of people were unauthorised maritime arrivals. This would impact on the rights of the people in this cohort in a number of ways, in particular:

   - whether the people were entitled to apply for a visa in Australia (including a protection visa)
   - whether they were liable to be taken to a regional processing country
   - if they were permitted to apply for a visa in Australia, whether they would have access only to limited merits review of any decision to refuse them a visa
   - if they were ultimately granted a permanent visa, the priority that would be given to any later application for a visa by a family member to permit family reunion.

5. Two Parliamentary Committees have sought information from the Minister for Home Affairs about who will be affected by the Bill and how they will be affected. The Commission agrees that this

information is vital if an informed decision is to be made about whether the Bill should be passed. The response given by the Minister for Home Affairs did not sufficiently answer these questions.

6. In addition, the Bill would limit certain human rights protected at international law. In order to determine whether this limitation meets the requirements of international human rights law, the Commission considers that more information is needed about the purpose of the Bill and the degree of the limitation on human rights. This information is crucial in assessing whether the limitation is necessary and proportionate to the achievement of the Bill's purpose.

7. The recommendations of the Commission are aimed at putting the Committee in the position to make this assessment.

3 Recommendations

8. The Commission makes the following recommendations.

Recommendation 1

The Commission recommends that the Committee ask the Minister for Immigration and Border Protection to provide:

(a) the number of non-citizens who entered the relevant waters of the Territory of Ashmore and Cartier Islands between 23 January 2002 and 31 May 2013 without a valid visa

(b) the number of non-citizens who entered the relevant waters of the Territory of Ashmore and Cartier Islands between 13 August 2012 and 31 May 2013 without a valid visa

(c) in particular, how many of the people in each of the groups described in (a) and (b), if any:

(i) are in Australia and have not yet made an application for a protection visa

(ii) have made an application for a protection visa that is yet to be finally determined

(iii) have been granted a protection visa

(iv) have had their application for a protection visa refused and finally determined but are still in Australia

(v) have been taken to a regional processing country

(vi) have been taken to a regional processing country and are still in that country

(d) how the persons in each of the categories above would have been treated if the 2002 appointment had not been made, and the extent of any detriment such persons may suffer if the 2002 appointment is retrospectively validated.

Recommendation 2

The Commission recommends that the Committee ask the Minister for Immigration and Border Protection to provide more detailed information regarding the purpose of the Bill and the reasons why the retrospective impact of the Bill on human rights is necessary and proportionate for the achievement of that purpose.

Recommendation 3

The Commission recommends that any recommendation by this Committee about whether the Bill should be passed include a detailed evaluation of the impact of the Bill on human rights and an assessment of whether this impact is necessary and proportionate to the achievement of a legitimate object.

4 Background

9. This Bill was introduced in response to a number of legal proceedings in which it was alleged that a lagoon near West Island at Ashmore Reef was not properly appointed as a 'proclaimed port' by the Hon Philip Ruddock MP, then Minister for Immigration and Multicultural and Indigenous Affairs, in 2002. If the appointment was not valid, the area would not have been an 'excised offshore place' under the *Migration Act 1958* (Cth) (Migration Act). One impact would be that asylum seekers who arrived in Australia at Ashmore Reef between 23 January 2002 and 31 May 2013 would not have had the legal status of 'offshore entry persons' (now called 'unauthorised maritime arrivals'). This would have a number of implications for the rights of those people, including:

- whether the people were entitled to apply for a visa in Australia (including a protection visa)
- whether they were liable to be taken to a regional processing country

- if they were permitted to apply for a visa in Australia, whether they would have access only to limited merits review of any decision to refuse them a visa
- if they were ultimately granted a permanent visa, the priority that would be given to any later application for a visa by a family member to permit family reunion.

10. The Bill was introduced on 20 June 2018 in anticipation that the 2002 appointment may be declared invalid. In his second reading speech, the Hon Peter Dutton MP, Minister for Home Affairs and Minister for Immigration and Border Protection, said that the Bill 'reiterates the Government's original intention that the Appointment is, and has always been, valid' and that the effect of the Bill 'will simply maintain the status quo'.[1]

11. The Explanatory Memorandum to the Bill said that the Bill 'reconfirms a legal position of the Australian Government' and that it 'does not engage any … applicable rights or freedoms'.[2]

12. On 11 July 2018, Smith J in the Federal Circuit Court of Australia delivered judgment in two proceedings.[3] The reasoning in each case is substantially the same. His Honour held that, in order for a place to be a 'proclaimed port', it must first be a port. In the context of the Migration Act, 'port' took its ordinary meaning as 'a place where there is ordinarily movement of goods and/or passengers between vessels on the water and the land' and 'ordinarily involves some infrastructure'.[4]

13. Applying that definition to the facts:

> These facts clearly establish that the relevant area was not a "port". The area was an area of water within a reef. It was, it seems, navigable, but it was not disputed that the area was not, and could not be, used for the transfer of goods or passengers from vessels unless that transfer was to another vessel.
>
> For those reasons, accepting for the present purposes that the Instrument was sufficiently clear to be valid, the area described in the Instrument was not a "port" within the meaning of the Act. As the Minister only had power to designate a "port" as a "proclaimed port", the Instrument was beyond the Minister's power and so was invalid.[5]

14. In each case, Smith J made declarations that:

- the purported appointment is invalid; and
- the applicant is not an 'unauthorised maritime arrival' within the meaning of s 5AA of the Migration Act.

15. On 1 August 2018, the Minister for Home Affairs filed an appeal in the Federal Court in relation to each of the two proceedings.[6] The appeals have yet to be determined.

16. On 6 August 2018, the Full Court of the Federal Court made declarations in a separate proceeding in the same terms as had been made by Smith J.[7]

17. The statements in the second reading speech and the Explanatory Memorandum about the 'status quo' must now be read in light of the subsequent judicial determination that the appointment was, and always has been, invalid. The effect of the Bill will be to retrospectively change that position.

18. When the Parliament proposes to enact retrospective laws that adversely affect the human rights of individuals, it needs to squarely address this and adequately weigh the consequences of the change in the law to ensure that any change is necessary, reasonable and proportionate to a legitimate object.

5 Retrospective laws

5.1 Impact on traditional rights, freedoms and privileges

19. In May 2014, the then Attorney-General, Senator the Hon George Brandis QC, asked the Australian Law Reform Commission (ALRC) to review Commonwealth legislation to identify provisions that unreasonably encroach upon traditional rights, freedoms and privileges. The terms of reference for the inquiry stated that laws that encroach upon traditional rights, freedoms and privileges should be understood to include laws that 'retrospectively change legal rights and obligations'.[8]

20. The ALRC referred to concerns that the retrospective operation of some of Australia's migration laws had not been sufficiently justified. Section 8 of this submission considers a number of examples of amendments to migration laws that had a retrospective operation. The Commission is concerned about Parliament repeatedly amending legislation in this area with the express intention of that amendment having retrospective operation.

21. There is a presumption at common law that statutes do not operate retrospectively unless this is clearly expressed. In *Maxwell v Murphy*, Dixon CJ said:

> The general rule of the common law is that a statute changing the law ought not, unless the intention appears with reasonable certainty, to be understood as applying to facts or events that have already occurred in such a way as to confer or impose or otherwise affect rights or liabilities which the law had defined by reference to the past events.[9]

22. One reason for the requirement of clear expression is the potential for retrospective laws to adversely impact on individual rights. People are entitled to rely on the law as it is when making decisions about how to act. The rule of law also requires that government act according to fixed rules that are clear and prospective. The High Court has said:

> In a representative democracy governed by the rule of law, it can be assumed that clear language will be used by the Parliament in enacting a statute which falsifies, retroactively, existing legal rules upon which people have ordered their affairs, exercised their rights and incurred liabilities and obligations. That assumption can be viewed as an aspect of the principle of legality, which also applies the constructional assumption that Parliament will use clear language if it intends to overthrow fundamental principles, infringe rights, or depart from the general system of law.[10]

23. If retrospective laws are for the benefit of those affected by them, there is less reason to object to them. The ALRC noted that some retrospective laws are also sought to be justified on other grounds including:

- The law operates retrospectively only from the date upon which it was announced by the Government that it intended to legislate, thereby fulfilling Blackstone's call for laws to be 'notified to the public' …
- The retrospective law operates to restore an understanding of the law that existed before a court decision unsettled that understanding …
- The retrospective law operates to address the consequences of a court decision that unsettled previous understandings of the law … .[11]

24. However, in every case it will be necessary to examine the practical operation of the proposed law and how it affects individual rights.

25. Here, the Bill contains clear language that shows an intention that the provisions will have a retrospective operation. Given the importance of the rule of law principles discussed above, what is required is a full appreciation of the impacts of the legislation and a clear justification of those impacts for the proposal to be properly assessed.

5.2 Review by Scrutiny of Bills Committee

26. For the past 30 years, the Senate Scrutiny of Bills Committee has had the function of reporting to Parliament in relation to whether proposed

Bills would trespass unduly on personal rights and liberties.[12] The Committee will comment on Bills under this principle if the Bill contains a provision that commences retrospectively and could give rise to a detriment to any person.[13]

27. This role is recognised in the *Legislation Handbook* published by the Department of Prime Minister and Cabinet. The Handbook relevantly provides:

> Provisions that have a retrospective operation adversely affecting rights or imposing liabilities are to be included only in exceptional circumstances and on explicit policy authority … .
>
> Departments need to be aware that the Senate Standing Committee for the Scrutiny of Bills and the Parliamentary Joint Committee on Human Rights, which scrutinise all bills, expect that an explanation and justification for any retrospective provisions will be included in the explanatory memorandum and statement of compatibility with human rights … .[14]

28. Where an Act will commence retrospectively, the *Legislation Handbook* provides that officers involved in preparing an explanatory memorandum must set out whether, and why, retrospective application of the Act would adversely affect any person.[15]

29. The Scrutiny of Bills Committee considered the present Bill in its report dated 27 June 2018 and raised concerns about its retrospective operation. It noted that:

> 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. One such value is that persons should be able to order their affairs on the basis of the law as it stands. … Another 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.[16]

30. The Committee concluded that the explanatory materials did not provide a sufficiently comprehensive justification for the retrospective validation of the 2002 appointment and it asked the Minister for detailed advice about the following issues:

- the basis of the legal challenges to the validity of the 2002 appointment and the general arguments raised by the applicants in those cases;

- the number of persons who entered the relevant waters of the Territory of Ashmore and Cartier Islands since 23 January 2002 to date. In particular, how many of these people, if any:
  - are yet to have their asylum applications finally determined;
  - have been granted a protection visa;
  - are in offshore detention;
  - have had their applications refused but remain in Australia;
- how the persons in each of the categories above would have been treated if the 2002 appointment had not been made, and the extent of any detriment such persons may suffer if the 2002 appointment is retrospectively validated; and
- the fairness of applying the bill to persons who have instituted proceedings but where judgment is not delivered before the commencement of the Act (noting that such persons may be liable to an adverse costs order).[17]

31. Similar questions were asked of the Minister by the Parliamentary Joint Committee on Human Rights when it considered the Bill.[18]

32. The Minister responded to the Scrutiny of Bills Committee on 19 July 2018. In his response, the Minister referred to the two judgments described in paragraphs 12 to 14 above that had been handed down by Smith J the previous week. The Minister's response did not provide details of the number of people who arrived at the Ashmore and Cartier Islands since 23 January 2002. In response to the question of detriment, the Minister claimed that:

> No persons will suffer a detriment if the validity of the Appointment is confirmed by passage of the Bill. Enactment of the Bill will merely confirm that the actions taken in relation to persons who entered the waters of the proclaimed port, by reference to their status as UMAs [unauthorised maritime arrivals], were valid and effective.[19]

33. A problem with this response is that, because the appointment was invalid, the persons were not UMAs. The Bill would change this position to the detriment of those people. Section 7 of this submission examines some of the ways in which the Bill would impact on the rights of these people to their detriment.

34. Before any decision is made about whether this Bill should be passed, the Parliament should have before it the number of people affected by the proposed amendments, and a clear assessment of how their

interests will be affected. It is only with the benefit of this information that an informed decision can be made about whether limiting the rights of these people retrospectively can be justified by some other policy objective.

35. The following recommendation is based on the requests for information previously made by the Senate Scrutiny of Bills Committee and the Parliamentary Joint Committee on Human Rights. The particular nature of the requests set out in the recommendation has been refined based on the impact on human rights described in section 7 of this submission.

Recommendation 1

The Commission recommends that the Committee ask the Minister for Immigration and Border Protection to provide:

(a) the number of non-citizens who entered the relevant waters of the Territory of Ashmore and Cartier Islands between 23 January 2002 and 31 May 2013 without a valid visa

(b) the number of non-citizens who entered the relevant waters of the Territory of Ashmore and Cartier Islands between 13 August 2012 and 31 May 2013 without a valid visa

(c) in particular, how many of the people in each of the groups described in (a) and (b), if any:

(i) are in Australia and have not yet made an application for a protection visa

(ii) have made an application for a protection visa that is yet to be finally determined

(iii) have been granted a protection visa

(iv) have had their application for a protection visa refused and finally determined but are still in Australia

(v) have been taken to a regional processing country

(vi) have been taken to a regional processing country and are still in that country

(d) how the persons in each of the categories above would have been treated if the 2002 appointment had not been made, and the extent

of any detriment such persons may suffer if the 2002 appointment is retrospectively validated.

6 The provisions of the Bill

6.1 Effect of the Bill

36. There are four main provisions in the Bill.

37. First, the Bill would retrospectively amend the text of a notice published in the *Commonwealth of Australia Gazette* on 23 January 2002 and given by the Hon Phillip Ruddock MP, Minister for Immigration and Multicultural and Indigenous Affairs. The amendments would correct a number of typographical errors dealing with the coordinates of Ashmore Reef.[20]

38. Secondly, the Bill would retrospectively deem the Migration Act to be 'taken always to have had effect as if the area of waters specified in the appointment [as amended] were a port' for the purposes of the Migration Act.[21] This amendment would change the current legal position, as found by Smith J, that the area described in the appointment was not a 'port' within the meaning of the Migration Act.

39. Thirdly, the Bill would retrospectively validate anything that would otherwise have been invalid but for the amendments in the Bill.[22] This broad validation of any past actions is likely to substantially affect the rights of a large number of people. Some of the effects of this retrospective validation are considered in more detail in section 7 of this submission below.

40. Fourthly, the Bill includes a narrow exception to the validation of otherwise invalid past acts. The Bill would not affect rights or liabilities arising between parties to legal proceedings, provided that:

- the validity of the appointment was at issue in the proceedings;
- judgment has already been delivered before the provisions in the Bill commence; and
- the judgment set aside the appointment or declared it to be invalid.[23]

41. As things currently stand, it appears that the exception in cl 5 of the Bill will only apply to the applicants in the two proceedings heard by Smith J and the appellant in the proceeding heard by the Full Court of the Federal Court. The rights and liabilities of any other person affected by the amendments to the Bill will not be protected.

6.2 Purpose of the Bill

42. Under Australia's international human rights law obligations, it is necessary to assess whether the Bill's retrospective limitation on the rights of those affected is necessary, reasonable and proportionate to the achievement of the Bill's purpose.[24] This assessment can only be made by reference to a clear understanding of the Bill's purpose.

43. The Explanatory Memorandum to the Bill provides that the purpose of the Bill 'is to confirm the validity of the appointment of a proclaimed port in the Territory of Ashmore and Cartier Islands contained in the Commonwealth of Australia Gazette No. GN 3, 23 January 2002'.[25]

44. There is a threshold question whether the Bill can be seen as achieving this purpose at all. Given the decisions of the Federal Circuit Court and Full Court of the Federal Court of Australia referred to above, it is now clear that the instrument of appointment was never legally valid. As a bill cannot 'confirm' the validity of something that was never valid, the Bill appears on its face to do the opposite: to remove retroactively the invalidity of the instrument of appointment.

45. This is not merely a semantic or trivial distinction. It would be easier to accept that the impact on human rights of a statutory amendment that *confirms* the validity of a law, which was always valid, would have no significant effect on the rights and interests of anyone affected by the law. However, that is not the case here. This Bill appears to alter the legal position in a way that limits individuals' rights as compared with the true legal position prior to the amendment.

46. If this is the only purpose of the Bill, its limitation on the rights of those affected is unlikely to satisfy the necessity and proportionality requirements. In other words, in the Commission's view, an honest but mistaken belief by the Australian Government that the appointment was valid is unlikely to be a sufficient basis to interfere with the rights of people who arrived in Australia at Ashmore Reef between 2002 and 2013.

47. It may be that other purposes can be evinced in respect of this Bill. In his second reading speech, the Minister said that the Government 'will not hesitate to protect the integrity of Australia's migration framework and maintain public confidence in our border protection arrangements'.[26] Similarly, in his response to the Scrutiny of Bills Committee, the Minister said:

> Government policy around the management of UMAs has been highly effective in responding to the enduring threat of maritime people

> smuggling and protecting the integrity of Australia's migration framework. 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. In order to maintain public confidence in our border protection arrangements, it is imperative that we uphold the original intent of the Appointment'.[27]

48. In assessing these statements, it is important to understand that the appointment, even if it was valid, ceased to have any effect more than 5 years ago. From 1 June 2013, the definition of 'offshore entry person' in the Migration Act was replaced with a new definition of 'unauthorised maritime arrival', which applied to anyone who entered Australia by sea regardless of where they entered.[28]

49. This means that the appointment is not a part of Australia's current migration framework. If this Bill is passed, it will not change the way in which Australia's migration framework operates into the future. The only change will be in relation to the rights of people who arrived in Australia at Ashmore Reef between 23 January 2002 and 31 May 2013.

50. The Government has sought to justify some past changes to migration law on the basis that they would operate as a deterrent for people making dangerous journeys by boat to Australia.[29] It does not appear that this rationale has been made explicit in any of the extrinsic material for the present Bill.

51. However, even if this is a claimed objective, it would be difficult to justify because the Bill applies only to validate past conduct and does not change the migration framework that has been in operation for the past five years. In other words, as the Bill's operation is entirely retroactive, it does not deal with how the Australian Government will treat people in this situation in future.

Recommendation 2

The Commission recommends that the Committee ask the Minister for Immigration and Border Protection to provide more detailed information regarding the purpose of the Bill and the reasons why the retrospective impact of the Bill on human rights is necessary and proportionate for the achievement of that purpose.

7 Current rights of asylum seekers who arrived at Ashmore Reef and Cartier Islands

52. As outlined above, a consequence of the recent judgments by the Federal Circuit Court is that asylum seekers who arrived by boat

between 23 January 2002 and 31 May 2013, and first entered Australian territory via the 'proclaimed port' at Ashmore Reef, were never 'unauthorised maritime arrivals' under the Migration Act.

53. The Minister has asserted that 'no persons will suffer a detriment' if the Bill is passed.[30] However, the Bill may in fact have a significant impact on the rights of people in the affected cohort to their detriment if they are retrospectively determined to be unauthorised maritime arrivals.

54. In the time available to make a submission to this inquiry, the Commission has not been able to undertake a comprehensive analysis of the rights of asylum seekers that are likely to be affected. This section of the submission highlights a number of relevant rights. In particular, it appears that:

- People who arrived at Ashmore Reef between 23 January 2002 and 31 May 2013 were invalidly barred under s 46A of the Migration Act from making an application for a protection visa without Ministerial approval. For most people in this cohort who arrived since 2012, this has resulted in substantial delay in being able to make a visa application because of a delay in obtaining Ministerial approval. This delay may also have prevented them from obtaining a permanent Protection Visa rather than a Temporary Protection Visa (TPV).
- There is a small group of 71 asylum seekers that have again had bar under s 46A of the Migration Act applied to them and are now not being permitted to make an application for protection. It is possible that some members of this group arrived in Australia at Ashmore Reef prior to 31 May 2013 and should not have this bar applied to them.
- People who arrived at Ashmore Reef between 13 August 2012 and 31 May 2013 were invalidly assessed as being liable to be taken to a regional processing country: either Nauru or Manus Island, Papua New Guinea. It seems likely that none of this cohort are still in a regional processing country as a result of subsequent policy changes; however, they may have suffered a detriment as a result of being taken there.
- People who arrived at Ashmore Reef between 13 August 2012 and 31 May 2013 and were permitted to make an application for a protection visa in Australia would have invalidly been made subject to the 'fast track' assessment process in the Immigration Assessment Authority (IAA) if their applications were refused. This

is a limited form of merits review and may result or may have resulted in a higher chance of a decision being made against them.

- People who arrived at Ashmore Reef between 23 January 2002 and 31 May 2013 and who were subsequently granted a permanent visa will be able to sponsor family members to travel to Australia, but will invalidly have had a lower processing priority applied to such applications.

55. As noted in recommendation 1, the Commission considers that an assessment needs to be made of the numbers of people affected by the Bill and the nature of the impact on their rights before any decision is made about whether the Bill should be passed. The particular issues identified by the Commission are discussed in more detail below.

7.1 Ability to apply for a protection visa

56. Under s 46A of the Migration Act, a visa application is invalid if it is made by an unauthorised maritime arrival who is in Australia and is either an unlawful non-citizen or holds a Bridging Visa, TPV or another kind of prescribed temporary visa.[31] The effect of this provision is that some unauthorised maritime arrivals cannot lodge a valid visa application unless the Minister exercises their personal power to determine that s 46A does not apply to a person (a process colloquially referred to as 'lifting the bar').[32]

57. People who arrived in Australia between 23 January 2002 and 31 May 2013 at Ashmore Reef should have been permitted to lodge a valid visa application without first requiring the Minister's personal intervention to 'lift the bar'. Instead, they have had the bar on visa applications in s 46A applied to them.

58. This has had three impacts. First, for a large cohort, there was a significant delay in their ability to apply for a protection visa. Secondly, during this period of delay, there was a change in the type of protection visa available from a permanent visa to a temporary visa. Thirdly, for a smaller cohort, they have now been prohibited from applying for a protection visa because they did not make an application during a particular window of time specified by the Minister.

(a) Delay in visa processing

59. The processing of visa applications for asylum seekers who arrived in Australia by boat was 'paused' for a considerable period of time following the reinstatement of third country processing in 2012.[33]

Processing was further delayed after the federal election in 2013, pending the implementation of a range of policy and legislative changes such as the reintroduction of temporary protection arrangements.[34]

60. In September 2014, the Government introduced legislation to reintroduce TPVs and establish a new 'fast track' assessment process for review of decisions to refuse the grant of a TPV.[35] The then Minister said that this new regime was targeted at a cohort of more than 30,000 asylum seekers who had arrived in Australia by boat between 13 August 2012 and 31 December 2013 and had not yet been permitted to apply for protection (a group referred to by the Government as the 'legacy caseload'). The Minister said that, once this legislation was passed, the Government would 'commence processing asylum claims' of this group.[36] By 25 May 2015, the Minister had 'lifted the bar' under s 46A of the Migration Act for 602 asylum seekers in this cohort and permitted them to make an application for protection.[37] In February 2017, the Department said that the Minister had lifted the bar for 'virtually the whole cohort of 30,000'.[38] By that time, this cohort had been in Australia for up to 4 and a half years.

61. Many asylum seekers who arrived in Australia since 2012 have consequently experienced a delay of several years between their arrival and the lifting of the bar under s 46A to allow them to apply for a visa.

(b) Changes to available visa types

62. Due to changes in policy settings in the intervening period, these delays may have had significant implications for the status of the people affected.

63. For example, an asylum seeker who arrived in Australia in 2012 and who was not an unauthorised maritime arrival would have been eligible to apply for a permanent Protection Visa.

64. However, if the asylum seeker was invalidly assessed as an unauthorised maritime arrival and the bar under s 46A was not lifted until 2015, they would only have been eligible to apply for a TPV or a Safe Haven Enterprise Visa (SHEV).[39]

65. A permanent Protection Visa provides a more favourable visa outcome than a temporary visa such as a TPV or a SHEV. Permanent residents have access to a broader range of services and entitlements than temporary visa holders, including in relation to tertiary education support schemes, settlement services, social security and family

reunion opportunities.[40] Permanent residency is also a prerequisite for obtaining Australian citizenship by conferral.[41]

66. The use of temporary protection arrangements for refugees may breach a range of international human rights obligations, including the rights to non-discrimination, the highest attainable standard of health and protection of the family.[42] The Commission has also previously identified that the use of TPVs for refugee children breached several of Australia's obligations under the Convention on the Rights of the Child.[43]

67. People in the affected cohort to whom the visa bar under s 46A was applied, and consequently did not have an opportunity to lodge a valid application for a permanent Protection Visa, may therefore have experienced significant detriment as a result of being classified as unauthorised maritime arrivals.

(c) Inability to apply for a protection visa

68. On 21 May 2017, the Minister announced that if people in the 'legacy caseload' failed to apply for protection by 1 October 2017, they would again be barred from applying for protection.[44] By 1 October 2017, only 71 people remaining in the cohort had not lodged an application for protection.[45] If some of these 71 people arrived in Australia at Ashmore Reef between 23 January 2002 and 31 May 2013 then they have been denied the ability to apply for a protection visa because s 46A does not apply to them.

7.2 Third country processing

69. Following their reintroduction in 2012, third country processing arrangements initially applied to all asylum seekers who arrived in Australia from 13 August 2012 onwards.[46]

70. The *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012* (Cth) inserted s 198AD(2) into the Migration Act, which provides that an officer must take an unauthorised maritime arrival to a regional processing country as soon as reasonably practicable.

71. People who arrived in Australia at Ashmore Reef in the nine and a half months between 13 August 2012 and 31 May 2013 were invalidly assessed as unauthorised maritime arrivals and were therefore assessed as being liable to offshore processing.

72. People in the affected cohort may have experienced significant detriment as a result of being transferred to Regional Processing Centres. Monitoring reports of these facilities published during the relevant time period by the United Nations High Commissioner for Refugees raised a number of significant human rights concerns. These included: delays in the processing of refugee claims; the use of mandatory indefinite detention; harsh and inadequate conditions of detention; limited capacity of health care services; and inadequate arrangements for protecting the best interests of children.[47]

73. As a consequence of subsequent policy changes, people who were transferred to Nauru or Manus Island, Papua New Guinea under third country processing arrangements prior to 19 July 2013 were later returned to Australia.

74. On 19 July 2013, the then Prime Minister Kevin Rudd announced that people who arrived in Australia by boat after that date would be subject to offshore processing and had no prospect of being resettled in Australia.[48] People who had already been transferred to regional processing countries were returned to Australia.[49] On 25 September 2014, the then Minister for Immigration and Border Protection, the Hon Scott Morrison MP, announced that this position would change following the passage of the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth).[50] After the passage of that Bill, asylum seekers who arrived in Australia by boat on or prior to 31 December 2013 and who had not already been taken to Nauru or Manus Island would have their claims for protection assessed in Australia. However, those who had already been taken to a regional processing country would not be resettled in Australia.

75. It seems likely that the people in the cohort affected by the present Bill and who had been taken to a regional processing country would have been returned to Australia (unless they had elected to return to their country of origin before that time). The Bill is therefore unlikely to result in any further detriment to the affected cohort in relation to third country processing arrangements. However, the Bill does seek to validate the action of taking people in this cohort to the regional processing countries.

7.3 'Fast track' merits review process

76. Asylum seekers who arrived in Australia as unauthorised maritime arrivals between 13 August 2012 and 1 January 2014 and who receive a

negative decision on an application for a TPV or SHEV are subject to a 'fast track' merits review process.[51]

77. Under this process, visa applicants are not permitted to apply to the Administrative Appeals Tribunal (AAT) for a review of the negative decision.[52] Instead, their applications will be referred to the IAA for review[53] (unless the person is an 'excluded fast track review applicant', in which case they are not eligible for any form of merits review).[54] The IAA is an independent body established specifically for the purpose of reviewing the claims of asylum seekers subject to the fast track merits review process.

78. The fast track process differs in several important respects from the ordinary merits review process administered by the AAT. Under the AAT's ordinary processes, the decision-maker reconsiders the facts, law and policy aspects of the original decision, and determines what is the correct and preferable decision based on all of the relevant facts. The AAT may take into account new information that was not before the original decision-maker; and typically conducts hearings during which evidence can be tested and additional evidence can be presented orally.

79. The IAA, by contrast, must generally review decisions 'on the papers' — that is, on the basis of the information relied on by the primary decision-maker to reach their findings.[55] In some cases, the IAA can obtain other information beyond that used by the primary decision-maker. Other than in exceptional circumstances, however, the IAA will not interview the visa applicant nor consider any new information from them.[56]

80. The Commission has previously raised concerns that the 'fast track' review process does not provide an adequate system of merits review.[57] The heavy reliance of the IAA on information used by the primary decision-maker; the inability of the applicant to present new information in support of their claims in most circumstances; and the practice of making decisions without interviewing applicants, undermine the capacity of the IAA to undertake fair, thorough and accurate assessments of visa applications. In addition, certain applicants are excluded from merits review altogether under the fast track process.

81. The fast track process may therefore result in breaches of Australia's international human rights obligations relating to procedural fairness, *non-refoulement* and non-discrimination.[58]

82. Available statistics suggest that the IAA affirms a higher proportion of primary decisions than bodies previously tasked with conducting merits review for similar caseloads. For example, between 2009–10 and 2012–13, almost 80% of initially unsuccessful applications lodged by asylum seekers who arrived by boat were overturned at the merits review stage where full merits review was available.[59] Between 1 July 2015 and 31 December 2017, the IAA remitted just 15% of initially unsuccessful applications for reconsideration under the more limited fast track process.[60]

83. As people who arrived in Australia at Ashmore Reef during the relevant period have been found not to be unauthorised maritime arrivals, they should no longer be subject to the fast track process. Due to the delays described in section 7.1(a) above, some people in the affected cohort may still be have visa applications under active consideration, including by the IAA.

84. As the fast track process provides a significantly less robust form of merits review than the AAT's normal merits review process, those in the affected cohort may experience significant detriment if the Bill is passed.

7.4 Family visa processing priorities

85. Under s 499 of the Migration Act, the Minister may give written directions about the performance of functions and the exercise of powers under the Act.[61] Ministerial Direction No. 72 concerns the order for considering and disposing of applications for family stream visas, setting out seven categories of applications from highest to lowest priority.[62]

86. Under Direction No. 72, an application for a family stream visa lodged by a person whose sponsor arrived in Australia as an unauthorised maritime arrival and who now has a permanent visa receive the lowest processing priority, unless there are special circumstances of a compassionate nature or other compelling reasons.[63] This provision applies regardless of the nature of the relationship between the sponsor and the visa applicant, or the vulnerability of the applicant.

87. The fact that the sponsor was an unauthorised maritime arrival can make a significant difference to the processing time for an application. For example, a visa application lodged by the spouse or dependent child of a sponsor who is not an unauthorised maritime arrival would receive the second-highest processing priority under Direction No. 72.[64] If the same application were lodged by the spouse or dependent child

of an unauthorised maritime arrival, the application would receive the lowest processing priority.[65]

88. The processing priorities under Direction No. 72 may significantly delay the progress of family stream visa applications where the sponsor is an unauthorised maritime arrival, potentially resulting in prolonged family separation.[66] People in the affected cohort who are seeking to reunite with relatives overseas may therefore experience significant detriment if the Bill is passed.

Recommendation 3

The Commission recommends that any recommendation by this Committee about whether the Bill should be passed includes a detailed evaluation of the impact of the Bill on human rights and an assessment of whether this impact is necessary and proportionate to the achievement of a legitimate object.

8 Other examples of retrospective migration laws

89. The concerns that the Commission has about the retrospective application of the current Bill are heightened as a result of the past practice of the Parliament in legislating retrospectively in the area of migration law. Regular resort to retrospective legislation undermines public confidence in the law.

90. This section of the submission identifies a range of other examples of migration laws that have been passed with retrospective effect and that interfered with the rights of individuals to their detriment.

8.1 Expanding the scope of people smuggling offences

91. There is a much stronger prohibition against retrospective criminal laws than retrospective civil laws. In *PGA v R*, Bell J said:

> The rule of law holds that a person may be punished for a breach of the law and for nothing else. It is abhorrent to impose criminal liability on a person for an act or omission which, at the time it was done or omitted to be done, did not subject the person to criminal punishment. Underlying the principle is the idea that the law should be known and accessible, so that those who are subject to it may conduct themselves with a view to avoiding criminal punishment if they choose.[67]

92. The *Guide to Framing Commonwealth Offences* published by the Attorney-General's Department states that 'an offence should be given

retrospective effect only in rare circumstances and with strong justification' and that '[i]f legislation is amended with retrospective effect, this should generally be accompanied by a caveat that no retrospective criminal liability is thereby created'.[68]

93. The ALRC raised concerns about the retrospective operation of the *Deterring People Smuggling Act 2011* (Cth), which it found 'has a retroactive operation for 11 years and may have enlarged the scope of the offence of people smuggling'.[69] The amending Act was enacted on 29 November 2011 but had retroactive effect from 16 December 1999. It inserted s 228B into the Migration Act, which defined the words 'no lawful right to come to Australia' for the purposes of the people smuggling offences in ss 233A and 233C.[70]

8.2 Changing the 'character test' with retrospective effect

94. On 25 July 2011, amendments were made to the 'character test' in the Migration Act.[71] The amendments provided that a person did not pass the character test, and could have their visa cancelled as a result, if they had been convicted of an offence while in immigration detention, or during or after an escape from immigration detention.[72]

95. The amendments were backdated and deemed to commence on 26 April 2011 when a policy announcement about the proposed changes had been made by the Government. Of particular concern was the fact that the changes applied to any offence, whether the offence was committed before, on or after the commencement of the new provision. That is, new adverse consequences were attached to past conduct that predated the Government's announcement. Conduct that did not give rise to a risk to a person's visa when it was engaged in suddenly could be the reason that the person's visa was cancelled.

96. In a submission to the ALRC in relation to its report on Traditional Rights and Freedoms, the Law Council said that these measures may not be justified in that they impose a penalty—liability to have one's visa cancelled—for an offence that may have occurred before the legislation commenced.[73]

97. Similar changes occurred in 2014. On 11 December 2014, amendments were made to the definition of 'substantial criminal record' for the purposes of the 'character test' in the Migration Act.[74] Previously, a person had a substantial criminal record if they had been convicted of offences with a total term of imprisonment of 2 years. The amendments reduced this period to 12 months. The change

applied to any decision to cancel a visa after the amendments commenced, regardless of when the offences were committed. That is, conduct that was not sufficiently serious to result in a person's visa being cancelled when it was engaged in suddenly could be the reason that the person's visa was cancelled.

98. At the same time, the amending Act introduced a requirement for mandatory cancellation of a person's visa if they did not pass the character test as a result of having a 'substantial criminal record'.[75] This change applied to any decision after the amendments commenced, whether the sentence of imprisonment on the basis of which the visa was cancelled was imposed before, on or after the commencement of the amendment. That is, the Minister was now required to cancel a person's visa as a result of conduct that occurred in the past that did not justify visa cancellation when it was engaged in.

8.3 Converting applications for permanent protection visas into applications for temporary protection visas

99. On 16 December 2014, s 45AA was inserted into the Migration Act which permitted the making of regulations that allowed an application for one type of visa to be considered as an application for another type of visa.[76]

100. Regulation 2.08F was then inserted into the Migration Regulations 1994 (Cth). The effect of this new regulation was to convert all applications for permanent Protection Visas by certain applicants (including unauthorised maritime arrivals and people who had not been immigration cleared) that had already been made before the regulation came into effect into applications for TPVs. That is, people who were entitled to apply, and had applied, for permanent Protection Visas, were taken to have only applied for TPVs instead. The regulation said that the applications were taken to 'never have been' an application for a permanent visa and were taken 'always to have been' an application for a TPV (even though TPVs did not exist immediately prior to the insertion of s 45AA into the Migration Act when the applications for permanent Protection Visas had been made). This retrospectively removed rights that vested upon the satisfaction of the relevant statutory criteria that existed at the time that individuals made their visa applications.

101. In its report on Traditional Rights and Freedoms, the ALRC recommended that s 45AA of the Migration Act and reg 2.08F of the

Migration Regulations be further reviewed to determine whether their retrospective operation was justified.[77]

8.4 Retrospectively validating conduct of the Commonwealth in regional processing countries

102. In May 2015, proceedings were commenced in the High Court against the Commonwealth which challenged whether the Commonwealth was authorised to engage in certain activities related to the creation and operation of the regional processing centre on Nauru.[78]

103. On 30 June 2015, after these proceedings had commenced but before the hearing, the *Migration Amendment (Regional Processing Arrangements) Act 2015* (Cth) was passed. That Act inserted s 198AHA into the Migration Act. The section commenced retrospectively from 18 August 2012, the date that the current legislative framework authorising regional processing commenced.[79]

104. The effect of this section was to retrospectively validate any action taken by the Commonwealth in relation to its regional processing arrangements with Nauru and Papua New Guinea, including:

- making payments in relation to the arrangement;
- 'exercising restraint over the liberty of a person'; and
- any other 'action in a regional processing country or another country'.

105. The High Court delivered judgment in February 2016 and held that the conduct of the Commonwealth in giving effect to Memoranda of Understanding with Nauru on 29 August 2012 and 3 August 2013 in relation to regional processing of asylum seekers was authorised by s 198AHA of the Migration Act, passed some years later.[80]

106. Justice Gageler dealt specifically with the retrospective effect of s 198AHA. His Honour said:

> The procurement of the plaintiff's detention on Nauru by the Executive Government of the Commonwealth … was therefore beyond the executive power of the Commonwealth unless it was authorised by valid Commonwealth law. Before 30 June 2015, there was no applicable Commonwealth law. On that day … s 198AHA was inserted with retrospective effect to 18 August 2012. …
>
> … I consider the plaintiff's central claim (that the Commonwealth and the Minister acted beyond the executive power of the Commonwealth by procuring and enforcing her detention at the Regional Processing Centre

between 24 March 2014 and 2 August 2014) to have been well-founded until 30 June 2015, when s 198AHA was inserted with retrospective effect.[81]

107. Ultimately, six of the seven Justices considered that s 198AHA provided sufficient statutory authority for the conduct by the Commonwealth, either in detaining the plaintiff or in 'participating' in her detention. If this retrospective legislation had not been passed, some of the conduct by the Commonwealth in regional processing countries may well have been unlawful.

---

1 Commonwealth, *Parliamentary Debates*, House of Representatives, 20 June 2018, p 9 (the Hon Peter Dutton MP, Minister for Home Affairs and Minister for Immigration and Border Protection). At https://www.aph.gov.au/Parliamentary_Business/Hansard/Hansard_Display?bid=chamber/hansardr/bf6054c6-068b-4e2f-82c1-db8835f50141/&sid=0000 (viewed 29 August 2018).

2 Explanatory Memorandum, Migration (Validation of Port Appointment) Bill 2018 (Cth), p 5.

3 *DBD16 v Minister for Immigration and Border Protection* [2018] FCCA 1801 and *DBC16 v Minister for Immigration and Border Protection* [2018] FCCA 1802.

4 *DBD16 v Minister for Immigration and Border Protection* [2018] FCCA 1801 at [28].

5 *DBD16 v Minister for Immigration and Border Protection* [2018] FCCA 1801 at [55]-[56].

6 *Minister for Home Affairs v DBD16*, Federal Court proceeding WAD 345/2018; *Minister for Home Affairs v DBC16*, Federal Court proceeding WAD 346/2018.

7 *DBB16 v Minister for Immigration and Border Protection*, Federal Court proceeding NSD354/2017 (Perram, Wigney and Lee JJ).

8 Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws* (ALRC Report 129), p 10 [1.4]. At https://www.alrc.gov.au/sites/default/files/pdfs/publications/alrc_129_final_report_.pdf (viewed 29 August 2018).

9 *Maxwell v Murphy* (1957) 96 CLR 261 at 637–8 (Dixon CJ).

10 *Australian Education Union v General Manager of Fair Work Australia* (2012) 246 CLR 117 at 134-135 [30] (French CJ, Crennan and Kiefel JJ).

11 Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws* (ALRC Report 129), p 370-371 [13.56]. At https://www.alrc.gov.au/sites/default/files/pdfs/publications/alrc_129_final_report_.pdf (viewed 29 August 2018).

12 Senate, *Standing orders*, order 24(1)(a)(i). At https://www.aph.gov.au/~/media/05%20About%20Parliament/52%20Sen/523%20PPP/Standing%20Orders%202015/StandingOrders.pdf?la=en (viewed 29 August 2018).

13 Senate Standing Committee for the Scrutiny of Bills, *Submission to the Australian Law Reform Commission's Inquiry into Traditional Rights and Freedoms*, 3 December 2015, p 5. At https://www.alrc.gov.au/sites/default/files/subs/150._org_the_senate_standing_committee_for_the_scrutiny_of_bills.pdf (viewed 29 August 2018).

14 Australian Government, Department of Prime Minister and Cabinet, *Legislation Handbook* (2017), p 25 [5.19]-[5.20] (internal cross-references omitted). At https://www.pmc.gov.au/sites/default/files/publications/legislation-handbook-2017.pdf (viewed 29 August 2018).

[15] Australian Government, Department of Prime Minister and Cabinet, *Legislation Handbook* (2017), p 42 [7.29]. At https://www.pmc.gov.au/sites/default/files/publications/legislation-handbook-2017.pdf (viewed 29 August 2018).

[16] Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 7 of 2018*, 27 June 2018, p 2 [1.6]. At https://www.aph.gov.au/~/media/Committees/Senate/committee/scrutiny/scrutiny_digest/2018/PDF/d07.pdf?la=en (viewed 29 August 2018).

[17] Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 7 of 2018*, 27 June 2018, pp 3-4 [1.9]. At https://www.aph.gov.au/~/media/Committees/Senate/committee/scrutiny/scrutiny_digest/2018/PDF/d07.pdf?la=en (viewed 29 August 2018).

[18] Parliamentary Joint Committee on Human Rights, *Human rights scrutiny report, Report 7 of 2018*, 14 August 2018, p 19 [1.60]. At https://www.aph.gov.au/~/media/Committees/Senate/committee/humanrights_ctte/reports/2018/Report%207/Report7.pdf?la=en (viewed 29 August 2018).

[19] Letter from the Hon Peter Dutton MP, Minister for Home Affairs and Minister for Immigration and Border Protection, to the Senate Scrutiny of Bills Committee dated 19 July 2018. At https://www.aph.gov.au/~/media/Committees/Senate/committee/scrutiny/scrutiny_digest/2018/PDF/Min_responses08.pdf?la=en (viewed 29 August 2018).

[20] Migration (Validation of Port Appointment) Bill 2018 (Cth), s 3(2).

[21] Migration (Validation of Port Appointment) Bill 2018 (Cth), s 3(3).

[22] Migration (Validation of Port Appointment) Bill 2018 (Cth), s 4.

[23] Migration (Validation of Port Appointment) Bill 2018 (Cth), s 5.

[24] Human Rights Committee, *General Comment No. 31 [80], The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add. 13 (26 May 2004), [6]. At http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f21%2fRev.1%2fAdd.13&Lang=en (viewed 31 August 2018). See also UN Commission on Human Rights, The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, UN Doc E/CN.4/1985/4Annex (28 September 1984). At http://www.refworld.org/docid/4672bc122.html (viewed 31 August 2018).

[25] Explanatory Memorandum, Migration (Validation of Port Appointment) Bill 2018 (Cth), p 5.

[26] Commonwealth, *Parliamentary Debates*, House of Representatives, 20 June 2018, p 9 (the Hon Peter Dutton MP, Minister for Home Affairs and Minister for Immigration and Border Protection). At https://www.aph.gov.au/Parliamentary_Business/Hansard/Hansard_Display?bid=chamber/hansardr/bf6054c6-068b-4e2f-82c1-db8835f50141/&sid=0000 (viewed 29 August 2018).

[27] Letter from the Hon Peter Dutton MP, Minister for Home Affairs and Minister for Immigration and Border Protection, to the Senate Scrutiny of Bills Committee dated 19 July 2018. At https://www.aph.gov.au/~/media/Committees/Senate/committee/scrutiny/scrutiny_digest/2018/PDF/Min_responses08.pdf?la=en (viewed 29 August 2018).

[28] *Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Act 2013* (Cth).

[29] For example the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth).

[30] Letter from the Hon Peter Dutton MP, Minister for Home Affairs and Minister for Immigration and Border Protection, to the Senate Scrutiny of Bills Committee dated 19 July 2018. At https://www.aph.gov.au/~/media/Committees/Senate/committee/scrutiny/scrutiny_digest/2018/PDF/Min_responses08.pdf?la=en (viewed 29 August 2018).

[31] *Migration Act 1958* (Cth), s 46A(1).

[32] *Migration Act 1958* (Cth), s 46A(2)–(3).

[33] The Hon Tony Burke MP, Minister for Immigration, Multicultural Affairs and Citizenship, 'Split in the Opposition's asylum seeker policy; asylum seeker policy' (Transcript of Press Conference, 7 July 2013). At http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2F3063861%22 (viewed 30 August 2018).

[34] Evidence to the Australian Human Rights Commission, Fourth Public Hearing of the National Inquiry into Children in Immigration Detention 2014, Canberra, 22 August 2014, pp 20–24 (The Hon Scott Morrison MP). At https://www.humanrights.gov.au/sites/default/files/Hon%20Scott%20Morrison%20Mr%20Bowles.pdf (viewed 30 August 2018).

[35] Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth).

[36] The Hon Scott Morrison MP, Minister for Immigration and Border Protection, 'Restoring TPVs to resolve labor's legacy caseload', Media release 25 September 2014. At http://pandora.nla.gov.au/pan/143035/20141222-1032/www.minister.immi.gov.au/media/sm/2014/sm218127.htm (viewed 15 March 2018).

[37] Senate Legal and Constitutional Affairs Legislation Committee, Estimates, *Official Committee Hansard*, 25 May 2015, p 66 (Mr Michael Manthorpe PSM, Deputy Secretary, Visa and Citizenship Management). At http://parlinfo.aph.gov.au/parlInfo/download/committees/estimate/0c5973fa-5b41-457f-af39-57df2971a205/toc_pdf/Legal%20and%20Constitutional%20Affairs%20Legislation%20Committee_2015_05_25_3493_Official.pdf;fileType=application%2Fpdf#search=%22committees/estimate/0c5973fa-5b41-457f-af39-57df2971a205/0000%22 (viewed 15 March 2018).

[38] Senate Legal and Constitutional Affairs Legislation Committee, Estimates, *Official Committee Hansard*, 27 February 2017, p 105 (Mr Michael Manthorpe PSM, Deputy Secretary, Visa and Citizenship Services). At http://parlinfo.aph.gov.au/parlInfo/download/committees/estimate/ac9b833f-cd57-4b33-9926-9b4e27fe5733/toc_pdf/Legal%20and%20Constitutional%20Affairs%20Legislation%20Committee_2017_02_27_4792_Official.pdf;fileType=application%2Fpdf#search=%22committees/estimate/ac9b833f-cd57-4b33-9926-9b4e27fe5733/0000%22 (viewed 15 March 2018).

[39] TPVs and SHEVs were reintroduced in late 2014 through the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth).

[40] See Australian Human Rights Commission, *Asylum seekers, refugees and human rights: Snapshot Report (2nd edition)* (2017) pp 43–46. At https://www.humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/asylum-seekers-refugees-and-human-rights-snapsho-0 (viewed 30 August 2018).

[41] *Australian Citizenship Act 2007* (Cth), s 21. See also Department of Home Affairs, *Migrant with permanent residence — eligibility* (n.d.). At https://www.homeaffairs.gov.au/trav/citi/pathways-processes/application-options/migrant-with-permanent-residence/eligibility (viewed 30 August 2018).

[42] See Australian Human Rights Commission, Submission No 163 to the Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014*, 31 October 2014, pp 36–42.

[43] Human Rights and Equal Opportunity Commission, *A last resort? National Inquiry into Children in Immigration Detention* (2004) pp 820, 841. At http://www.humanrights.gov.au/last-resort-report-national-inquiry-children-immigration-detention-2004 (viewed 30 August 2018).

[44] The Hon Peter Dutton MP, Minister for Immigration and Border Protection, 'Lodge or leave – Deadline for illegal maritime arrivals to claim protection', *Media release*, 21 May 2017. At

http://minister.homeaffairs.gov.au/peterdutton/2017/Pages/deadline-for-illegal-maritime-arrivals-to-claim-protection.aspx (viewed 15 March 2018).

[45] The Hon Peter Dutton MP, Minister for Immigration and Border Protection, Interview with Ray Hadley, Radio 2GB-4BC, 12 October 2017. At http://minister.homeaffairs.gov.au/peterdutton/Pages/hadley.aspx (viewed 15 March 2018).

[46] See *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012* (Cth).

[47] See United Nations High Commissioner for Refugees, *Mission to the Republic of Nauru, 3–5 December 2012* (14 December 2012). At http://www.unhcr.org/en-au/publications/legal/58c8bc864/unhcr-monitoring-mission-to-the-republic-of-nauru-3-5-december-2012.html (viewed 30 August 2018); United Nations High Commissioner for Refugees, *Mission to Manus Island, Papua New Guinea, 15–17 January 2013* (4 February 2013). At http://www.unhcr.org/en-au/publications/legal/58117c617/unhcr-mission-to-manus-island-papua-new-guinea-15-17-january-2013.html (viewed 30 August 2018); United Nations High Commissioner for Refugees, *Monitoring Visit to Manus Island, Papua New Guinea, 11–13 June 2013* (12 July 2013). At http://www.unhcr.org/en-au/publications/legal/58117c1a7/unhcr-monitoring-visit-to-manus-island-papua-new-guinea-11-13-june-2013.html (viewed 30 August 2018).

[48] The Hon Kevin Rudd MP, Prime Minister, 'Transcript of broadcast on the Regional Resettlement Arrangement between Australia and PNG' Media Release, 19 July 2013. At http://pandora.nla.gov.au/pan/79983/20130830-1433/www.pm.gov.au/press-office/transcript-broadcast-regional-resettlement-arrangement-between-australia-and-png.html (viewed 15 November 2016).

[49] United Nations High Commissioner for Refugees, *Monitoring visit to the Republic of Nauru, 7 to 9 October 2013* (26 November 2013) p 8, at http://www.refworld.org/docid/5294a6534.html (viewed 30 August 2018). United Nations High Commissioner for Refugees, *Monitoring visit to Manus Island, Papua New Guinea, 23 to 25 October 2013* (26 November 2013) p 5, at http://www.refworld.org/docid/5294aa8b0.html (viewed 30 August 2018).

[50] The Hon Scott Morrison MP, Minister for Immigration and Border Protection, 'Restoring TPVs to resolve Labor's legacy caseload' Media Release, 25 September 2014. At http://pandora.nla.gov.au/pan/143035/20141222-1032/www.minister.immi.gov.au/media/sm/2014/sm218127.htm (viewed 15 November 2016).

[51] See definition of 'fast track applicant' in *Migration Act 1958* (Cth), s 5(1).

[52] Merits review of Protection Visa applications was previously undertaken by the Refugee Review Tribunal. On 1 July 2015, the Refugee Review Tribunal (along with the Migration Review Tribunal and Social Security Appeals Tribunal) merged with the AAT to form a single amalgamated merits review body (see *Tribunals Amalgamation Act 2015* (Cth)). Merits review of decisions to review or cancel a visa (including a Protection Visa) are now handled by the AAT's Migration and Refugee Division. As the vast majority of people in the Legacy Caseload were not permitted to lodge applications for substantive visas prior to the amalgamation — by which time the 'fast track' merits review process had come into effect — very few people in the Legacy Caseload would have had the opportunity to apply to the Refugee Review Tribunal or the AAT for merits review of a decision to refuse a substantive visa application.

[53] *Migration Act 1958* (Cth), s 473CA.

[54] *Migration Act 1958* (Cth), ss 5(1), 473BB.

[55] *Migration Act 1958* (Cth), s 473CB(1).

[56] *Migration Act 1958* (Cth), ss 473DB, 473DD.

[57] See Australian Human Rights Commission, Submission No 163 to the Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014*, 31 October 2014, pp 18–33. At

https://www.aph.gov.au/DocumentStore.ashx?id=e50d519a-f240-4c6e-8f7e-baa7e3af7c33&subId=301611 (viewed 30 August 2018).

[58] See Australian Human Rights Commission, Submission No 163 to the Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014*, 31 October 2014, pp 18–33. At https://www.aph.gov.au/DocumentStore.ashx?id=e50d519a-f240-4c6e-8f7e-baa7e3af7c33&subId=301611 (viewed 30 August 2018).

[59] Department of Immigration and Border Protection, *Asylum Trends 2012–13* (2013) p 29. At https://www.homeaffairs.gov.au/ReportsandPublications/Documents/statistics/asylum-trends-aus-2012-13.pdf (viewed 30 August 2018).

[60] Immigration Assessment Authority, *Caseload Report (2017-18 YTD)* (2018) p 2. At http://www.iaa.gov.au/IAA/media/IAA/Statistics/IAACaseloadReport2017-18YTD.pdf (viewed 30 August 2018).

[61] *Migration Act 1958* (Cth), s 499.

[62] Minister for Immigration and Border Protection, *Direction No. 72 under section 499 of the Migration Act 1958 – Order for considering and disposing of Family visa applications* (13 September 2016) Section 8.

[63] Minister for Immigration and Border Protection, *Direction No. 72 under section 499 of the Migration Act 1958 – Order for considering and disposing of Family visa applications* (13 September 2016) Sections 8(1)(g), 9.

[64] Minister for Immigration and Border Protection, *Direction No. 72 under section 499 of the Migration Act 1958 – Order for considering and disposing of Family visa applications* (13 September 2016) Section 8(1)(b).

[65] Minister for Immigration and Border Protection, *Direction No. 72 under section 499 of the Migration Act 1958 – Order for considering and disposing of Family visa applications* (13 September 2016) Section 8(1)(g).

[66] For example, see the discussion in *CM v Commonwealth of Australia (DIBP)* [2015] AusHRC 99 at [27] and [43] (at https://www.humanrights.gov.au/our-work/legal/publications/cm-v-commonwealth-australia-dibp (viewed 31 August 2018)) which referred to delays of many years under the previous Direction 62, which did not permit consideration of special circumstances of a compelling or compassionate nature in relation to family Stream visa applications where the sponsor had been an unauthorised maritime arrival.

[67] *PGA v The Queen* (2012) 245 CLR 355 at 444 [245]; see also generally *Polyukhovich v Commonwealth* (1991) 172 CLR 501.

[68] Australian Government, Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (2011), p 15. At https://www.ag.gov.au/Publications/Documents/GuidetoFramingCommonwealthOffencesInfringementNoticesandEnforcementPowers/A%20Guide%20to%20Framing%20Cth%20Offences.pdf (viewed 29 August 2018).

[69] Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws* (ALRC Report 129), p 390 [13.146]. At https://www.alrc.gov.au/sites/default/files/pdfs/publications/alrc_129_final_report_.pdf (viewed 29 August 2018).

[70] Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws* (ALRC Report 129), p 374-375 [13.74]-[13.78]. At https://www.alrc.gov.au/sites/default/files/pdfs/publications/alrc_129_final_report_.pdf (viewed 29 August 2018).

[71] *Migration Amendment (Strengthening the Character Test and Other Provisions) Act 2011* (Cth).

[72] *Migration Act 1958* (Cth), s 501(6)(aa).

[73] Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws* (ALRC Report 129), p 386 [13.133]. At https://www.alrc.gov.au/sites/default/files/pdfs/publications/alrc_129_final_report_.pdf (viewed 29 August 2018).

[74] *Migration Amendment (Character and General Visa Cancellation) Act 2014* (Cth).

[75] *Migration Act 1958* (Cth), s 501(3A)(a)(i).

[76] Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth), Sch 2, Part 2, item 20.

[77] Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws* (ALRC Report 129), p 390 [13.147]. At https://www.alrc.gov.au/sites/default/files/pdfs/publications/alrc_129_final_report_.pdf (viewed 29 August 2018).

[78] *Plaintiff M68/2015 v Minister for Immigration and Border Protection*, High Court proceeding M68/2015.

[79] The *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012* (Cth) commenced on 18 August 2012.

[80] *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42.

[81] *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42 at 110 [180] and 112 [188] (Gageler J). Justices Bell, Gageler and Gordon would have held that the Commonwealth was responsible for the detention of the plaintiff, but their Honours were in dissent on this point.