The Senate

Legal and Constitutional Affairs Legislation Committee

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

November 2016

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2.35 The committee recommends that the Senate pass the bill.

Chapter 1
Introduction

Referral

1.1 The Migration Legislation Amendment (Regional Processing Cohort) Bill 2016 (the bill) was introduced into the House of Representatives on 8 November 2016 by the Minister for Immigration and Border Protection, the Hon Peter Dutton MP.[1] On 10 November 2016, the Senate referred the bill to the Senate Legal and Constitutional Affairs Legislation Committee for inquiry and report by 22 November 2016.[2]

1.2 The Senate Selection of Bills Committee recommended that the bill be referred to examine the '[i]mpact on families and children [and] compliance with Australia's International Human Rights obligations'.[3]

Conduct of inquiry

1.3 In accordance with usual practice, the committee advertised the inquiry on its website and wrote to organisations inviting written submissions by 14 November 2016. The committee received 84 submissions, listed at Appendix 1. The committee held a public hearing in Melbourne on 15 November 2016. Details of the public hearing are provided at Appendix 2. Questions on notice and other material received by the committee are listed at Appendix 3. The committee thanks the Department of Immigration and Border Protection and the other organisations and individuals that assisted with the inquiry.

Overview of the bill

1.4 The bill, if passed, would amend the *Migration Act 1958* (Migration Act) and the Migration Regulations 1994 (Migration Regulations) to indefinitely preclude 'unauthorised maritime arrivals' (UMAs) from making a valid application for any Australian visa. Item 1 of the bill inserts a proposed new definition in subsection 5(1) of the Migration Act. This classifies specific persons as part of a 'regional processing cohort'. This includes individuals who were at least 18 years old and are transferred to a regional processing country after 19 July 2013, including those who:

- are currently in a regional processing country;
- have left a regional processing country and are in another country;
- are in Australia awaiting transfer back to a regional processing country and who are taken to a regional processing country in the future;[4] and,

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

2 Journals of the Senate, *No. 15 2016*, p. 448.

3 Senate Selection of Bills Committee, *Report No. 8 of 2016,* 10 November 2016, Appendix 6.

- people temporarily transferred from regional processing countries to Australia for medical treatment and those who have since settled in another country or returned home and applies to both temporary and permanent visas.[5]

1.5 The bill confers a power on the Minister to permit a member of the designated regional processing cohort, or a class of persons within the designated regional processing cohort, to make a valid application for a visa if the Minister considers it is in the public interest to do so.

1.6 The bill also includes measures to prevent a member of the designated regional processing cohort from being deemed to have been granted a special purpose visa under section 33 of the Migration Act, or being deemed to have applied for particular visas under the Migration Regulations.

1.7 The Explanatory Memorandum describes the bill as introducing a 'statutory bar' preventing certain non-citizens who were taken to a regional processing country from making a valid application for a visa to come to or remain in Australia. The Minister's power to permit a member of a regional processing cohort to make a valid visa application where it is in the public interest is referred to as 'lifting the bar' in the Explanatory Memorandum.[6]

Purpose and background

1.8 The stated purpose of the bill is:

> …to prevent unauthorised maritime arrivals (UMAs) who were at least 18 years of age and were taken to a regional processing country after 19 July 2013 from making a valid application for an Australian visa.[7]

1.9 The Minister for Immigration and Border Protection, the Hon Peter Dutton MP, described the policy background to the bill in the second reading speech:

> The government's reform of our border protection policies has sent the message to people smugglers that they cannot offer a path to Australia. Life in Australia is not an illicit commodity to be sold to the desperate and vulnerable at a great profit.[8]

1.10 The Minister has stated that the purpose of the bill is to 'reinforce the government's longstanding policy that people who travel here illegally by boat will never be settled in this country'.[9]

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4 Migration Legislation Amendment (Regional Processing Cohort) Bill 2016, Explanatory Memorandum (EM), p. 2.

5 EM, p. 2.

6 EM, *Attachment A*, p. 23.

7 EM, p. 2.

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

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

1.11 The measures in the bill were first announced on 19 July 2013. The Department of Immigration and Border Protection confirmed in evidence to the committee that

> Mr Rudd said, that after that date, 19 July 2013—it being significant insofar as it was the date that he and Mr O'Neill, the Prime Minister of Papua New Guinea, signed an agreement pertaining to Manus—persons who were transferred to Manus or Nauru would 'never settle' in Australia.[10]

Inquiry timeframe

1.12 The committee notes the short timeframe for reporting on the bill, and appreciates the assistance of submitters and witnesses who provided evidence and made themselves available at the public hearing.

Structure of this report

1.13 There are two chapters in this report.

1.14 Chapter 1 outlines the context and background to the inquiry.

1.15 Chapter 2 discusses the key issues raised in submissions and at the public hearing, and provides the committee's recommendation.

10 Mr Michael Pezzullo, Secretary, DIBP, *Committee Hansard,* 15 November 2016, p. 30.

Chapter 2

Key issues

2.1 A number of key issues were raised about the Migration Legislation Amendment (Regional Processing Cohort) Bill 2016 (the bill) during the inquiry. These ranged from the need to augment Australia's suite of border protection measures, concerns regarding the impact of the bill on people and families, and the interaction of the bill's provisions with Australia's human rights obligations. This chapter will outline issues raised by submitters and witnesses, and provide the committee's views on the bill.

2.2 During the committee's inquiry, the Government announced that agreement had been reached with the United States of America (United States) (in addition to earlier agreements with Papua New Guinea and Cambodia), for the resettlement of refugees currently in regional processing centres:

> This further agreement is with the United States and it will not under any circumstances be available to any future illegal maritime arrivals (IMAs) to Australia. The priority under this arrangement will be for resettlement of those who are most vulnerable, namely women, children and families. US authorities will conduct their own assessment of refugees and decide which people are resettled in the US. Refugees will need to satisfy standard requirements for admission into the US, including passing health and security checks.[1]

2.3 The committee was advised that the bill is part of a comprehensive set of measures designed to form a 'strengthened protective shield' to deter unauthorised boat arrivals from coming to Australia.[2] In addition to the resettlement agreement and the bill, other measures include:

- A surge in intelligence and disruption operations, including with international partners;
- The largest civil maritime operation in Australia's history; and
- The maintenance of ongoing and enduring regional processing on Nauru, accompanied by a 20-year visa that the Government of Nauru has decided to implement.[3]

2.4 According to the Department of Immigration and Border Protection (the Department), 857 people in the proposed cohort have registered their interest in being

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1 Hon Peter Dutton MP, Minister for Immigration and Border Protection (DIBP), *Media Release*, Refugee resettlement from Regional Process Centres', 13 November 2016, http://www.minister.border.gov.au/peterdutton/Pages/Refugee-esettlement-from-Regional-Process-Centres.aspx (accessed 18 November 2016).

2 Mr Michael Pezzullo, Secretary, Department of Immigration and Border Protection, *Committee Hansard,* 15 November 2016, p. 21.

3 Mr Pezzullo, DIBP, *Committee Hansard,* 15 November 2016, p. 21.

settled in the United States.[4] The committee notes that it does not consider that the passage of the bill is dependent on the resettlement deal proceeding.

Purpose of the bill

2.5 The committee heard evidence from several witnesses at their public hearing that the objective of the bill had not been sufficiently explained. Mr David Manne from Refugee Legal stated that currently:

> There is no evidence that has been presented by the government, that this is necessary in order to deter people. In fact, we have been told for a long time that everything is under control, that the boats have been stopped and that the measures in place have deterred people. Putting aside the question of whether I agree with those laws and think they meet our obligations that is what we have been told. So the onus, I would submit, is on the government to demonstrate why all of a sudden, out of the blue, these laws were not presented some time ago if they are so necessary.[5]

2.6 A significant number of submissions made to the inquiry argued that the bill is unnecessary.[6] The Refugee Council of Australia (RCA) noted that the Government's main justification for the bill 'appears to be that these people might be able to enter Australia illegitimately, through (for example) faking marriages with Australians'.[7] However, RCA explained that the Migration Act already contains extensive powers and safeguards to regulate these matters, and visas are refused or cancelled on a regular basis when evidence is available.[8]

2.7 Concerns were raised that the Explanatory Memorandum (EM) does not sufficiently explain the purpose of the bill, and that the bill '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'.[9] Ms Fiona McLeod SC advised the committee that more detail of the Government's objectives in the EM 'would certainly be useful to lawyers scrutinising the bill'.[10] The Department has, however, indicated that it believes the scope of the EM is sufficient.[11]

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4 The Department of Immigration and Border Protection, answers to questions on notice, 15 November 2016 (received 17 November 2016).

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

6 See e.g. Australian Lawyers Alliance, *Submission 18*; Civil Liberties Australia, *Submission 6*; Fr Frank Brennan, *Submission 31*; Dr Anne Junor, *Submission 33*; Dr Helen Johnson, *Submission 43*.

7 Refugee Council of Australia (RCA), *Submission 26*, p. 2.

8 RCA, *Submission 26*, p. 2.

9 Law Council of Australia (LCA), *Submission 8*, p. 11.

10 Ms Fiona McLeod SC, President-elect, LCA, *Committee Hansard*, 15 November 2016, p. 20.

11 The Department of Immigration and Border Protection, answers to questions on notice, 15 November 2016 (received 17 November 2016).

2.8 The Immigration Advice and Rights Centre (IARC) argue that there is nothing in the bill or the EM to support a conclusion that the measures are 'necessary, reasonable or proportionate', concluding that 'the proposed changes are punitive'.[12] Mr Julian Burnside QC stated that '[b]y our increasingly harsh policies, which are explicitly intended to deter boat people, we are contradicting the central purpose of the Refugees Convention'.[13]

2.9 The Department provided further information to the committee to explain why the bill was introduced:

> It is a measure that the Australian government has independently determined to be in the national interest, insofar as the measure, should it be passed into law, will form a crucial and, indeed, imperative component of the suite of measures that will form a strengthened protective shield to deter potential illegal immigrants from coming by boat to Australia.[14]

2.10 Many submitters offered their view that the bill contravenes Australia's international human rights and other obligations, including the Refugee Convention and the Convention on the Rights of the Child.[15]

2.11 Potential human rights issues in the bill are addressed in Attachment A of the EM which describes how these issues are mitigated. Where a non-citizen has family members who have been granted a visa to enter or remain in Australia, and this results in separation, or the continued separation of a family unit, the EM explains that the bill:

> …includes flexibility for the Minister for Immigration and Border Protection 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…[16]

2.12 A further potential human rights issue noted in the EM is the right to equal protection of the law without discrimination.[17] Attachment A of the EM explains that any differential treatment proposed by the bill is for a 'legitimate purpose and based on relevant objective criteria and that is reasonable and proportionate in the

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12 Immigration Advice and Rights Centre (IARC), *Submission 22*, p. 1.

13 Mr Julian Burnside AO QC, *Submission 30*, p. 6.

14 Mr Pezzullo, DIBP, *Committee Hansard*, 15 November 2016, p. 21.

15 See e.g., Ms Elaine Pearson, Human Rights Watch, *Committee Hansard,* 15 November 2016, p. 1; Mr Daniel Webb, Human Rights Law Centre, *Committee Hansard,* 15 November 2016, p. 1.

16 Explanatory Memorandum (EM), *Attachment A*, p. 23.

17 Article 26 of the International Covenant on Civil and Political Rights (ICCPR) states:
All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

circumstances'.[18] These circumstances include that it is a proportionate response to prevent a 'cohort of non-citizens who have previously sought to circumvent Australia's managed migration program by entering or attempting to enter Australia…from applying for a visa…' and that the bill seeks to discourage people from attempting hazardous boat journeys with the assistance of people smugglers, instead encouraging them to pursue regular migration pathways.[19]

2.13 As discussed in Chapter 1, the Government has stated that a key objective of the bill is to discourage refugees from attempting to reach Australia by boat and discourage the people smugglers who have facilitated Illegal Maritime Arrivals. In response to this, witnesses argued that Australia already has a robust visa application process:

> …the Australian migration system has very robust processes for determining whether or not someone is granted, for example, a partner visa or for that matter any other kind of visa. There are already robust processes to determine whether people can get a visa to enter Australia. I should note that even if you are granted a visitor visa, for example, to come to Australia it is not the case then that you can just stay in Australia forever. These people are then expected to leave after the duration of their visas. People are subjected to quite rigorous character assessments for visas as well. In that sense, we think those kinds of arguments about sham marriages do not really stack up when you look at the current migration system and how it operates.[20]

2.14 The Secretary of the Department confirmed for the committee that the proposed measures in the bill, if passed, would discourage refugees from attempting to reach Australia illegally by boat and discourage the people smugglers who have facilitated Illegal Maritime Arrivals:

> Yes, indeed. Anything that we do that has the effect of ratcheting up the difficulties involved in getting to Australia, or ever getting to Australia if they get to regional processing, always have a dampening effect on the interest in travelling to Australia—always.[21]

2.15 The Secretary of the Department also confirmed for the committee that the proposed measures in the bill, if passed, would provide a further deterrent to persons seeking to illegally enter, or illegally facilitate entry into, the Australian migration zone.[22] Finally, the Secretary explained:

> It goes fundamentally to the point I made in my opening statement; that is, that this is part of a suite of further strengthening our 'shield', as I described

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18 EM, *Attachment A*, p. 24.

19 EM, *Attachment A*, p. 24.

20 Mr Khanh Hoang, Co-Chair, Refugee Rights Sub-committee, Australian Lawyers for Human Rights (ALHR), *Committee Hansard*, 15 November 2016, p. 2.

21 Mr Pezzullo, DIBP, *Committee Hansard*, 15 November 2016, p. 18.

22 Mr Pezzullo, DIBP, *Committee Hansard*, 15 November 2016, p. 23.

> it. The Prime Minister did not mince his words on the weekend and nor will I. Whatever resettlement arrangement you come to, if it is sufficiently conducive with carrots in it to get people to take up the option—because there is only consensual resettlement to deal with this diabolically difficult problem that has been inherited by every official at this table, I can assure you—you need sticks, and this is a stick.[23]

Interpretation of the lifetime ban

2.16 The LCA considered that the bill's proposed lifetime ban is inconsistent with international human rights obligations because it discriminates on the basis of arrival method. That is, the ban only applies to boat arrivals that have been taken to a regional processing country (Nauru and Papua New Guinea), and that this constitutes a penalty.[24] Further, the Castan Centre for Human Rights Law (Castan Centre) states that:

> Banning refugees from coming to Australia would comprise an unlawful penalty which places Australia in breach of Article 31. It is widely accepted that the term 'penalty' does not need to be a criminal punishment. Therefore administrative sanctions and a restriction on freedom of movement would constitute a penalty for the purpose of Article 31.[25] [26]

2.17 The RCA submitted that the bill 'targets the very people that Australia has already punished the most…who have been languishing in Nauru or Manus Island for over three years in indefinite detention in awful conditions'.[27]

2.18 Save the Children is critical of a lack of detail concerning how the Government intends to implement the ban, and considers that insufficient evidence has been provided to support the claim that the bill will deter potential unauthorised maritime arrivals in the future. They emphasise that:

> The decisions made by refugees about the direction in which they flee persecution involve a complex array of issues and may be influenced by a variety of push-factors as well as pull factors and individual circumstances. In our experience, most refugees who have sought to come to Australia by boat in recent years have done so with a view to simply finding a safe place to rebuild their lives.[28]

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23 Mr Pezzullo, DIBP, *Committee Hansard*, 15 November 2016, p. 24.

24 LCA, *Submission 8*, p. 14.

25 Castan Centre, *Submission 20*, p. 5.

26 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.

27 RCA, *Submission 26*, p. 2.

28 Save the Children, *Submission 21*, p. 3.

2.19 However, the Department clearly stated in evidence to the committee that the measures in the bill are likely to have an important deterrent effect on the people smuggling trade:

> The deterrent effect of this legislation has to play out in the future, but our assessment based on hard experience, based on toughening up or ratcheting up certain measures, is that, whenever you announce a measure of this character—either regional processing in Manus or Nauru; changes to visa conditions; the introduction of temporary visas; the introduction of more stringent checking; the escalation of maritime security patrols—we know that, literally sometimes within minutes, if not hours or days—and that has certainly happened since Sunday—there is a dampening effect in terms of the interest, particularly for people who are currently poised in Indonesia.[29]

Potential impact on families

2.20 The Castan Centre claimed that the bill may cause children residing in Australia to be separated from their parents, and further claimed that the 'ministerial power to lift the bar in order to facilitate family reunification is not expeditious and lacks transparency and certainty'.[30]

2.21 A number of submissions, including those received from Save the Children, the LCA, Amnesty International, and UNICEF raised concerns regarding whether Ministerial discretion could satisfy Australia's human rights obligations.[31] For example, the LCA stated:

> …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.[32]

2.22 UNICEF Australia argue that exclusions for some individuals should be incorporated into the bill, such as whether:

> …the individual concerned has family members in Australia (particularly children) and/or it is otherwise in the best interests of a child (wherever residing) for a person to be granted an Australian visa.[33]

2.23 The Department advised that situations such as this can be avoided by offering people the opportunity to express an interest in going to a specific third country, and working with them and the other government to find a suitable approach on an individual basis:

> The bottom line is that those transitory people—parents with children in Australia—can now express an interest in going to the United States from

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29 Mr Pezzullo, DIBP, *Committee Hansard*, 15 November 2016, p. 30.

30 Castan Centre, *Submission 20*, p. 4.

31 LCA, *Submission 8*, p. 16; Save the Children, *Submission 21*, p. 5; Amnesty International, *Submission 17*, p. 2; UNICEF Australia, *Submission 5*, p. 2.

32 LCA, *Submission 8*, p. 16.

33 UNICEF Australia, *Submission 5*, p. 2.

> Australia, and then once we understand whether they are interested, we can work through the logistics of that on a case-by-case basis from a compassionate perspective with those other governments that I mentioned.[34]

Ministerial discretion

2.24 The bill confers a power on the Minister to permit a member of the designated regional processing cohort, or a class of persons within the designated regional processing cohort, to make a valid application for a visa if the Minister considers that it is in the public interest to do so.

2.25 The Department advised the committee that Ministerial decisions on whether to lift the bar would be subject to review, stating that '[t]he personal, non-compellable power of the minister to lift the bar…once engaged, is the subject of judicial review'.[35] However, they also advised that the Minister cannot be compelled to exercise their power to consider a particular individual's visa. If the Minister does not exercise their authority to consider an application, it cannot be pursued further by an applicant, and 'there is no review of a decision not to make a decision'.[36]

Retrospectivity

2.26 Concerns were raised during the inquiry that the bill, if passed, contains measures that have retrospective application, as they would apply from 19 July 2013. There is an argument that this may be unfair because it imposes consequences on the basis of past conduct (coming to Australia by boat) when an individual affected could not have been aware of the bill. According to the LCA, this is discriminatory to those who arrived by boat and were taken to a regional processing country, as opposed to those who arrived via another form of transportation.[37] The Castan Centre also argue that this approach is 'inconsistent with well-established common law principles and undermines the rule of law'.[38] Ms Fiona McLeod SC explained that in her view, '…retrospective laws are bad in all circumstances. The primary reason for that is that we should be governed by laws that are known and knowable at all times'.[39]

2.27 The Department advised the committee that the bill relies on a statement made by the then Prime Minister on 19 July 2013, that no one coming to Australia by boat would be settled in Australia. This is included in the second reading speech by the Minister for Immigration and Border Protection when the bill was introduced in the House of Representatives:

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34 Ms Rachel Noble, Deputy Secretary, Policy, DIBP, *Committee Hansard*, 15 November 2016, p. 20.

35 Ms Philippa de Veau, General Counsel, DIBP, *Committee Hansard*, 15 November 2016, p. 18.

36 Ms de Veau, DIBP, *Committee Hansard*, 15 November 2016, p. 22.

37 LCA, *Submission 8*, p. 17.

38 Castan Centre, *Submission 20*, p. 2.

39 Ms McLeod SC, LCA, *Committee Hansard*, 15 November 2016, p. 18.

> This legislation importantly is consistent with the announcement by former Prime Minister Kevin Rudd who when announcing the signing of the Regional Resettlement Arrangement with Papua New Guinea on 19 July 2013 declared and I quote: 'from now on any asylum seeker who arrives in Australia by boat will have no chance of being settled in Australia as refugees.[40]

2.28 Some witnesses emphasised that this statement by the former Prime Minister has no legal effect and should not be used by the Government as a basis for claiming that the bill is not retrospective. Mr David Manne from Refugee Legal stated that '…warnings are not laws…were the warning to have been legislated before, this bill would not be before parliament'.[41] However, the committee notes that similar procedures are often used where legislation follows an earlier announcement.

2.29 Although there is scope for the Minister to lift the bar on valid applications in the public interest, submitters expressed concern that wide discretion is granted to the Minister to vary, revoke or change any decision.[42] Points that have been made include a lack of procedural fairness, no reasons being provided for an adverse decision, and the administrative burden of the Minister being involved in all visa decisions, potentially resulting in lengthy delays in processing.[43] It was noted that while reference is made to human rights obligations, the EM does not outline the public interest grounds for the potential exercise of the Ministerial discretion to lift the bar.[44]

2.30 The Secretary of the Department explained at the hearing:

> As to the reach back to 19 July 2013, as the minister made clear in his speech, as I think the EM makes abundantly clear and as the Prime Minister and others have stated, that is to capture, by definition, the 'group' that falls within the ambit of this legislation. That is the date which the then Labor government agreed with a change or tightening of its policy about regional processing. Mr Rudd said, that after that date, 19 July 2013—it being significant insofar as it was the date that he and Mr O'Neill, the Prime Minister of Papua New Guinea, signed an agreement pertaining to Manus—persons who were transferred to Manus or Nauru would 'never settle' in Australia. So it has become the policy position that was carried forward by Mr Abbott and then Mr Turnbull. What this legislation seeks to do is to say that…class of people who are defined by that date fall within the ambit of the legislation. So it is retrospective in that sense. It codifies in statute what has been our policy position for 3½ years.[45]

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40 Mr Pezzullo, DIBP, *Committee Hansard*, 15 November 2016, p. 31.

41 Mr Manne, Refugee Legal, *Committee Hansard*, 15 November 2016, p. 14.

42 LCA, *Submission 8*, p. 17.

43 LCA, *Submission 8*, p. 18.

44 LCA, *Submission 8*, p. 18.

45 Mr Pezzullo, DIBP, *Committee Hansard*, 15 November 2016, p. 30.

Committee view

2.31 The committee notes the concerns that have been expressed about aspects of this bill by submitters and witnesses in the course of the inquiry. However, it has formed the view that the bill is part of a comprehensive suite of related measures that together act as a deterrent to people risking their lives by illegally coming to Australia by boat, and to those who would ply the illegal people smuggling trade into Australia.

2.32 The committee notes the concerns expressed by some witnesses and agrees that it would be beneficial if the explanatory memorandum clarified in more detail why further measures are necessary beyond those that are already in place to deter unauthorised maritime arrivals; as well as the factors that the Minister should consider in determining whether it is in the public interest to 'lift the bar' on a case-by-case basis.

2.33 The committee is satisfied that the proposed measures are necessary and that there are sufficient safeguards incorporated within the bill to deal with the issues that have been raised.

2.34 The committee notes that, per capita, Australia has one of the most generous refugee resettlement programs in the world. This program provides resettlement services and support for those persons already identified as refugees who are resident in camps around the world.

Recommendation 1

2.35 The committee recommends that the Senate pass the bill.

Senator the Hon Ian Macdonald
Chair

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

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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;

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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.

- 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

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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 Laws for Human Rights (ALHR) and Ms Fiona McLeod SC, that this ministerial discretion is far too

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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.

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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

Dissenting Report by the Australian Greens

1.1 The committee's inquiry into the Migration Legislation Amendment (Regional Processing Cohort) Bill 2016 (the bill) received 84 submissions from legal and immigration experts. All of these submissions raised serious concerns regarding this bill. All witnesses at the public hearing also criticised the bill, with the exception of those representing the Department of Immigration and Border Protection.

1.2 Despite the evidence provided and concerns raised by submissions and witnesses, the report recommends that this bill be passed. However, the Australian Greens believe that the recommendation does not sufficiently address the serious problems identified with this bill.

1.3 The Australian Greens are concerned that the bill is punitive, will impact negatively on families, and that the Government has not demonstrated the bill is necessary to deter asylum seekers. There is no evidence that this bill will actually achieve its stated objective.

1.4 The bill arbitrarily discriminates against the cohort on the basis of their mode of arrival, which they may have had little choice over. The bill contravenes numerous human rights and international obligations to which Australia is a signatory.

1.5 The Australian Greens note the issues raised by witnesses about the public interest test and capacity of the Minister to 'lift the bar' in individual cases. We do not believe that this is sufficient to satisfy Australia's international human rights obligations. The public interest is not defined in the bill, and there is no duty on the minister to exercise this power. The bill provides yet another non-compellable and therefore non-reviewable discretionary power to the Minister.

1.6 The Australian Greens reject the view of the Government that a statement by the then Prime Minister on 19 July 2013 can be used as a basis for claiming that the bill is not retrospective. This is an arrogant and disrespectful claim to make in proposing a bill that will have significant repercussions for this cohort of individuals.

1.7 The bill has the potential to further separate families and sever support networks of people who have already been significantly damaged, both mentally and physically, by Australia’s policy of indefinite offshore detention.

Conclusion

1.8 The Australian Greens find that the report has not adequately responded to or addressed the concerns raised in all 84 submissions received on this bill.

1.9 The Australian Greens find that the bill contravenes numerous international rights including the rights to non-discrimination and equality, and the rights of the child and protection of the family.

Recommendation 1

1.10 The Australian Greens recommend that the bill be rejected by the Senate.

Senator Nick McKim
Senator for Tasmania

Appendix 1

Public submissions

1	Andrew & Renata Kaldor Centre for International Refugee Law, UNSW; the Institute of International Law and Humanities, Melbourne Law School; and Professor Ben Saul, Challis Chair of International Law, Sydney Law School
2	Australian Lawyers for Human Rights
3	UnitingJustice Australia
4	NSW Council for Civil Liberties
5	UNICEF Australia
6	Civil Liberties Australia
7	Australian Association of Social Workers
8	Law Council of Australia
9	Federation of Ethnic Communities' Councils of Australia (FECCA)
10	Muslim Legal Network (NSW)
11	Hunter Asylum Seeker Advocacy
12	Victorian Women Lawyers
13	Baptcare
14	University of Adelaide
15	Welcome to Australia
16	Settlement Council of Australia
17	Amnesty International
18	Australian Lawyers Alliance
19	ANU College of Law
20	Castan Centre for Human Rights Law
21	Save the Children
22	Immigration Advice and Rights Centre (IARC)
23	Doctors for Refugees
24	Australian Churches Refugee Taskforce
25	Human Rights Law Centre
26	Refugee Council of Australia
27	United Nations High Commissioner for Refugees
28	Australian Human Rights Commission

29 Ms Margaret Sinclair
30 Mr Julian Burnside AO QC
31 Fr Frank Brennan
32 Mx Bridget Harilaou
33 Dr Anne Junor
34 Ms Betty McGeever
35 Name Withheld
36 Ms Virginia Overell
37 Name Withheld
38 Ms Morgan Hemsworth-Shead
39 Mr Ryan Edwards
40 Ms Sarah Gleeson
41 Name Withheld
42 Ms Suzon Fuks
43 Dr Helen Johnson
44 Name Withheld
45 Ms Rosie Isaac
46 Ms Eva Birch
47 Ms Andrea Hince
48 Mr Greg Reilly
49 Ms Kandy Henderson
50 Ms Julia Hall
51 Mr Rastko Antic
52 Ms Elka Sadler
53 Ms Frederika E. Steen AM
54 Mr Benjamin Dimas
55 Humanist Society of Victoria Inc
56 Ms Tracie Aylmer
57 Name Withheld
58 Name Withheld
59 Mr Joseph Ishow
60 Ms Jenny Barnes
61 Ms Zoe Hooligan

62 Ms Saskia Doherty
63 Mr James Robinson
64 Human Rights Committee of the Victorian Bar
65 Mr Ben Hjorth
66 Ms Jennifer Coman
67 Mr Jeffrey Passlow
68 Ms Kate Matthews
69 Ms Briony Galligan
70 Ms Emma Hart
71 Name Withheld
72 Dr Emma Browne
73 Dr Sheknaz Graham
74 Ms Katrine Mcleod
75 Ms Fay Smith
76 Ms Sally Hunter
77 Name Withheld
78 Mrs Beverly Holmes-Brown
79 Ms Liz Thompson
80 Rural Australians for Refugees – Euroa
81 Ms Anthea Falkenberg
82 Name Withheld
83 Asylum Seeker Resource Centre
84 Confidential

Appendix 2

Public hearings and witnesses

Tuesday 15 November 2016—Melbourne

BUTTON, Ms Lisa, Asylum Seeker and Refugee Policy and Advocacy Adviser, Save the Children

CHIA, Dr Joyce, Senior Policy Officer, Refugee Council of Australia

de VEAU, Ms Philippa, General Counsel, Department of Immigration and Border Protection

DOWD, Ms Rebecca, Co-Chair, Refugee Rights Sub-committee, Australian Lawyers for Human Rights

FREW, Ms Amy, Lawyer, Human Rights Law Centre

HANSFORD, Mr Hamish, Acting First Assistant Secretary, Immigration and Citizenship Policy Division, Department of Immigration and Border Protection

HOANG, Mr Khanh, Co-Chair, Refugee Rights Sub-committee, Australian Lawyers for Human Rights

MANNE, Mr David, Executive Director, Refugee Legal

McLEOD, Ms Fiona, SC, President-elect, Law Council of Australia

NOBLE, Ms Rachel, Deputy Secretary, Policy, Department of Immigration and Border Protection

PARMETER, Mr Nick, Director, Policy, Law Council of Australia

PEARSON, Ms Elaine, Australia Director, Human Rights Watch

PEZZULLO, Mr Michael, Secretary, Department of Immigration and Border Protection

TALBOT, Ms Anna, Legal and Policy Adviser, Australian Lawyers Alliance

TINKLER, Mr Mat, Director of Policy and Public Affairs, Save the Children

WEBB, Mr Daniel, Director of Advocacy, Human Rights Law Centre

Appendix 3

Tabled documents, answers to questions on notice and additional information

Answers to questions on notice

1 Department of Immigration and Border Protection – answers to questions taken on notice at a public hearing on 15 November 2016 (received 17 November 2016)