

Dissenting Report by the Labor Senators

- 1.1 The Senate should reject this bill.
- 1.2 Labor Senators believe that the bill should be rejected because:
 - (a) The bill would not achieve its stated aims or the Government's stated policy intent;
 - (b) the effects of the bill would be broad-reaching, and extend well beyond the Government's stated policy objective;
 - (c) the Minister for Immigration and Border Protection's discretion is non-compellable and the public interest is undefined, meaning the Minister has no obligation to consider applications for a visa from this cohort;
 - (d) the bill would contravene international legal instruments, notably article 31 of the Refugee Convention; and
 - (e) the bill would have retrospective application.

The bill would not achieve its stated aims or the Government's stated policy intent

- 1.3 The Explanatory Memorandum (EM) states that the purpose of this bill is to:

Prevent unauthorised maritime arrivals (UMAs) who were at least 18 years of age and were taken to a regional processing centre after 19 July 2013 from making a valid application for an Australia visa.¹
- 1.4 As the Minister for Immigration and Border Protection, the Hon Peter Dutton MP, explained, the bill would also be part of the government's broader aim of making it clear to people smugglers that they cannot promise a pathway to Australia.²
- 1.5 It is clear that the measures proposed in this bill would not help to achieve this aim.
- 1.6 It seems implausible that the threat of being denied a tourist visa twenty years into the future (for example) would have any impact on a vulnerable asylum seeker's decision to try and seek asylum in Australia by a people smuggler's boat. As Mr Daniel Webb of the Human Rights Law Centre stated, Australian law already requires that any such individual will be processed in an offshore detention centre and will have no right to apply for protection. The idea that such a measure would add to the deterrence policy is illogical.³ The added penalty of never being able to come to

1 Explanatory Memorandum (EM), p. 2.

2 The Hon Peter Dutton MP, Minister for Immigration and Border Protection, *House of Representatives Hansard*, 8 November 2016, p. 1.

3 Mr Daniel Webb, Director of Advocacy, Human Rights Law Centre (HRLC), *Committee Hansard*, Tuesday 15 November 2016, pp. 2-3.

Australia in future, even as a tourist, student or business-person, would be, as Mr Webb stated, 'harm for harm's sake'.⁴

The effects of the bill

1.7 This bill is designed to permanently exclude any person who travelled to Australia by means other than the normal channels for immigration, and by boat, from ever entering Australia. This would include individuals travelling to visit family, for tourism, and for business or study.

1.8 Despite claims to the contrary, there is no credible evidence to suggest that the bill is required to secure durable third country resettlement options for the regional processing cohort.

1.9 Labor senators agree with the Law Council of Australia (LCA) President-elect Ms Fiona McLeod SC, who stated that the bill is neither necessary nor proportionate to its intended objective.⁵ The effects of the bill would extend far beyond the stated aim of enacting into law the previous Labor government and current Coalition Government's policy that asylum seekers who arrive by boat will not be *settled* in Australia.

1.10 Labor Senators were particularly convinced by the comments of Mr David Manne, Executive Director of Refugee Legal, who questioned why this bill was being introduced when the government continually states that all boats have been stopped and our borders are under control.⁶ Mr Manne also provided the personal story of Australian orthopaedic surgeon, Associate Professor Munjed Al Muderis, who arrived in Australia as a refugee by boat. The committee was told that if this proposed legislation had been in force when Professor Al Muderis had arrived, he would not even be able to enter Australia to attend a professional conference:

[N]ot only would they be automatically barred from coming but having to seek to lift that ban could cause all sorts of embarrassment to that person and to our country. It would end up ultimately...having to go to the minister's desk with a submission asking: 'Can this world-leading surgeon come to Australia? Can you make an exception?' We do not know what the outcome would be.⁷

1.11 Other scenarios could include:

- politicians undertaking a political exchange;
- elite athletes hoping to compete in Australian sport events;

4 Mr Daniel Webb, Director of Advocacy, HRLC, *Committee Hansard*, Tuesday 15 November 2016, p. 3.

5 Ms Fiona McLeod SC, President-elect, Law Council of Australia (LCA), *Committee Hansard*, Tuesday 15 November 2016, p. 10.

6 Mr David Manne, Executive Director, Refugee Legal, *Committee Hansard*, Tuesday 15 November 2016, p. 10.

7 Mr David Manne, Executive Director, Refugee Legal, *Committee Hansard*, Tuesday 15 November 2016, p. 16.

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- adverse impacts to any future Australian Olympic bids, noting that there is now a recognised Refugee Olympic Team;
 - former refugees who are now citizens of another country visiting family members in Australia;
 - tourist visits by former refugees who are now citizens of another country; and
 - business owners or employees visiting in Australia to discuss the expansion of companies and businesses into the Australia market.

1.12 Witnesses also raised the example of someone needing to rush to Australia for a family funeral, or to visit a sick relative.⁸ In such scenarios having to apply to the Minister for an exception to the blanket rule that they would be barred from applying for *any* visa could be very problematic. Secretary Michael Pezzullo stated that in such scenarios the applicants could seek to have their matter dealt with urgently, and that 'a future minister would attend to that as expeditiously as was necessary'.⁹ Labor senators are not assured that the Minister would always have the capacity to attend to urgent applicants in the timeframe required by the applicant, nor do Labor senators believe that placing such an administrative burden on the shoulders of the applicant would be appropriate.

1.13 Mr Manne also noted that people who would be banned from entering Australia under this bill would have to declare this when trying to enter unrelated countries, and that this would affect them for the rest of their lives:

There is the possibility that, when seeking to arrive in other countries, this cohort will be required to tick the box that says, 'Yes, I've been deported or banned from entering another country.' It will not be a historical incident; it will be an ongoing incident that will stay with them for the rest of their lives. They will continue to have to declare that, whether it happened two weeks ago or 20 years ago. That might affect their ability to travel around the globe, and that is not something that is really being addressed in terms of the implementation of this.¹⁰

1.14 These measures would also negatively impact Australia's relationship with New Zealand as measures imposed by the bill could prevent former refugees who are granted New Zealand citizenship from entering Australia. Currently, citizens of New Zealand who travel to Australia for work, study or to visit, are issued with a special category 444 temporary visa. It would be unreasonable for former members of the regional processing cohort who may in future receive New Zealand citizenship to not be able to take advantage of this arrangement. New Zealand Prime Minister John Key has been reported as ruling out an arrangement which would create 'different classes

8 See Ms Fiona McLeod SC, President-elect, LCA, *Committee Hansard*, Tuesday 15 November 2016, p. 16.

9 Mr Michael Pezzullo, Secretary, Department of Immigration and Border Protection (DIBP), *Committee Hansard*, Tuesday 15 November 2016, p. 27.

10 Mr David Manne, Executive Director, Refugee Legal, *Committee Hansard*, Tuesday 15 November 2016, p. 17.

of New Zealand citizens' and has stated that New Zealand would not enter into a resettlement arrangement with Australia on those conditions.¹¹

International legal instruments

1.15 As many witnesses highlighted, this bill would be inconsistent with a number of international legal instruments. In particular, the bill would be in breach of article 31 of the Refugee Convention,¹² the Convention on the Rights of the Child,¹³ the International Covenant on Economic Social and Cultural Rights, and the International Covenant on Civil and Political Rights.¹⁴ The Regional Representative of the United Nations High Commissioner for Refugees, Mr Thomas Albrecht, has also raised concerns about the proposed ban breaching international law,¹⁵ as has Mr Ben Saul, Challis Chair of International Law at the University of Sydney.¹⁶

Ministerial discretion

1.16 The Minister for Immigration and Border Protection's discretion is non-compellable and the public interest is undefined, meaning that the Minister has no obligation to consider applications for a visa from this cohort. The bill would give the Minister the personal power to decline to make a decision about an application to allow a person otherwise ineligible for a visa to be allowed to apply, or to make the decision to decline or allow such an application. As the bill states, the Minister could permit a member of the 'regional processing cohort' to make a valid visa application if the Minister considers it to be in the public interest to do so, however 'public interest' remains undefined. The effect of this would be to shift exclusive control over access to Australia by former asylum seekers to the Minister.

1.17 Labor senators agree with Mr Khanh Hoang of Australian Lawyers for Human Rights (ALHR) and Ms Fiona McLeod SC, that this ministerial discretion is far too

11 Sky News, *NZ says Australia won't accept refugee deal*, <http://www.skynews.com.au/news/top-stories/2016/10/31/nz-says-australia-won-t-accept-refugee-deal.html> (accessed 21 November 2016).

12 See Ms Elaine Pearson, Australia Director, Human Rights Watch (HRW), *Committee Hansard*, Tuesday 15 November 2016, p. 1.

13 Ms Elaine Pearson, Australia Director, HRW, *Committee Hansard*, Tuesday 15 November 2016, p. 1; Ms Rebecca Dowd, Co-Chair, Refugee Rights Sub-Committee, Australian Lawyers for Human Rights (ALHR), *Committee Hansard*, Tuesday 15 November 2016, p. 10; Ms Fiona McLeod SC, President-elect, LCA, *Committee Hansard*, Tuesday 15 November 2016, p. 14.

14 Ms Fiona McLeod SC, President-elect, LCA, *Committee Hansard*, Tuesday 15 November 2016, p. 14.

15 Sydney Morning Herald, *Refugee visa ban a likely breach of UN convention*, <http://www.smh.com.au/federal-politics/political-news/refugee-visa-ban-a-likely-breach-of-refugee-convention-20161104-gsic81.html> (accessed 21 November 2016).

16 Radio National, *Proposed ban on refugees arriving by boat in breach of Australia's international obligations: expert*, <http://www.abc.net.au/radionational/programs/breakfast/proposed-ban-on-refugees-arriving-by-boat-breach-of-obligations/7982624> (accessed 21 November 2016).

broad,¹⁷ and the legislation fails to define 'public interest', meaning that the power is unclear. The reviewability of decisions made would be limited, and would necessarily require the applicant to bear the administrative (and quite possibly the financial) burden of making an application for review. Labor senators also note that a decision *not* to make a decision, is not a reviewable decision.

1.18 The establishment of a broad and vaguely defined ministerial discretion under legislation creates a risk of unfair and inconsistent decisions, and is not in keeping with the rule of law. The establishment of the ministerial discretion contemplated by this bill would be highly inappropriate.

Retrospectivity

1.19 Were this bill to pass into law, individuals who had sought asylum in Australia since 19 July 2013 could be subject to its operation, despite the law not having been introduced or contemplated until November 2016. Such retrospective application in this context would be inappropriate. Labor senators agree with Ms McLeod SC who stated that, 'we should be governed by laws that are known and knowable at all times'.¹⁸

Concluding remarks

1.20 Labor senators support the government's goal of retaining control over Australia's borders, and working to ensure that people smugglers are not allowed back in business.

1.21 This does not, however, mean that Labor supports measures which are punitive for the sake of being punitive or extend beyond the policy position that people who come to Australia by a people smuggling boat will never *settle* in Australia. Furthermore, any amendments *must* be subject to rigorous scrutiny as to their compliance with international legal instruments, and must be found to be consistent with those instruments. This bill does not satisfy these requirements.

1.22 The Australian government has a robust visa compliance program in place to prevent, catch and remove people who overstay their visa. There has been no suggestion that this program is not equipped to manage future risks associated with issuing short-term visas to members of the regional processing cohort.

1.23 Lastly, Labor senators note that this legislation is required by third countries to secure durable third country resettlement options.

17 Mr Khanh Hoang, Co-Chair, Refugee Rights Sub-Committee, Australian Lawyers for Human Rights (ALHR), *Committee Hansard*, Tuesday 15 November 2016, p. 2; Ms Fiona McLeod SC, President-elect, LCA, *Committee Hansard*, Tuesday 15 November 2016, p. 10.

18 Ms Fiona McLeod SC, President-elect, LCA, *Committee Hansard*, Tuesday 15 November 2016, p. 18.

Recommendation 1

1.24 Labor senators recommend that the Senate reject the bill.

**Senator Louise Pratt
Deputy Chair**

**Senator Murray Watt
Australian Labor Party**