



**Law Council**  
OF AUSTRALIA

# Migration Legislation Amendment (Regional Processing Cohort) Bill 2016 [Provisions]

**Senate Legal and Constitutional Affairs Committee**

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*Telephone* +61 2 6246 3788 • *Fax* +61 2 6248 0639  
*Email* [mail@lawcouncil.asn.au](mailto:mail@lawcouncil.asn.au)  
GPO Box 1989, Canberra ACT 2601, DX 5719 Canberra  
19 Torrens St Braddon ACT 2612  
Law Council of Australia Limited ABN 85 005 260 622  
[www.lawcouncil.asn.au](http://www.lawcouncil.asn.au)

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## About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2016 Executive as at 1 January 2016 are:

- Mr S. Stuart Clark AM, President
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- Mr Konrad de Kerloy, Executive Member
- Mr Michael Fitzgerald, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

## Acknowledgement

The Law Council acknowledges the assistance of the Migration Law Committee, National Human Rights Committee, Constitutional Law Committee, Law Institute of Victoria, Law Society of South Australia and the Law Society of New South Wales in the preparation of this submission.

## Introduction

1. The Law Council welcomes the opportunity to provide the following comments to the Senate Legal and Constitutional Affairs Committee (**Senate Committee**) in respect of its inquiry into the Migration Legislation Amendment (Regional Processing Cohort) Bill 2016 [Provisions] (**the Inquiry**).
2. The primary effect of the Bill would be to invalidate any visa applications by adults who were taken to a regional processing country after 19 July 2013. It would prevent onshore and offshore visa applications by people who arrived by boat who are currently detained on Nauru or Manus Island, as well as people living in Australia who have been transferred from Nauru or Manus Island back to Australia, for medical or other reasons. The validity bar applies to any temporary or permanent visa applications from asylum seekers and refugees.
3. The Law Council has a number of concerns with the Bill. Those concerns include the:
  - violation of Article 31(1) of the *1951 Convention relating to the Status of Refugees* (the Refugee Convention) with regards to the imposition of a penalty based on the mode of arrival;
  - Bill appears to be neither necessary nor proportionate to its intended objective;
  - violation of Articles 3(1) and 10(1) of the Convention on the Rights of the Child, (CRC), Article 10(1) of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) and Article 21(1) of the *International Covenant on Civil and Political Rights* (ICCPR) with regards to the rights of the family and their children;
  - Bill will have the effect of splitting up families and preventing family reunions, in breach of Australia's international obligations and with severe impact upon settlement and mental health outcomes for refugees;
  - retrospective application of the Bill, insofar as it adversely affects people's rights and legitimate expectations and operates to punish them for past actions of seeking safety;
  - power of the Minister to lift the bar on valid applications in the 'public interest' is broad and not subject to review;
  - Bill may detrimentally effect the mental health already vulnerable people;
  - failure of the Statement of Compatibility to address key human rights issues, including the *Refugee Convention*; and
  - limited timeframes for scrutiny by the Senate Committee and limited capacity for interested persons and organisations to make submissions.
4. On the above grounds the Law Council recommends against passage of the Bill.

## Overview of the Proposed Changes

5. The Bill amends the *Migration Act 1958* (the Act) and the *Migration Regulations 1994* (the Regulations) to prevent certain unauthorised maritime arrivals<sup>1</sup> (UMAs) and transitory persons from making valid temporary or permanent visa applications.
6. Item 1 inserts a new definition in subsection 5(1) of the Migration Act of member of the designated regional processing cohort. The new definition includes:
  - a) people who arrived by boat who were at least 18 years of age and were taken to a regional processing country after 19 July 2013; and
  - b) transitory persons who were at least 18 years of age and were taken to a regional processing country after 19 July 2013 under the Maritime Powers Act 2013.
7. The new definition of regional processing cohort excludes children: subsection (5)(b)(ii) of the Migration Act definition makes clear that a transitory person is only a member of the designated regional processing cohort if they were at least 18 years of age when they were first taken to a regional processing country.
8. Items 2 and 3 provide that special purpose visas (Act based visa) cannot be granted to a member of the regional processing cohort.

### Visa Applications by Unauthorised Maritime Arrivals

9. The Bill provides for a new bar on valid visa applications by certain UMAs who were taken to a regional processing country. Item 4 inserts new subsections 46A(2AA), 46A(2AB) and 46A(2AC) after subsection 46A(2) in Part 2 of Division 3.
10. Existing section 46A(1) of the Migration Act provides for a bar on valid visa applications by unauthorised maritime arrivals (UMAs). Subsection 46A(2) provides that the Minister may 'lift the bar' if it is in the public interest to do so, whilst existing subsections 46A(2C), 46A(3) and 46A(7) describe the Minister's personal, non-compellable powers in relation to the lifting of the bar.
11. New subsections 46A(2AA), 46A(2AB) and 46A(2AC) provide for a new visa application bar. This new bar will prevent valid visa applications by UMAs who are members of the designated regional processing cohort whether they are inside or outside of Australia, and regardless of whether they are a lawful non-citizen or unlawful non-citizen.
12. New subsection 46A(2AA) provides that an application for a visa is not a valid application if it is made by a person who:
  - a) is an UMA under subsection 5AA(1); and
  - b) after 19 July 2013, was taken to a regional processing country under section 198AD; and

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<sup>1</sup> Defined in section 5AA(1) of the Act.

- c) was at least 18 years of age on the first or only occasion after 19 July 2013 when he or she was taken to a regional processing country

13. The Explanatory Memorandum provides that the purpose of this amendment is to:

*"...ensure that a UMA, who was taken to a regional processing country under section 198AD of the Migration Act after 19 July 2013, and was at least 18 years of age at that time, will not be eligible to apply for an Australian visa of any kind."*

14. New subsection 46A(2AB) mirrors the existing provision for Ministerial discretion in relation to lifting the statutory bar under section 46A(2AA) if the Minister thinks it is in the public interest to do so. Similar to the existing section 46A(2), the Minister's power to lift the bar is personal, non-compellable and it is for the Minister to decide what is in the public interest. Items 5 - 12 amend the legislative framework to give effect to this intention.

### Visa Applications by Transitory Persons

15. The Bill also provides for a new bar on valid visa applications by transitory persons. Item 13 inserts new subsections 46B(2AA), 46B(2AB) and 46B(2AC) after subsection 46B(2) of the Migration Act.

16. Existing section 46B of the Migration Act deals with visa applications by transitory persons. Transitory person is defined in subsection 5(1) of the Migration Act, and relevantly includes a person who was taken to a regional processing country under section 198AD of the Migration Act or a person who was taken to a place outside Australia under paragraph 245F(9)(b) of this Act, or under Division 7 or 8 of Part 3 of the Maritime Powers Act. Existing subsection 46B(1) provides for a bar on valid applications by transitory persons in Australia and is either an unlawful non-citizen or holds a bridging visa or certain kinds of temporary visas.

17. Similar to the provisions described above, existing subsection 46B(2) provides for the Minister to lift the bar on valid applications by transitory people where it is in the public interest. These powers are non-compellable (s46B(7)) and must be personally exercised by the Minister (s46B(3)).

18. New subsection 46B(2AA) provides that an application for a visa is not a valid application if it is made by a transitory person who:

- a) after 19 July 2013, was taken to a regional processing country under Division 7 or 8 or Part 3 of the Maritime Powers Act; and
- b) was at least 18 years of age on the first or only occasion after 19 July 2013 when he or she was so taken to a regional processing country.

19. The Explanatory Memorandum provides that the purpose of this amendment is to:

*"...introduce a new application bar for this cohort of transitory person [which applies] to any transitory person described above, whether they are in Australia or outside Australia, or whether they are a lawful non-citizen or an unlawful non-citizen."*

20. Similar to the new provisions described above, new subsection 46B(2AB) provides that if the Minister thinks that it is in the public interest to do so, the Minister may determine that subsection 46B(2AA) does not apply. The Minister's power to lift the bar is personal, non-compellable and it is for the Minister to decide what is in the public interest. Items 14 - 21 are consequential amendments to give effect to this intention.

### Other provisions

21. The Bill also provides for amendments to the Regulations which prevent deemed applications for certain visitor visas (business visitor and ETA) unless the Minister waives these provisions. Items 22 - 26 give effect to this intention.
22. Item 27 amends Regulation 2.07AM, which presently exists to give effect to the 'no advantage' principle from Recommendation 1 of the Report of the Expert Panel on Asylum Seekers.<sup>2</sup> Currently it prevents persons described in regulation 2.07AM(5), primarily illegal maritime arrivals from applying for a Class XB visa unless they are invited to apply by the Minister and accept the invitation. The new Regulation 2.07AM(6) appears to provide the Minister with the power to waive this validity bar.
23. Items 28 - 35 are inconsequential and have not been discussed further.

### Application provisions

24. The application bars described above have effect as follows:
- a) for people outside Australia, this affects any applications made after 8 November (when the Bill was introduced); and
  - b) for people inside Australia, this affects any visa applications made after the Act commences.
25. Item 36 provides for these commencement provisions.
26. In relation to offshore applicants, the Explanatory Memorandum states that this:
- "...reflects the intention that in addition to [the bars] applying prospectively from time of commencement, they will also apply to a visa application made from the time the Bill was introduced into the House of Representatives where that application was not finally determined before the commencement of this item."*
27. In relation to onshore applicants, the Explanatory Memorandum states that this:
- "...reflects the intention that [the bars] will apply prospectively to onshore applications made by persons who are members of the designated regional processing cohort,"* noting that it is *"unnecessary for the new amendments to apply retrospectively to members of the cohort in Australia because they*

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<sup>2</sup> Angus Houston, Expert Panel on Asylum Seekers, 13 August 2012. Available at: <http://apo.org.au/resource/report-expert-panel-asylum-seekers>.



*would not be permitted to make an application for a visa under the current bars unless permitted to do so by the Minister.”*

## Asylum Seekers Affected by the Bill

28. Presently there are around 30,500 people who arrived by boat residing in the Australian community, including around 6,000 people who arrived on or before 12 August 2012, as well as 24,500 people who arrived between 13 August 2012 and 31 December 2013. There have been numerous amendments to the refugee status determination process in past years for people who travel to Australia by boat, most notably the Migration and Maritime Powers (Resolving the Asylum Legacy Caseload) Act 2015 (the Legacy Caseload Act), which amongst other things:
- a) reintroduced Temporary Protection Visas and created a new category of visas known as Safe Haven Enterprise Visas (SHEVs);
  - b) introduced a system of Fast Track processing involving limited merits review on the papers; and
  - c) provided for conversion of permanent Protection visa applications not finally determined at 16 December 2014 to be converted to Temporary Protection Visas (TPVs).
29. Since 19 July 2013, asylum seekers who seek to travel to Australia by boat have been transferred to one of the regional processing centres on Manus Island or Nauru pursuant to section 198AD, contained in Subdivision AD of the Migration Act. There are 1,269 people detained offshore in the regional processing centres.<sup>3</sup> Manus Island presently houses 873 single adult males whilst Nauru holds 396 men, women and children.
30. Most of the people in regional processing countries have been assessed as refugees in accordance with the domestic law of each country. On Manus Island there have been 675 positive refugee determinations out of 1,015 and on Nauru there have been 941 positive determinations out of 1,195.
31. In addition there are over 300 transitory persons residing in Australia, who have been transferred from Nauru or Manus Island back to Australia, predominantly for medical reasons.
32. This Bill affects anyone who was taken by the Australian Government to Nauru or Manus Island after 19 July 2013, if they were an adult at the time they were first taken there. It also applies to people intercepted on the seas by the Australian Government and transferred to Nauru or Manus Island. The Bill affects those people now living in Australia who have been transferred from Nauru or Manus Island back to Australia, for medical or other reasons.
33. The Bill does not affect:

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<sup>3</sup> Department of Immigration and Border Protection, Immigration Detention Statistics DIBP 30 September 2016

- a) people seeking asylum in Australia who have not been on Nauru or Manus Island after 19 July 2013, or
- b) people who have arrived on refugee and humanitarian visas through resettlement.

## Purpose of the Bill

34. The Law Council queries whether the Bill is necessary, justified and proportionate to achieving a legitimate purpose.

35. The Law Council is concerned that the Explanatory Memorandum does not explain the purpose for the introduction of the Bill. The Outline to the Explanatory Memorandum contains no detail on why the Bill was introduced nor what issues it aims to address. It is only by reference to the Minister for Immigration's Second Reading Speech that some guidance can be gained. The Minister stated:

*The purpose of the Migration Legislation Amendment (Regional Processing Cohort) Bill 2016 is to reinforce the government's longstanding policy is to reinforce the government's longstanding policy that people who travel here illegally by boat will never be settled in this country*

...

*This legislation sends a strong message to people smugglers and those considering travelling illegally to Australia by boat: Australia's borders are now stronger than ever.<sup>4</sup>*

36. Government Ministers have also suggested that they have introduced this Bill because otherwise these people might be able to enter Australia illegitimately, through (for example) faking marriages with Australians<sup>5</sup> or by arriving to Australia on tourist visas.<sup>6</sup> However, the Law Council notes that the Migration Act already contains extensive powers and safeguards to ensure that visas of any kind are obtained legitimately.

37. In the Law Council's experience, visas are routinely refused or cancelled where there is evidence of an ulterior purpose. For example, in the subclass 309 partner visa pathway, a visa applicant and their Australian sponsor must prove at the time of application for the visa as well as the time of decision on the application that the relationship is genuine and continuing. This involves stringent checks of documentary evidence as well as interviews with a Departmental officer if necessary. To obtain a permanent subclass 100 partner visa, the couple's relationship is examined again more than 2 years after the time of initial visa application. Similarly, any application for a tourist visa is assessed against 'genuine temporary entrant' criteria by which

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<sup>4</sup> The Hon Peter Dutton MP, Minister for Immigration and Border Protection, Second Reading Speech, House of Representatives, 8 November 2016.

<sup>5</sup> The Guardian, Peter Dutton's 'sham relationships' claim questioned by migration experts, 3 November 2016. Available at: <https://www.theguardian.com/australia-news/2016/nov/03/peter-duttons-sham-relationships-claim-questioned-by-migration-experts>.

<sup>6</sup> News.com.au, Turnbull to propose law that bans boat asylum seekers from Australia permanently, 31 October 2016. Available at: <http://www.news.com.au/national/turnbull-to-propose-law-that-bans-boat-asylum-seekers-from-australia-permanently/news-story/793919195011e35c15471918b007c8a1>.

applicants must demonstrate to the Department that they are genuine visitors and will return to their home country at the expiry of their visa.

38. This Bill is not limited to barring fraudulent applications. Instead, it prevents entry even if a person would otherwise meet all the criteria for a visa, simply because this person has been on Nauru or Manus Island. This extends to skilled migrants, business visitors, employer sponsored entrants and tourists as well as partners, parents and children.
39. Putting this Bill into practice administratively is also likely to be costly given the length of time the bar is in place being the lifetime of those persons and that it applies to all visas. Electronic visa systems and all forms will need to be adapted to pick up such persons as many of these people may later hold citizenship from other countries. Currently no paper application forms or electronic forms include questions relating to this cohort. If a waiver of the bar is sought, this adds another cost in the process and potentially increasing 'red tape'.

## Australia's Obligations under International Law

40. It is clear that every person has the right to seek and enjoy asylum from persecution, serious human rights violations and other serious harm. This right is protected under the *Universal Declaration of Human Rights* and a number of international Conventions to which Australia is a party.
41. Australia is obliged under international law to recognise the right to seek asylum and to ensure that laws and policies concerning asylum seekers adhere to the principles contained in the Refugee Convention, and other relevant instruments including the ICCPR and its *Second Optional Protocol*; the *Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment* (CAT) and its *Optional Protocol*; CROC; and the ICESCR.
42. The principle of non-refoulement and other relevant obligations in these Conventions apply to all people seeking asylum in Australia regardless of their mode or time of arrival. As described in the Law Council's *Asylum Seeker Policy*,<sup>7</sup> these principles require that Australia (relevantly):
  - a) enact and apply a consistent legal process for determining protection status that does not discriminate against applicants based on where they come from or how they arrive;
  - b) ensure that asylum seekers who enter Australia are not penalised for doing so without a valid visa, or for their mode of arrival, provided they present themselves to the authorities without delay and show good cause for their entry or presence; and
  - c) recognise, protect and promote the right for those who invoke Australia's protection obligations to be reunited with close family members.

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<sup>7</sup> Law Council of Australia, *Asylum Seeker Policy*, 5 September 2014. Available at: [https://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/AsylumSeeker\\_Policy\\_web.pdf](https://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/AsylumSeeker_Policy_web.pdf).

43. The Law Council reiterates its position<sup>8</sup> that the Commonwealth retains responsibility, either wholly or in part, for the health and safety of asylum seekers transferred to other countries for offshore processing and assessment under the *Refugee Convention*. Australia's responsibility derives from:
- a) the Commonwealth's potential common law duty of care; and
  - b) international law under:
  - c) the joint and several responsibility for internationally wrongful acts; and
  - d) Australia's effective control of its regional processing centres in relation to the extraterritorial application of human rights treaties to which it is party.
44. Therefore, Australia is required to provide protections to any person within Australia's 'effective control'. This applies to Nauru and Manus regional processing centres due to the high level of the participation in their funding, construction and management. The Law Council believes that where transfer arrangements are used, Australia retains the obligation to ensure their well-being and to find adequate long-term solutions for those found to be refugees.<sup>9</sup>

## Application of Article 31(1) under the *Refugee Convention*

45. Article 31(1) of the Refugee Convention states:

*The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence*

46. The Law Council is of the view that the Bill's proposed lifetime ban is inconsistent with international law obligations as it discriminates based on method of arrival through the imposition of a penalty. Firstly, the ban only applies to boat arrivals that have been taken to a regional processing country, i.e. Nauru and Papua New Guinea, under proposed subsection 46A(2AA) and subsection 46B(2AA). Secondly, the proposed ban under subsection 46A(2AA) and subsection 46B(2AA) is a penalty. The term 'penalty' may include, but is not necessarily limited to, prosecution, fine and imprisonment.<sup>10</sup>

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<sup>8</sup> Law Council of Australia, Submission to the Select Committee on Recent Allegations relating to Conditions and Circumstances at the Regional Processing Centre in Nauru, 12 May 2015, available at: [http://www.lawcouncil.asn.au/lawcouncil/images/2988\\_-\\_S\\_-\\_Naru\\_Inquiry.pdf](http://www.lawcouncil.asn.au/lawcouncil/images/2988_-_S_-_Naru_Inquiry.pdf).

<sup>9</sup> See p9, Law Council of Australia, Asylum Seeker Policy, 5 September 2014. Available at:

[https://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/AsylumSeeker\\_Policy\\_web.pdf](https://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/AsylumSeeker_Policy_web.pdf).

<sup>10</sup> Global Consultations on International Protection, Summary Conclusions: Article 31 of the 1951 Convention, Expert Roundtable organised by the United Nations High Commissioner for Refugees and the Graduate Institute of International Studies, Geneva, Switzerland, 8-9 November 2001. Available at: <http://www.unhcr.org/419c783f4.pdf>.

47. Further direction on the definition of penalty can be obtained from relevant case law. With reference to Article 15 of the ICCPR, in *Van Duzen v Canada*<sup>11</sup> the United Nations Human Rights Committee said:

*Whether the word "penalty" in article 15 (1) should be interpreted narrowly or widely, and whether it applies to different kinds of penalties, "criminal" and "administrative", under the Covenant, must depend on other factors. Apart from the text of article 15 (1), regard must be had, inter alia, to its object and purpose.*

48. Additionally the judgment in the judgment of Brown LJ in *R v Uxbridge Magistrates Court & Another Ex Parte Adimi R v Crown Prosecution Services Ex Parte Sorani R v Secretary of State for Home Department Ex Parte Sorani R v Secretary of State for Home Department and Another Ex Parte Kaziu*<sup>12</sup> at paragraphs 15 and 16 provides guidance:

*15. What, then, was the broad purpose sought to be achieved by Article 31? Self-evidently it was to provide immunity for genuine refugees whose quest for asylum reasonably involved them in breaching the law. In the course of argument my Lord suggested the following formulation: "Where the illegal entry or use of false documents or delay can be attributed to a bona fide desire to seek asylum whether here or elsewhere, that conduct should be covered by Article 31."*

*16. That Article 31 extends not merely to those ultimately accorded refugee status but also to those claiming asylum in good faith (presumptive refugees) is not in doubt.'*

49. The Law Council also notes that the text of Article 31(1) makes it clear that it is not particular types of penalties that are forbidden; instead, Article 31(1) prohibits the imposition of penalties (in general) in a particular context, namely as a result of unlawful entry or presence. Article 31(1) of the *Vienna Convention on the Law of Treaties* states that:

*"A treaty shall be interpreted in good faith in accordance with the ordinary meaning given to the terms of the treaty in their context and in light of its object and purpose"*

50. Based upon these assessments, the Law Council takes the view that a 'penalty' is to be construed broadly, particularly in light of the decision by the drafters not to focus on a particular class or classes of penalty but instead to focus on what the penalty is imposed for.

51. The Law Council notes that the penalty is not imposed on other visa applicants and is solely based on the way the person entered irrespective of the fact that they are later found to be a refugee. It is this unfavourable treatment as well as the length of the ban which makes it punitive in its nature and contrary to the *Refugee Convention*. The penalty operates in addition to the penalties applied to people who arrived by boat described above in relation to the Legacy Caseload Act. The combined effect of these

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<sup>11</sup> Communication No. R.12/50, U.N. Doc. Supp. No. 40 (A/37/40) at 150 (1982).

<sup>12</sup> [1999] EWHC Admin 765 (29 July 1999).

measures is that people who arrived in Australia by boat at any time in the last 5-6 years face a radically different system of refugee status determination to people who arrived by plane with a valid visa.

52. The Law Council notes the ban only applies to refugees who sought to enter Australia "illegally" under Australia's immigration law. It would not apply to refugees who entered "legally" on any visa, including under Australia's refugee resettlement program. As noted by Professor Ben Saul and Professor Jane McAdam, the penalty of a lifetime ban would be imposed, as defined by Article 31, "on account of" illegal entry.<sup>13</sup>
53. The Law Council believes that the basic human right of every person to seek asylum from persecution is not diminished by their mode of arrival. Those forced to flee persecution need and deserve humane conditions of protection, and a sustainable long-term solution.
54. Professor Saul and Professor McAdam also note that while Article 31 states that it only applies to refugees "coming directly" from persecution, it does not mean that refugees are only protected from punishment if they travel immediately to Australia from their home country.<sup>14</sup> Protections would still apply to refugees who transit through other countries on their way to Australia, where those other countries do not offer effective, safe legal and practical protection. Refugees cannot stay in a transit country which does not recognise refugee status or the *Refugee Convention*. Additionally, they cannot stay in a country where they are classed as "illegal" migrants and remain vulnerable to expulsion due to persecution at any time.

## Human Rights of the Family and Children under CRC, ICESCR and ICCPR

55. It is important to take account of the broader impacts of the Bill in its effect on families and children. Given that, 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."
56. The greatest impact of this Bill will be on those people on Nauru and Manus Island who have been separated from family in Australia, including:
  - a) people who arrived many years ago, who already have citizenship, a permanent protection visa or another permanent humanitarian or migration visa;
  - b) people seeking protection who came to Australia before 19 July 2013 who are within the 24,500 people currently undergoing refugee status determination in Australia.

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<sup>13</sup> Professor Ben Saul and Professor Jane McAdam, Sydney Morning Herald, Malcolm Turnbull is breaking international law with cruel lifetime refugee ban, 9 November 2016. Available at: <http://www.smh.com.au/comment/malcolm-turnbull-is-breaking-international-law-with-cruel-lifetime-refugee-ban-20161108-gskstx>.

<sup>14</sup> Ibid.

57. Human rights relating to respect for the family and children are contained in the CRC, ICESCR and ICCPR. Those rights which are engaged by the Bill include:

a) Article 3(1) of the CRC:

*In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.*

b) Article 10(1) of the CRC:

*In accordance with the obligation of States Parties under article 9, paragraph 1, applications by a child or his parents to enter or leave a State Party for the purposes of family reunification shall be dealt with by States Parties in a positive, human and expeditious manner. States Parties shall further ensure that the submission of such a request shall entail no adverse consequences for the applicants and for the members of their family.*

c) Article 10(1) of ICESCR, which is not referred to in the Statement of Compatibility, provides:

*The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children.*

d) Article 17(1) of the ICCPR:

*No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.*

e) Article 23 ICCPR:

*The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.*

f) Article 24(1) of the ICCPR:

*Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.*

58. The Law Council is of the view that the Bill breaches Australia's human rights obligations under the CRC, ICESCR and the ICCPR with regards to the family and children.

59. For those in Australia who are currently seeking protection, they will be granted only temporary protection visas. This does not give them the right to resettle their family or even to travel overseas without the permission of the Australian Government. The effect of this Bill is to compound this, so that their family in Nauru or Manus Island,

most of which have already been determined to be refugees,<sup>15</sup> will never be able to visit or reunite with them in Australia.

60. The ban will also prevent family reunions, as many asylum seekers who would be banned under the proposed laws would have family members living in Australia.<sup>16</sup> International law has a strong focus on family unity and reunification. While it has been stated that the proposed ban will not apply to children, it will still affect many families.
61. Where people on Manus Island and Nauru have family members in Australia who are citizens or permanent residents, the Bill operates to discriminate against certain Australians who are then barred from sponsoring their family where they would otherwise meet the requirements for the visa.
62. The Law Council is concerned with the assessment contained in the Statement of Compatibility that the Ministerial discretion contained in the Bill could include consideration of Australia's human rights obligations.<sup>17</sup> If the intention is that the public interest test would provide the capacity to interpret matters on a case by case basis with reference to Australia's international human rights obligations with respect to the rights of families and children, it should be explicitly stated. Additionally, the assessment is of concern in that it suggests that the Minister has discretion to decide whether or not Australia's human rights obligations should be adhered to.
63. The Law Council is of the view that Australia's human rights obligations should always be given consideration when decisions of the Minister are being made, especially when they are likely to have a substantial impact upon an individual's wellbeing and livelihood, as is often the case in deciding whether or not to grant a visa.

## Mental health Concerns and Additional Punishment for Vulnerable People

64. The effect of this Bill is to punish a group of extremely vulnerable people indefinitely, simply for seeking protection. Indeed, the Bill targets the most vulnerable group of refugees – people we have forced into indefinite detention in remote offshore locations places and in conditions which the United Nations High Commissioner for Refugees has described as "immensely harmful".<sup>18</sup>
65. The conditions on Nauru and Manus Island and the prolonged detention in those places with uncertain status or resettlement circumstances is likely to have led to

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<sup>15</sup> Department of Immigration and Border Protection, Operation Sovereign Borders monthly update: October 2016, 7 November 2016. Available at: <http://newsroom.border.gov.au/channels/Operation-Sovereign-Borders/releases/operation-sovereign-borders-monthly-update-october-2>.

<sup>16</sup> Paragraph 7(f) LCA Asylum Seeker Policy

<sup>17</sup> "...the proposed legislative amendments will include flexibility for the Minister for Immigration and Border Protection personally to 'lift' the bar where the Minister thinks it is in the public interest to do so. This consideration could occur in circumstances involving Australia's human rights obligations towards families and children, allowing a valid application for a visa on a case by case basis and in consideration of the individual circumstances of the case, including the best interests of affected children" See page 3, Migration Legislation amendment (Regional Processing Cohort) Bill 2016, Explanatory Memorandum.

<sup>18</sup> UNHCR, UNHCR Calls for Immediate Movement of Refugees and Asylum-Seekers to Humane Conditions, 2 May 2016. Available at: <http://unhcr.org.au/news/unhcr-calls-immediate-movement-refugees-asylum-seekers-humane-conditions/>.



many among the detainees suffering mental health problems and injuries, from which they may never recover. Situations of protracted uncertainty, including lengthy periods of detention, temporary visas and prolonged separation of family units, are all major factors in mental health outcomes for refugees and asylum seekers.

66. As mentioned above, many of the people in the new group of 'regional processing cohort' have family in Australia within the legacy caseload of 24,500 people (who are only eligible for TPVs or SHEVs). UNHCR has criticised Australia's policy of using TPVs and welcomed the end of TPVs in 2008. At that time, UNHCR's Regional Representative, Mr Richard Towle, said the agency had long held concerns about denying refugees access to family reunion and travel rights, stating that the use of TPVs:

*"...also perpetuated uncertainty for refugees who had already suffered enormous hardship, impeding their ability to restart their lives and prolonging the separation of families."<sup>19</sup>*

## Application of Rule of Law Principles

67. The Law Council is concerned that the Bill has retrospective application, in that proposed subsection 46A(2AA) applies to visa applicants, not from the proposed date of assent, but instead from 19 July 2013. As outlined in the Law Council's Policy Statement on Rule of Law Principles (the Rule of Law Principles)<sup>20</sup> the law must be both readily known and available, and certain and clear.
68. The Bill unfairly punishes people for what they have done in the past. That is, trying to come by boat to Australia over three years ago, with the greatest impact being for those people currently on Nauru and Manus Island who have family in Australia.
69. Additionally, the Law Council is concerned that the Bill does not apply to all people equally, in that it discriminates on an arbitrary or irrational grounds.<sup>21</sup> The Bill seeks to discriminate on the mode of arrival, as the ban only applies to boat arrivals that have been taken to a regional processing country. The Law Council is of the view that this proposed distinction, as opposed to someone who has arrived by any other form of transportation to Australia is on an arbitrary basis.

## Power of the Minister to Grant Exemptions

70. The Law Council is of the view that the power of the Minister to lift the bar on valid applications in the 'public interest' is too broad. Under subsections 46A(2AB), 46A(2AC) and 46A(2D) wide discretion is granted to the Minister to vary, revoke or change any decision.
71. There are numerous other broad, non-compellable Ministerial discretions in the Migration Act including existing sections 46A (lifting the bar on valid onshore visa applications by UMA's), 351 (intervention following decision by Tribunal where it is in

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<sup>19</sup> United Nations High Commissioner for Refugees, UN refugee agency welcomes end of TPVs, 14 May 2008, available at: <http://www.unhcr.org.au/pdfs/UNHCRwelcomesbudgetannouncementmay08.pdf>

<sup>20</sup> Law Council of Australia, Policy Statement: Rule of Law Principles, March 2011, p2. Available at: <http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/PolicyStatementRuleofLaw.pdf>.

<sup>21</sup> Ibid.

the public interest), 417 (humanitarian intervention following decision of a Tribunal) and 195A (power to grant a visa to a detainee). The Minister routinely issues written guidelines to his officers when considering the use of these powers, however, in the experience of the Law Council such broad discretion and usage of these guidelines are problematic for a number of reasons.

72. The Law Council has observed that there is a lack of procedural fairness associated with the personal powers of the Minister, which often leads to unjust and unpredictable results. In addition, the administrative burden of the Minister being personally involved in all visa making decisions often means lengthy delays in processing. There are also no reasons given for an adverse decision. It is also a costly administrative burden on the Minister given it would be in place during the lifetime of such persons.
73. As the application bars proposed in subsections 46A(2AA) and 46B(2AA) operate as a bar on making a valid application, there is no right to review of any adverse decision. In contrast to a visa refusal decision, which generally has the right of merits review to the Administrative Appeals Tribunal or judicial review in the Federal Courts, these personal Ministerial decisions are not reviewable. This proposal contrasts with the Rule of Law Principles, which state that the use of executive powers should be subject to meaningful parliamentary and judicial oversight.<sup>22</sup>
74. The Explanatory Memorandum provides no explanation as to what may be considered in the public interest for the potential exercise of the Ministerial power to lift the bar, aside from consideration of international obligations. Noting that this Bill directly contradicts several international obligations (as outlined above), the Law Council believes that the public interest test does not sufficiently protect a visa applicant's human rights.

## Statement of Compatibility with Human Rights

75. The Law Council has previously expressed concerns that human rights statements of compatibility contained in explanatory memoranda to Bills, in many cases, are failing to provide sufficient legal analysis of human rights impacts.<sup>23</sup> This has been observed in Bills put forward by various government departments, which evidence a misunderstanding and a lack of lack of rigour.<sup>24</sup> The Law Council expresses similar concerns in the drafting of the statement of compatibility attached to the Bill.
76. Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) outlines the processes involved in the development of a statement of compatibility in respect of a Bill. Under subsection 8(3) a statement of compatibility must include an assessment of whether a bill is compatible with human rights. According to subsection 3(1) human

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<sup>22</sup> Ibid, p4.

<sup>23</sup> Law Council of Australia, Submission to the Australian Law Reform Commission, Interim Report into Traditional Rights and Freedoms – Encroachment by Commonwealth Laws, 9 October 2015, p13-15. Available at: [http://www.lawcouncil.asn.au/lawcouncil/images/3065\\_-\\_Interim\\_Report\\_into\\_Traditional\\_Rights\\_and\\_Freedoms.pdf](http://www.lawcouncil.asn.au/lawcouncil/images/3065_-_Interim_Report_into_Traditional_Rights_and_Freedoms.pdf).

<sup>24</sup> For example, Minister for Immigration and Border Protection, the Hon. Peter Dutton MP, Explanatory Memorandum, Migration Amendment (Regional Processing Arrangements) Bill 2015, 24 June 2015, p9. For further discussion, see Parliamentary Joint Committee on Human Rights, Twenty-Fifth Report of the 44th Parliament, 11 August 2015, p58.

rights are defined as including the rights and freedoms declared in ICESCR, ICCPR, CRC, *Convention on the Elimination of all Forms of Racial Discrimination*, *Convention on the Elimination of All Forms of Discrimination Against Women* and the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* and the *Convention on the Rights of Persons with Disabilities*.

77. Subsection 3(2) continues on to state that the reference to the rights and freedoms recognised or declared by an international instrument is to be read as a reference to the rights and freedoms recognised or declared by the instrument as it applies to Australia.
78. The Law Council's position in regards to the definition of 'human rights' was put forward in its submission to the Senate Committee Inquiry into the Human Rights (Parliamentary Scrutiny) Bill 2010 and the Human Rights (Parliamentary Scrutiny) (Consequential Provisions) Bill 2010 (the Bills).<sup>25</sup> In the submission the Law Council expressed concerns with the definition which referred to treaties to which Australia is a party to rather than a consolidated list of human rights. The Law Council foresaw challenges with this approach, including the large number of rights to consider under a treaty based model, uncertainty around the meaning and content of protected rights, difficulties in assessing justifiable limits or derogations from protected rights, a limited use of comparative law materials and the need for incorporation of protected rights into existing policy development and guidelines.
79. The Statement of Compatibility accompanying the Bill highlights some of the concerns that the Law Council has previously foreshadowed. Namely, that some of the most pertinent rights with respect to a Bill are not referenced on the grounds that there is no requirement to do so. In this case, the omission of any discussion of the *Refugee Convention* in the Statement of Compatibility is of particular concern. Given that the Bill, in the Law Council's view, violates Article 31 of the *Refugee Convention*, further consideration should have been given to its implications.
80. The Law Council also notes that the Australian Law Reform Commission (ALRC) recommended in its *Traditional Rights and Freedoms - Encroachment by Commonwealth Laws* Report<sup>26</sup> (ALRC's Traditional Rights and Freedoms Report) that:

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<sup>25</sup> Law Council of Australia, Submission to the Senate Legal and Constitutional Affairs Committee Inquiry into the Human Rights (Parliamentary Scrutiny) Bill 2010 and the Human Rights (Parliamentary Scrutiny) (Consequential Provisions) Bill 2010 (the Bills), 25 October 2010. Available at: <http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-2300-2399/2315%20Human%20Rights%20%28Parliamentary%20Scrutiny%29%20Bill%202010%20and%20the%20Human%20Rights%20%28Parliamentary%20Scrutiny%29%20%28Consequential%20Provisions%29%20Bill%202010.pdf>. The Law Council's proposal was to use clause 10 of the Bill, now section 10 of the Act, to overcome any perceived challenges with the definition of human rights. That is an amendment could have been made to the definition of human rights in clause 3 of the Bill, now section 3 of the Act, to refer to a consolidated list of human rights in the Regulations. This position was endorsed by the National Consultation Committee who concluded that a 'readily comprehensive list of Australian rights and responsibilities' was needed to assist in education programs and public awareness raising in respect of the protection and promotion of human rights. See National Human Rights Consultation Committee, National Human Rights Consultation Report, September 2009, Recommendation 3, see also Recommendation 2. Available at: <https://www.ag.gov.au/RightsAndProtections/HumanRights/TreatyBodyReporting/Pages/HumanRightsconsultationreport.aspx>.

<sup>26</sup> Australian Law Reform Commission, *Traditional Rights and Freedoms - Encroachment by Commonwealth Laws* (ALRC Report 129), 2 March 2016. Available at: <https://www.alrc.gov.au/publications/freedoms-alrc129>.

*...the mechanisms and processes for the scrutiny of laws for compatibility with rights and freedoms could be further improved by:*

...

*improving the quality of explanatory material and statements of compatibility...*

81. The Law Council is of the view that in its current form, the Statement of Compatibility does not sufficiently address substantial human rights concerns arising from the Bill.

## Legislative Standards and Scrutiny Processes

82. The Law Council understands that parliamentary committees tasked with legislative scrutiny are often subject to significant time and resources constraints. However, the Law Council is particularly concerned with the scrutiny process for the Bill.

83. The Bill was introduced and read a first time into the House of Representatives on 8 November 2016. Just two days later, on 10 November 2016, the Bill was referred to the Senate Committee with request that a report was provided by 22 November 2016. Only on 11 November 2016 was the Senate Committee's website updated to indicate that submissions were due on 14 November 2016.

84. A total of 3 days is inadequate for sufficient consultation on a Bill that gives rise to substantial human rights concerns and is the source of significant public debate. The ALRC's Traditional Rights and Freedoms Report concludes that:

*...the mechanisms and processes for the scrutiny of laws for compatibility with rights and freedoms could be further improved by:*

...

*increasing the time available for scrutiny committees to conduct its scrutiny...*

85. The Law Council is of the view that substantially more time should have been granted for the Senate Committee to review the Bill. Additional time would have enabled Senate Committee members to obtain the views of a much wider range of organisations and individuals affected by the Bill.