The Senate

Legal and Constitutional Affairs Legislation Committee

Migration (Validation of Port Appointment) Bill 2018

September 2018

ISBN 978-1-76010-827-4

This document was produced by the Senate Legal and Constitutional Affairs Committee secretariat and printed by the Senate Printing Unit, Department of the Senate, Parliament House, Canberra.

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Recommendations

Recommendation 1

2.52 The committee recommends that the bill be passed.

Chapter 1

Introduction

1.1 On 21 August 2018, the Senate referred the Migration (Validation of Port Appointment) Bill 2018 (the bill) to the Legal and Constitutional Affairs Legislation Committee (the committee) for inquiry and report by 10 September 2018.[1] On 10 September 2018, the Senate granted the committee an extension to report by 12 September 2018.[2]

1.2 The bill confirms the validity of the appointment of a proclaimed port in the territory of Ashmore and Cartier Islands contained in the Commonwealth of Australia Gazette No. GN 3, 23 January 2002 (the Appointment).

1.3 As outlined in the Explanatory Memorandum, the provisions of the bill would:

- clarify the geographical coordinates of the area of waters within the Territory of Ashmore and Cartier Islands specified in the appointment;
- confirm that there was a properly proclaimed port at Ashmore and Cartier Islands at all relevant times; and
- confirm the validity of things done under the *Migration Act 1958* (Migration Act), such as actions taken or decisions made which relied directly or indirectly on the terms of the appointment, before the commencement of this Act.[3]

1.4 The bill also clarifies that the proposed Act does not affect certain rights or liabilities.[4] These proposed changes are explained in more detail later in this chapter.

Background and purpose of the bill

1.5 The Appointment, which was gazetted in 2002 by the then Minister for Immigration and Multicultural and Indigenous Affairs, the Hon Phillip Ruddock MP, was designed to ensure that illegal maritime arrivals who entered certain waters of the territory of Ashmore and Cartier Islands, an 'excised offshore place' for the purposes of the Migration Act, would thereby become 'offshore entry persons', now referred to as 'unauthorised maritime arrivals' (UMAs).[5] However, it has since become apparent that the Appointment was not correctly drafted and was missing necessary details to ensure its effectiveness.

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1 *Journals of the Senate*, No. 111, 21 August 2018, p. 3556.

2 *Journals of the Senate*, No. 114, 10 September 2018, p. 3654.

3 Explanatory Memorandum, p. 2.

4 Explanatory Memorandum, p. 4.

5 The Hon. Peter Dutton MP, Minister for Home Affairs and Minister for Immigration and Border Protection, *House of Representatives Hansard*, 20 June 2018, p. 8.

1.6 The Appointment was critical to determining the status of persons who entered Australia via this proclaimed port between 23 January 2002 and 1 June 2013—that is, deeming them to be UMAs.

1.7 Further, illegal maritime arrivals, who became UMAs by reason of having entered the proclaimed port at Ashmore and Cartier Islands between 13 August 2012 and 1 June 2013[6], also became 'fast-track applicants' under the Act.

1.8 Generally, fast-track applicants are individuals who arrived on or after 13 August 2012 and before 1 January 2014, and are assessed using the Fast Track Assessment process. This process uses a review body called the Immigration Assessment Authority (IAA) that is a separate office within the Administrative Appeals Tribunal.[7]

1.9 The process was introduced in 2014, to assist in processing a backlog of approximately 30,000 cases of individuals who arrived in Australia by boat.

1.10 The Department of Home Affairs' (the department) website explains:

> The Fast Track Assessment process allows protection claims to be assessed efficiently by introducing shorter timeframes for applicants to respond to requests for further information or to respond to adverse information. This means we can make sure our protection visa application process for these asylum seekers is more efficient and effective.[8]

1.11 Under the Fast Track Assessment process, applicants do not have access to a full administrative review by the Migration and Refugee Division of the Administrative Appeals Tribunal.[9]

Challenges to the validity of the Appointment

1.12 The validity of the Appointment made in 2002 has been challenged in the Federal Circuit Court and the Federal Court.

1.13 On 11 July 2018, the Federal Circuit Court (the Court) handed down two decisions regarding the following matters:

- DBC16 v Minister for Immigration and Border Protection & Anor [2018]; and
- DBD16 v Minister for Immigration and Border Protection & Anor [2018]

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6 From 1 June 2013, people who arrived by boat without a visa at any location in Australia—not only at Ashmore and Cartier Islands—were subject to a statutory bar on applying for a visa.

7 Department of Home Affairs, Fast Track Assessment process, https://www.homeaffairs.gov.au/Refugeeandhumanitarian/Pages/assessment-process.aspx (accessed 30 August 2018).

8 Department of Home Affairs, Fast Track Assessment process, https://www.homeaffairs.gov.au/Refugeeandhumanitarian/Pages/assessment-process.aspx (accessed 30 August 2018).

9 Department of Home Affairs, Fast Track Assessment process, https://www.homeaffairs.gov.au/Refugeeandhumanitarian/Pages/assessment-process.aspx (accessed 30 August 2018).

1.14 In both cases, the Court found the 2002 Appointment to be invalid and also found that the applicant in the case is not a UMA:

> (1) A declaration that the purported appointment of a port, as a proclaimed port, an area of waters within the Territory of Ashmore and Cartier Islands by notice published in the Commonwealth of Australia Gazette No GN 3 on 23 January 2002 is invalid.
>
> (2) A declaration that the applicant is not an 'unauthorised maritime arrival' within the meaning of s.5AA of the *Migration Act 1958 (Cth)*.[10]

1.15 Any further challenges to the Appointment may also find that affected persons did not enter Australia at an excised offshore place and are therefore not UMAs under the Migration Act. Further challenges may also find that some affected persons do not qualify as 'fast-track applicants' under the Migration Act.

1.16 In justifying his judgement on DBC16 v Minister for Immigration and Border Protection & Anor [2018], Judge Justin Smith commented:

> These facts clearly establish that the relevant area was not a 'port'. The area was an area of water within a reef. It was, it seems, navigable, but it was not disputed that the area was not, and could not be, used for the transfer of goods or passengers from vessels unless that transfer was to another vessel.
>
> For those reasons, accepting for the present purposes that the Instrument was sufficiently clear to be valid, the area described in the Instrument was not a 'port' within the meaning of the Act. As the Minister only had power to designate a 'port' as a 'proclaimed port', the Instrument was beyond the Minister's power and so was invalid.
>
> As I have explained, the consequence of the invalidity of the Instrument is that the decision of the delegate was not reviewable under pt.7AA of the Act and there has been no notification of that decision. There will be an order for a writ of certiorari quashing the IAA's decision and a declaration as to the lack of notice.[11]

1.17 In summary, the Federal Circuit Court's finding demonstrated that the Appointment is invalid, not due to the missing geographical coordinates, but rather due to the fact that the area set out in the Appointment was not a port, and therefore could not become a proclaimed port.

1.18 This judgement has been interpreted by some critics of the broader policy of offshore detention to mean that asylum seekers may have been denied the right to apply for permanent protection, wider review rights, as well as being unlawfully detained, by the invalid appointment.

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10 DBC16 v Minister for Immigration and Border Protection & Anor [2018], http://classic.austlii.edu.au/au/cases/cth/FCCA/2018/1802.html (accessed 28 August 2018); and DBD16 v Minister for Immigration and Border Protection & Anor [2018], http://classic.austlii.edu.au/au/cases/cth/FCCA/2018/1801.html (accessed 28 August 2018).

11 DBC16 v Minister for Immigration and Border Protection & Anor [2018], http://classic.austlii.edu.au/au/cases/cth/FCCA/2018/1802.html (accessed 29 August 2018).

1.19 Further, on 6 August 2018, the Federal Court ruled the Appointment invalid in the matter DBB16 v Minister for Immigration and Border Protection – NSD354/2017. The Federal Court has not yet published written reasons for its decision.[12]

1.20 The bill is intended to address the risk that further cases might challenge the validity of the Appointment, by confirming it to ensure:

- there was a properly proclaimed port at Ashmore and Cartier Islands at all relevant times;
- things done under the Act (such as actions taken or decisions made) which relied directly or indirectly on the terms of the Appointment are valid and effective.[13]

1.21 In his second reading speech, the Minister for Immigration and Border Protection, the Hon Peter Dutton MP, noted that the bill 'reiterates the government's original intention that the Appointment is, and always has been, valid'.[14]

1.22 No consultation process was conducted for this bill.

Key provisions

Validation of appointment of an area of water within the Territory of Ashmore and Cartier Islands as a port

1.23 Clause 3 of the bill amends the wording of the Appointment. The original Appointment inadvertently omitted a number of specific details relating to the geographical coordinates of the area of waters within the Territory of Ashmore and Cartier Islands. The proposed new Appointment will set out these coordinates as follows:

> [T]he area of waters within the Territory of Ashmore and Cartier Islands commencing at a point on the Mean Low Water (MLW) line closest to Latitude 12 degrees 13.2 minutes South, Longitude 122 degrees 59.0 minutes East, then following the line of MLW in an anticlockwise direction so as to enclose a bay by bridging across islands of MLW at the entrance to the bay to close back to the point of commencement.[15]

1.24 The Explanatory Memorandum stated that this change is consistent with the intention of the original appointment.[16]

12 Department of Home Affairs, *Submission 13*, pp. 3–4.

13 The Hon. Peter Dutton MP, Minister for Home Affairs and Minister for Immigration and Border Protection, *House of Representatives Hansard*, 20 June 2018, p. 8.

14 The Hon. Peter Dutton MP, Minister for Home Affairs and Minister for Immigration and Border Protection, *House of Representatives Hansard*, 20 June 2018, p. 8.

15 Explanatory Memorandum, p. 3.

16 Explanatory Memorandum, p. 4.

Validation of things done under the Migration Act 1958

1.25 The Explanatory Memorandum sets out that Clause 4 of the bill confirms the validity of things done (such as actions taken or decisions made) under the Migration Act which relied directly or indirectly on the terms of the Appointment, before the commencement of this Act.[17]

1.26 The practical effect of this clause means that a 'thing done' is considered to have been valid and effective and will remain so, despite the proposed change to the Appointment.

The Act does not affect certain rights or liabilities

1.27 The purpose of Clause 5 is to confirm that, upon Royal Assent, the new Act 'will not apply to cases where judgment has been delivered by a court before the commencement of this Act but only if the validity of the appointment was at issue in the proceedings and the judgment set aside the appointment or declared it to be invalid'.[18] It 'preserves any such decision of a court prior to the commencement of the new Act'.[19]

Proposed Amendments to the Bill

1.28 The Department of Home Affairs' written submission to the inquiry indicated that the government intends to move minor amendments to the bill in response to the recent decisions of the Federal Circuit Court and the Federal Court, which declared the Appointment to be invalid:

> The FCC upheld the Minister's argument that minor and inadvertent omissions in the geographical coordinates specified in the Appointment did not render the Appointment invalid. However, the FCC went on to find that the word 'port' in its ordinary meaning is a place with infrastructure to facilitate the movement of goods and/or passengers between vessels on the water and the land. Consequently, the FCC found that the area described in the Appointment was not a 'port', as it lacked infrastructure, and therefore the Appointment was invalid. The Minister appealed these decisions on 1 August 2018.[20]

1.29 The proposed amendments to the Bill would address the Federal Circuit Court's reasoning in its decisions by:

- defining the term 'appointment' to put beyond doubt that the Appointment referred to in the Bill includes a purported appointment. This is because the Appointment is currently declared invalid by a Court;

17 Explanatory Memorandum, p. 4.

18 Explanatory Memorandum, p. 4.

19 Explanatory Memorandum, p. 4.

20 Department of Home Affairs, *Submission 13*, pp. 3–4.

- removing the reference to a thing done under the Migration Act being invalid or ineffective either directly or indirectly because of the terms of the Appointment; and
- providing that the doing of a thing under the Migration Act will not be invalid or ineffective if it relied, directly or indirectly, on the validity of the Appointment generally.[21]

Conduct of the inquiry

1.30 Details of this inquiry were advertised on the committee's website, including a call for submissions to be received by 30 August 2018. The committee also wrote directly to some individuals and organisations inviting them to make submissions.

1.31 The committee received 16 submissions, which are listed at Appendix 1. All submissions are available in full on the committee's website.

1.32 The committee held public hearings on 3 September 2018 in Melbourne, and on 10 September 2018 in Canberra.

Financial implications

1.33 The Explanatory Memorandum states that the amendments in the bill 'will have no financial impact'.[22]

Legislative scrutiny

1.34 The Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills Committee) raised concerns regarding the retrospective nature of the bill:

> [I]n seeking to retrospectively validate the 2002 appointment, the bill is apt to adversely affect any person who seeks to challenge an act or decision under the Migration Act on the basis that the impugned action or decision is invalid under the 2002 appointment.[23]

1.35 The Scrutiny of Bills Committee requested clarification from the Minister as to how the bill might affect any persons if the Appointment is retrospectively validated, to which the Minister responded:

> No persons will suffer a detriment if the validity of the Appointment is confirmed by passage of the Bill. Enactment of the Bill will merely confirm that the actions taken in relation to persons who entered the waters of the proclaimed port, by reference to their status as UMAs, were valid and effective.[24]

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21 Department of Home Affairs, *Submission 13*, pp. 3–4.

22 Explanatory Memorandum, p. 2.

23 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest No.7 of 2018*, p. 2.

24 The Hon. Peter Dutton MP, Minister for Home Affairs and Minister for Immigration and Border Protection, *Response to the Standing Committee for the Scrutiny of Bills*, 19 July 2018, p. 2.

1.36 The comments made by the Scrutiny of Bills Committee in the Scrutiny Digest, as well as the Minister's response, are addressed in Chapter 2 of this report.

Human Rights Compatibility

1.37 According to the Explanatory Memorandum, the bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.[25] These rights and freedoms include:

- the right to freedom of movement: Article 12(1) of the International Covenant on Civil and Political Rights (ICCPR); and
- Australia's non-refoulement obligations: Articles 6 and 7 of the ICCPR and Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[26]

1.38 In examining the bill, the Parliamentary Joint Committee on Human Rights (Human Rights Committee) considered that the bill engaged the following human rights: non-refoulement, liberty, fair hearing, not to be expelled without due process, and effective remedy.[27]

1.39 The Human Rights Committee noted that it has previously considered the fast-track applicant process, and believes it to be 'incompatible with Australia's obligations under the International Covenant on Civil and Political Rights and the Convention Against Torture'.[28]

1.40 The Human Rights Committee has requested advice from the Minister on the other matters raised in its report.[29]

1.41 The Human Rights engaged by the bill are discussed in more detail in Chapter 2 of this report.

Structure of this report

1.42 This report consists of two chapters including this introductory chapter.

1.43 Chapter 2 considers issues raised by participants in the inquiry and sets out the committee's views and recommendation.

Acknowledgements

1.44 The committee thanks all organisations and individuals that made submissions to this inquiry, as well as those that gave further evidence at public hearings.

25 Explanatory Memorandum—Attachment A, pp. 5–6.

26 Explanatory Memorandum—Attachment A, p. 6.

27 Parliamentary Joint Committee on Human Rights, *Report 7 of 2018*, p. 15.

28 Parliamentary Joint Committee on Human Rights, *Report 7 of 2018*, pp. 18–19.

29 Parliamentary Joint Committee on Human Rights, *Report 7 of 2018*, pp. 15–22.

Chapter 2

Key issues

2.1 This chapter outlines the key issues raised in written submissions and in evidence provided at the public hearings on 3 and 10 September 2018.

2.2 As explained in Chapter 1, the bill retrospectively confirms the validity of the appointment of a proclaimed port in the territory of Ashmore and Cartier Islands from 23 January 2002.

2.3 The majority of participants in the inquiry opposed the bill, expressing concerns about its retrospective nature. Concerns were also raised regarding the compatibility of the bill with human rights, and its specific impact on those individuals who arrived at Ashmore and Cartier Islands between 23 January 2002 and 1 June 2013. The committee also received evidence in relation to potential unintended consequences of the bill.

2.4 However, the Department of Home Affairs (the department) advised the committee that the bill would simply preserve the status quo for individuals who arrived at Ashmore and Cartier Islands, and confirm that they are unauthorised maritime arrivals (UMAs), as had been understood and accepted at the time of their respective arrivals.

2.5 This chapter summarises these competing views, and in turn sets out the committee's views and recommendation.

Retrospectivity

2.6 The Scrutiny of Bills Committee raised concerns regarding the retrospective nature of the bill, commenting that 'such legislation can undermine the rule of law'.[1] A number of inquiry participants indicated that they agreed with the Scrutiny of Bills Committee's assessment.[2] For example, Andrew and Renata Kaldor Centre for International Refugee Law (Kaldor Centre) submitted that:

> …an element of the rule of law is that the law should be accessible and, as far as possible, certain, intelligible, clear and predictable. It is a fundamental rule of law principle that people should be capable of knowing what the law requires of them at any given time, and retrospective legislation undermines this by altering legal rights and obligations with backdated effect.[3]

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1 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest No.7 of 2018*, p. 2.

2 See for example:; Refugee Advice and Casework Service, *Submission 3*; Australian Lawyers for Human Rights, *Submission 4*; Asylum Seeker Resource Centre, *Submission 8*; Law Council of Australia, *Submission 10*.

3 Andrew and Renata Kaldor Centre for International Refugee Law, *Submission 9*, p. 2.

2.7 Mr Min Guo, Barrister at The List G Lawyers, emphasised that the 'presumption against retrospectivity' is well-established in the Australian legal system, and further explained:

> The reason why there is, legally, a presumption against retrospectivity, is that retrospectivity offends the principle that people should be able to have certainty as to how the law will treat them, in accordance with the law as it exists at the time they so act.[4]

2.8 The Law Council of Australia (LCA) considered that 'there has been insufficient justification for such retrospectivity, when consideration is given to the considerable legal and procedural effects of the proposed measures on the lives of those who have been affected by the 2002 instrument'.[5] The LCA also contended that 'even if only to reflect the original policy intent, the validation of the 2002 Appointment has the potential to undermine the rule of law'.[6]

2.9 In his second reading speech, the Minister noted that the bill 'reiterates the government's original intention that the Appointment is, and always has been, valid'.[7]

2.10 The department acknowledged in evidence to the committee that the bill's effect is retrospective, however also noted that the bill was important for ensuring certainty in Australia's border protection regime:

> In terms of the broader border protection architecture, certainty is absolutely essential. If there's any perception that different elements of the border protection regime can be litigated out of existence and not reaffirmed, if you like, by the parliament, that may have some impact.[8]

2.11 The department also considered that not passing the bill 'would have a negative impact upon the integrity of Australia's migration system and on public confidence in Australia's border protection regime'.[9]

2.12 The department noted that retrospective legislation had been used previously to validate decisions made under the *Migration Act 1958*. The department pointed, in particular, to the *Migration Amendment (Validation of Decisions) Act 2017* (MAVD Act) as an example of similar legislation. The purpose of the MAVD Act is to validate past decisions in the event that a Court were to make a relevant declaration of invalidity. The department also noted that this legislation was introduced in similar

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4 Mr Min Guo, *Submission 15*, pp. 1–2.

5 Ms Carina Ford, Deputy Chair, Migration Law Committee, Law Council of Australia, *Committee Hansard*, 3 September 2018, p. 22.

6 Law Council of Australia, *Submission 10*, p. 4.

7 The Hon. Peter Dutton MP, Minister for Home Affairs and Minister for Immigration and Border Protection, *House of Representatives Hansard*, 20 June 2018, p. 8.

8 Mr Ian Deane, Special Counsel, Department of Home Affairs, *Committee Hansard*, 10 September 2018, pp. 9–10.

9 Department of Home Affairs, *Submission 13*, p. 5.

circumstances to the bill under inquiry—that is, following litigation in the High Court.[10]

Compatibility with human rights

2.13 As noted in Chapter 1, according to the Explanatory Memorandum, the bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.[11] These rights and freedoms include:

- Right to freedom of movement: Article 12(1) of the International Covenant on Civil and Political Rights (ICCPR); and
- Australia's non-refoulement obligations: Articles 6 and 7 of the ICCPR and Article 3 of the Convention Against Torture (CAT) and Other Cruel, Inhuman or Degrading Treatment or Punishment.[12]

2.14 However, as noted in the previous chapter, the Parliamentary Joint Committee on Human Rights (Human Rights Committee) considered that the bill did engage certain human rights.

Human rights implications of confirming the Appointment

2.15 In its assessment of the bill, the Human Rights Committee set out that the Federal Circuit Court's finding that the Appointment was invalidly made would have a range of consequences:

> Specifically, the effect of the 2002 appointment being invalid may be that persons who entered the area of waters within the Territory of Ashmore and Cartier Islands without a valid visa may not have been correctly classified as 'offshore entry persons' (now UMAs).
>
> The classification of a person as an UMA significantly affects how their rights and obligations under the Migration Act are to be determined and how their applications for a visa may be processed. For example, persons who entered the area of waters within the Territory of Ashmore and Cartier Islands between 13 August 2012 and 1 June 2013 without a valid visa and were classified as UMAs became 'fast track applicants' under the Migration Act. This would have resulted in the 'fast track' process applying to the assessment and review of their claims for refugee status and applications for protection visas.[13]

2.16 The ALHR agreed with this assessment, noting that in classifying a person as a UMA the bill would also 'retrospectively authorise a range of forms of treatment that have consistently been shown to raise serious human rights concerns':

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10 Department of Home Affairs, answers to questions on notice (3 September 2018), received 7 September 2018.

11 Explanatory Memorandum–Attachment A, pp. 5–6.

12 Explanatory Memorandum–Attachment A, p. 6.

13 Parliamentary Joint Committee on Human Rights, *Report 7 of 2018*, p. 17.

> This treatment includes unnecessarily lengthy periods of open-ended detention and liability to be transferred to detention in Nauru or Papua New Guinea. People who are affected by violations of human rights have a legal entitlement to an effective remedy. This right is protected by article 2 of the International Covenant on Civil and Political Rights. By interfering with the ability of affected people to seek legal remedies, the Bill infringes upon this right.[14]

2.17 However, when asked about the bill's engagement of the principle of non-refoulement, Department officials commented that the bill does not directly engage this principle:

> The processes that are used to assess refugee status, the decision-making that goes into that and the actual processes leading up to removal of somebody, obviously, directly engage that principle. But I don't see how the bill itself directly engages that.[15]

Fast-track assessment process

2.18 Submitters also commented specifically on the human rights implications of the fast-track assessment process, noting that some individuals affected by the bill may be (re)classified as fast-track applicants.

2.19 The ALHR argued that the fast-track assessment process falls short of international human rights standards, and highlighted findings of the Human Rights Committee, UN High Commissioner for Refugees and the UN Human Rights Committee in this regard.[16]

2.20 In its submission to the inquiry, the department maintained that the bill complies with Australia's human rights obligations, and does not remove the rights of affected persons to seek protection and have their claims properly assessed:

> All of the persons affected by this Bill have had the opportunity to seek protection and have their claims assessed. The passage of the Bill will not change this.
>
> Enactment of the Bill will confirm that the actions taken in relation to persons who entered the waters of the proclaimed port, by reference to their status as UMAs, were valid and effective. The Bill is compatible with human rights and freedoms because it does not engage any obligations under relevant human rights treaties.[17]

2.21 It should also be emphasised that the committee is not inquiring here into the merits or otherwise of the fast-track assessment process.

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14 Australian Lawyers for Human Rights, *Submission 4*, p. 2.

15 Mr Ian Deane, Special Counsel, Department of Home Affairs, *Committee Hansard*, 10 September 2018, p. 12.

16 Australian Lawyers Human Rights, *Submission 4*, p. 2.

17 Department of Home Affairs, *Submission 13*, p. 5.

Implications for individuals who arrived at Ashmore and Cartier Islands between 23 January 2002 and 1 June 2013

2.22 As noted previously, the bill, if passed, will have implications for those individuals who arrived at Ashmore and Cartier Islands between 23 January 2002 and 1 June 2013. These implications stem from the Federal Circuit Court's decisions.

2.23 The Federal Circuit Court's findings in relation to cases DBC16 and DBD16 v Minister for Immigration and Border Protection & Anor [2018], confirmed the 2002 Appointment to be invalid and also found that the applicant in each case is not a UMA.

2.24 An important implication of these findings is that currently, those individuals who arrived at Ashmore and Cartier Islands between 23 January 2002 and 1 June 2013 can bring their own cases to the Federal Court or Federal Circuit Court, and, in keeping with the Court's previous findings, would likely be found not to be UMAs. In some cases, these individuals may also be found not to be subject to the fast-track application process.

2.25 Representatives of the ASRC explained that it was their understanding that at the time the affected individuals arrived at Ashmore and Cartier Islands, individuals ought to have been considered to be 'direct entry persons' as opposed to UMAs, and therefore would not have been subject to transfer to offshore processing:

> They would still be technically an unlawful arrival in the sense that they arrived in Australia without a visa, so we're not saying that it magically transforms their status into being lawful boat arrivals, and they would still be subject to the immigration clearance provisions. However, they wouldn't be unauthorised maritime arrivals as defined under the act, which is the trigger for the lawful transfer of persons to offshore processing centres.[18]

2.26 The department confirmed this:

> If the Bill with the proposed amendments is not passed it would mean that individuals who entered Australia via the Territory of Ashmore and Cartier Islands between 23 January 2002 and 1 June 2013 did not enter Australia by sea at an excised offshore place and are therefore not UMAs under the *Migration Act 1958*. For some, it would also mean that they are not fast track applicants under the *Migration Act 1958*. This would have consequences for the way in which affected persons have been processed under the *Migration Act 1958*.[19]

2.27 In evidence to the committee, AHRC explained that the bill could negatively affect this group of individuals in a number of ways:

> First, the bill would affect whether this group was entitled to apply for protection visas when they arrived in Australia. Many in this group were prevented from applying for any kind of protection visa for many years.

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18 Dr Carolyn Graydon, Principal Solicitor, Asylum Seeker Resource Centre, *Committee Hansard*, 3 September 2018, p. 13.

19 Department of Home Affairs, *Submission 13*, p. 5.

> When they were eventually allowed to apply for protection, many were permitted to apply only for temporary protection visas, TPVs, rather than permanent protection visas. Some people might be denied the right to apply for protection at all if this is passed. The second point we make is that many in this group were invalidly taken to regional processing centres offshore. The commission has expressed human rights concerns about regional processing for many years. The bill would retrospectively authorise the act of taking these people to Nauru and Manus Island. Third, people in this group who were allowed to apply for protection in Australia and had their applications refused can access only limited merits review in the Immigration Assessment Authority. Some people may still be waiting for a decision on their protection applications. As the law stands today, these people should be entitled to full merits review in the AAT in respect of any negative decision, and this bill would remove that right. Fourth, if this bill is passed, some in this group who arrived many years ago and are now permanent residents will have a lower processing priority in any family reunion visa application.[20]

2.28 Mr Graeme Edgerton, Deputy General Counsel from AHRC confirmed that it was also AHCR's understanding that these individuals should have been able to apply for a permanent protection visa when they arrived.[21]

2.29 The department acknowledged this:

> Without the Appointment, persons who entered Australia via the Territory of Ashmore and Cartier Islands before 1 June 2013 would not have been determined to be UMAs under the *Migration Act 1958*. Some of these people would also not be fast track applicants under the *Migration Act 1958*. However, the affected persons still entered Australia without a valid visa and therefore were unlawful non-citizens subject to immigration detention.[22]

2.30 However, departmental officials also stressed that whether individuals were assessed by the IAA or the Administrative Appeals Tribunal (AAT), 'it's still a merits review process as determined by the High Court'.[23] Officials further noted that whether an individual's case was assessed by the IAA or AAT would not change their access to protection. Individuals would still be eligible for a temporary protection visa or a safe haven enterprise visa.[24]

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20 Mr Edward Santow, Human Rights Commissioner, Australian Human Rights Commission, *Committee Hansard*, 3 September 2018, p.18.

21 Mr Graeme Edgerton, Deputy General Counsel, Australian Human Rights Commission, *Committee Hansard*, 3 September 2018, p. 20.

22 Department of Home Affairs, *Submission 13*, p. 4.

23 Mr Ian Deane, Special Counsel, Department of Home Affairs, *Committee Hansard*, 10 September 2018, p. 8.

24 Ms Miranda Lauman, Assistant Secretary, Humanitarian Program Capability Branch, Department of Home Affairs, *Committee Hansard*, 10 September 2018, p. 9.

2.31 It might also be noted here that in response to a request for advice from the Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills Committee), the Minister explained that the bill does not impose any new obligations or detriment on affected persons:

> Instead, it maintains the status quo in relation to the processing of UMAs and, where relevant, fast track applicants under the Act who entered Australia via this proclaimed port between 23 January 2002 and 1 June 2013.[25]

Number of individuals potentially affected by the bill

2.32 At the public hearing in Melbourne, the committee sought advice in relation to the number of individuals who might be affected by the bill—that is, the number of individuals who passed through Ashmore and Cartier Islands between 23 January 2002 and 1 June 2013, and were subsequently determined to be UMAs. It should be noted here that from 1 June 2013, people who arrived by boat without a visa at *any* location in Australia—not only at Ashmore and Cartier Islands—were subject to a statutory bar on applying for a visa. As such, the validity of the Appointment is not relevant for persons who arrived at Ashmore and Cartier Islands from 1 June 2013 onward.

2.33 The ALHR noted that the group of people who would be affected by the bill is 'finite in number, and comprised of noncitizens who entered Australia by boat via the relevant territory prior to June 2013':

> It is not possible for this group to grow. Opportunities for this closed with the commencement of the *Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Act 2013*. The Bill is therefore concerned with the historical and ongoing legal rights of a limited number of people.[26]

2.34 No witnesses were able to provide an exact figure. However, several organisations, including the department, suggested that approximately 1600 individuals would be affected by the bill.[27] In answers to questions on notice, the department confirmed its estimate that between 1600 and 1800 individuals would be affected by the bill.[28]

2.35 The department put forward that it was likely that 'most, if not all, of the people who entered the relevant waters before 13 August 2012 have already had their

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25 The Hon. Peter Dutton MP, Minister for Home Affairs and Minister for Immigration and Border Protection, *Response to the Standing Committee for the Scrutiny of Bills*, 19 July 2018, p. 3.

26 Australian Lawyers for Human Rights, *Submission 4*, p. 1.

27 Mr Ian Deane, Special Counsel, Department of Home Affairs, *Committee Hansard*, 3 September 2018, p. 28.

28 Department of Home Affairs, answers to questions on notice (3 September 2018), received 7 September 2018.

protection obligations and asylum applications processed'.[29] This would mean that the majority of individuals who would be affected by the bill are likely to have arrived between 13 August 2012 and 1 June 2013, and may be subject to the fast-track assessment process. The department also advised the committee that it understood no individuals affected by the bill were currently in an offshore processing centre.[30]

Transitional arrangements

2.36 Clause 5 of the bill provides that the new Act 'does not affect rights or liabilities arising between parties to proceedings in which judgement has been delivered by a court before the commencement of this Act'.[31]

2.37 However, the new Act would affect any cases where judgement has not yet been delivered or that are yet to be brought before a court. As such, some submitters suggested that the transitional arrangements proposed in Clause 5 of the bill were unfair to those applicants who have pending cases before the courts. For example, Mr Guo argued the transitional arrangements created an 'unprincipled' distinction between those who have already commenced proceedings, and those who have not:

> We're coming down entirely to when a person files a proceeding and when the court is able to accommodate them. In my submission, that is not a principled way to give some people the benefit of the transition provision and deny it to others.[32]

2.38 RACS recommended that the transitional arrangements be extended to include those who had cases pending at court.[33]

2.39 The Refugee Council of Australia agreed, suggesting that 'the Government should minimise the confusion it has created by protecting the expectations of those who are already midway through the processes of review or decision'.[34]

2.40 RACS recommended that the transitional provisions in the bill should protect people that have filed a case at the MRD to allow the MRD to continue to have jurisdiction to finalise the review.

2.41 However, Mr Bruck from RACS considered that the bill did provide some protections for those people whose cases had been assessed and who had been granted a form of protection visa:

> I think the only appropriate part of this bill is to not retract people's visas where they've already been granted a safe haven enterprise visa for five

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29 Department of Home Affairs, answers to questions on notice (3 September 2018), received 7 September 2018.

30 Mr Ian Deane, Special Counsel, Department of Home Affairs, *Committee Hansard*, 10 September 2018, p. 4.

31 Explanatory Memorandum, p. 4.

32 Mr Min Guo, *Committee Hansard*, 3 September 2018, p. 5.

33 Refugee Advice and Casework Service, *Submission 3*, p. 3.

34 Refugee Council of Australia, *Submission 11*, p. 3.

> years or a temporary protection visas for three years. Ultimately, those people should have been allowed to apply for permanent protection. We still maintain that that is the most appropriate view. But, in terms of the legal issues, those people should not be removed from their existing granted TPVs and SHEVs.[35]

2.42 The department advised the committee that the bill did not remove the rights of affected individuals to either a merits reviews or a judicial review:

> The Bill, with the proposed amendments, does not remove the rights of individuals who passed through the Territory of Ashmore and Cartier Islands to seek protection, or to have their claims comprehensively assessed on their merits. These individuals have been and will still be able to seek merits review and judicial review.[36]

2.43 In answers to questions on notice, the department also considered that the impact of retrospectively validating the Appointment, in relation to the affected persons, would be:

> …that they would not be able to obtain a court declaration that they are not an unauthorised maritime arrival; if they have been to the IAA they would not be able to obtain a court declaration quashing the IAA's decision for lack of jurisdiction; and they would not be able to seek review by the AAT of a refusal decision (rather, their application will be reviewed by the IAA unless the person is an excluded fast track review applicant).

2.44 Departmental officials also noted that in drafting the bill, consideration was given to 'ensuring that the bill did not impermissibly interfere with judicial power':

> The department's position was that the carve-out that has been included in the bill ensures that that is the case: that there is no impermissible interference with the judicial power. But, in the department's position, that was sufficient in order to ensure that.[37]

Other matters raised

Unintended consequences

2.45 Mr Guo's submission raised a number of concerns about the bill, commenting that it is 'poorly drafted and will likely create unintended consequences'.[38] Mr Guo particularly noted the difficulties that the bill would pose for Australian citizens and legitimate Australian visa holders should they return to Australia through Ashmore Island. He explained:

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35 Mr Simon Bruck, Senior Solicitor, Refugee Advice and Casework Service, *Committee Hansard*, 3 September 2018, p. 12.

36 Department of Home Affairs, *Submission 13*, p. 5.

37 Ms Heimura Ringi, Assistant Secretary, Legislation Branch, Department of Home Affairs, *Committee Hansard*, 10 September 2018, p. 8.

38 Mr Min Guo, *Submission 15*, p. 3.

> In short, the Bill means that an Australian citizen returning to the country via Ashmore Island would be entering a 'port', and yet be in a position where it would be physically impossible to become 'immigration cleared', because there would be no immigration officers there to clear the citizen. This means the person will be taken to have 'bypassed immigration clearance' despite having no means to become 'immigration cleared'. Under the *Migration Act 1958* as it stands now, the bypassing of immigration clearance is enough to justify the immigration detention of the person—even if the person is a citizen.[39]

2.46 The department responded to Mr Guo's concerns in written answers to questions on notice. The department commented that the bill would not negatively impact Australian citizens or Australian visa holders. In relation to Australian citizens the Department noted:

> There would be no question of an Australian citizen who complies with immigration clearance requirements at an "on-port" being taken into immigration detention merely because they had entered the waters of the Territory of Ashmore and Cartier Islands at an earlier point.[40]

Committee view

2.47 The committee believes that the protection of Australia's borders is crucial to the integrity of Australia's migration system. In considering the bill, the committee notes that the Appointment made in 2002 was critical to determining the status of persons who entered Australia via the proclaimed port at Ashmore and Cartier Islands between 23 January 2002 and 1 June 2013. These individuals were found to be unauthorised maritime arrivals (UMAs), and some also became fast-track applicants. The bill also validates any action taken or decision made under the Migration Act, which relied on the Appointment.

2.48 The committee is aware of the recent Federal Circuit Court decisions which found the 2002 Appointment to be invalid because of the description of what was a 'port', and that the two applicants were not UMAs. However, the committee considers that the bill reiterates the government's original intention that the Appointment is, and always has been, valid.

2.49 The committee notes the Explanatory Memorandum of the bill, which states that the bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

2.50 In confirming the validity of the Appointment, the committee is of the view that the law is not imposing new obligations. The purpose of this bill is to ensure the law had the effect it was thought to have at the time, and to maintain the validity of

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39 Mr Min Guo, *Submission 15*, p. 3.

40 Department of Home Affairs, answers to questions on notice (3 September 2018), received 7 September 2018.

actions taken on the basis of what was thought to be the law when the action was taken.

2.51 The committee considers that not passing the bill would have a negative impact on the integrity of Australia's migration system and on public confidence in Australia's border protection regime.

Recommendation 1

2.52 The committee recommends that the bill be passed.

Senator the Hon Ian Macdonald

Chair

Labor Party Senators' Dissenting Report

1.1 The Australian Labor Party (Labor Party) dissents from the majority report of the Legal and Constitutional Affairs Legislation Committee (the committee) inquiry into the provisions of the Migration (Validation of Port) Bill 2017 (the bill).

1.2 Labor Senators recognize that the Appointment, which was gazetted in 2002 by the then Liberal Minister for Immigration and Multicultural and Indigenous Affairs, the Hon Phillip Ruddock MP, was designed to ensure that maritime arrivals who entered certain waters of the territory of Ashmore and Cartier Islands, an 'excised offshore place' for the purposes of the Migration Act, would become 'offshore entry persons', now referred to as 'unauthorised maritime arrivals' (UMAs).

1.3 The Labor Party notes that this is another case of the poor drafting of legislation and associated instruments in matters relation to immigration matters and that this has occurred under successive Coalition Governments. The regular broad, poorly drafted, and erroneous legislation often has unintended consequences.

1.4 Labor Senators are strongly of the view that the Minister for Home Affairs and the Department of Home Affairs have failed to clearly articulate and outline the need for this legislation in its current form.

1.5 Despite numerous requests from Labor Senators, the Minister for Home Affairs and the Department of Home Affairs were unable to advise the number of persons affected by the invalid appointment, or how many affected persons remain in immigration detention or various stages of processing. It is hard to believe that the Department of Home Affairs is unable to definitively outline the number of individuals affected by this bill.

1.6 No submitters were able to provide an exact figure. However, submitters, including the Department, suggested that 1600 individuals would be affected by the bill. It should be noted that the department also suggested that the estimate could be between 1600 and 1800 individuals.

1.7 The Minister for Home Affairs and his Department have also failed to inform the persons affected that their immigration status and legal rights have been impacted by the invalid appointment. Instead, the Government has sought to pass the bill as swiftly as possible so that persons affected do not have time to exercise their rights before they are retrospectively stripped by the enactment of the bill.

1.8 In evidence to the inquiry, the Department admitted that:

- the essential effect of the bill was to remove the rights, of those affected by the bill, to:
    - seek a full merits review of their application for protection, by the AAT; and
    - apply for a permanent, as opposed to temporary, protection visa.

1.9 The bill has no impact positively or negatively on the ongoing and future operation of ‘Operation Sovereign Borders.’ In fact, Labor Senators note that Departmental officials stated

it would be 'false' for any person to claim that the failure of the bill to pass the parliament would impede the Government's capacity to carry out its activities under Operation Sovereign Borders.

1.10 Many submitters expressed valid concerns that the bill would unfairly remove the legal rights of various categories of people, including:

- people who have current matters before the court or relevant tribunals. Labor Senators are concerned that there may be a number of cases whereby a person has been refused by the IAA and appealed to Court, however they have not received a judgment from the court;
- people who are still having their applications for protection determined by the Department, and, because of that, have not commenced any judicial review proceedings;
- people who have been refused by the department but are subject to current unfinalised merits review by the IAA and, because of that, have not commenced any judicial review proceedings;
- people who have gone through the entire judicial review process, before the Federal Court and Federal Circuit Court identified issues with the Appointment.

1.11 The Labor Party opposes Temporary Protection Visas and believes those that are eligible for protection should be offered protection as permanent residents. In addition, the Labor Party opposes the Fast Track process, due to its denial of natural justice, and is concerned the Minister for Home Affairs and his Department are seeking to push people back into a Fast Track process.

Recommendation 1

Labor Senators recommend that anyone who is affected by this bill, in a manner set out in paragraph 1.10 above, should be protected in the transitional provisions of the Bill and allowed to exercise their rights without interference from this bill.

Recommendation 2

Labor Senators recommend that any amendment should allow for a further period of time in which people can pursue their claim for protection.

Recommendation 3

Labor Senators recommend that the Minister for Home Affairs and his Department urgently contact all affected individuals.

Senator Louise Pratt

Deputy Chair

Australian Greens Dissenting Report

1.1 The Australian Greens acknowledge the extensive work of the Committee in this inquiry, and thank everyone who made a public submission and/or public representation.

1.2 The Australian Greens hold substantial concerns regarding this bill.

1.3 The Australian Greens oppose the retrospectivity of this bill. Retrospective laws are widely considered inconsistent with the rule of law—particularly when applied to punitive legislation. As the Kaldor Centre for International Refugee Law noted:

> The government's own policy guidance at the Commonwealth level recommends that retrospective legislation that adversely affects rights or imposes liabilities should not be made except in 'exceptional circumstances' and with adequate justification … [and should] include an assurance that no person would be disadvantaged by the retrospective application of the Act.[1]

1.4 The retrospectivity of this bill is even more objectionable when you consider what this bill seeks to do through validation of the port appointment. As the Refugee Council of Australia submitted:

> This Bill is a shameful attempt to retrospectively authorise repeated unlawful actions by the Australian Government, in an attempt to evade its international human rights obligations.[2]

1.5 This denial of human rights is further facilitated by the appointment classifying people seeking asylum entering through the 'appointed port' as unauthorised maritime arrivals. As the Senate Standing Committee for the Scrutiny of Bills noted in its inquiry into the bill:

> The question of whether a person is or is not a UMA is of great significance with respect to how a person's rights and obligations under the Migration Act should be determined and how their applications should have proceeded.[3]

1.6 As unauthorised maritime arrivals, this already vulnerable cohort of people is condemned to a fast-track review system that denies them access to a full administrative review by the Migration and Refugee Division of the Administrative Appeals Tribunal. As Australian Lawyers for Human Rights submitted:

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1 Andrew and Renata Kaldor Centre for International Refugee Law, *Submission 9*, pp. 2–3.

2 Refugee Council of Australia, *Submission 11*, p. 1.

3 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest No.7 of 2018*, p. 3.

> The fast track process has been consistently found to fall short of international human rights standards … [including by the Australian Parliament's] Parliamentary Joint Committee on Human Rights.[4]

1.7 Furthermore, this can lead to further internationally recognised and condemned denials of human rights resulting from indefinite detention on Nauru or Manus Island. The Law Council submitted:

> …but for that[invalid] Instrument this cohort would have been able to seek permanent protection from Australia and, if that application were refused, have access to full merits review under Part 7A of the Act.[5]

1.8 Also of concern is the consideration and treatment of children by this bill and invalid port appointment. As submitted by Asylum Seeker Resource Centre:

> A further legal consequence of being incorrectly classified as an 'unauthorised maritime arrival' is that children who are born in the migration zone to a parent who has that status, are also considered to be 'unauthorised maritime arrivals'.[6]

1.9 The port appointment—invalid as it was—has also demonstrably been misused by the Australian Government, which has overseen Australian Defence Force vessels towing boat arrivals hundreds of nautical miles out of their way, through the territory of Ashmore and Cartier Islands, so that it could be claimed these people seeking asylum entered Australia at an excised offshore place, and were therefore unauthorised maritime arrivals.

1.10 The Australian Greens are also concerned for the welfare and rights of the approximate 1600–1800 people who are unjustly affected by the bill, and invalid port appointment. As Doctors for Refugees submitted:

> As the Australian Government has failed to excise the Territory of Ashmore—incorrectly described as being a port—from Australia's Migration Zone, the offshore detention and processing of refugees in between 2002-2013 has been deemed as illegal.[7]

1.11 Having been subjected to this wrongful and unlawful denial of justice and rights, the Australian Greens believe this cohort of people seeking asylum must now rightfully be afforded long-overdue on-shore processing, access to justice and procedural fairness, and appropriate physical and mental healthcare.

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4 Australian Lawyers for Human Rights, *Submission 4*, p. 2.

5 Law Council of Australia, *Submission 10*, p. 4.

6 Asylum Seeker Resource Centre, *Submission 8*, p. 7.

7 Doctors for Refugees, *Submission 5*, p. 2.

Recommendation 1

1.12 The Australian Greens recommend that the bill not be passed.

Senator Nick McKim
Senator for Tasmania

Appendix 1

Submissions

1 SCALES Community Legal Centre

2 Mr Michael de Rohan

3 Refugee Advice & Casework Service (Aust) Inc.

4 Australian Lawyers for Human Rights

5 Doctors for Refugees

6 Ms Christine Belford

7 Montmorency Asylum Seekers Support Group

8 Asylum Seeker Resource Centre

9 Andrew and Renata Kaldor Centre for International Refugee Law

10 Law Council of Australia

11 Refugee Council of Australia

12 Ms Betty McGeever

13 Department of Home Affairs

14 Australian Human Rights Commission

15 Mr Min Guo

16 Refugee and Immigration Legal Centre

Answers to questions on notice and additional information

Answers to questions on notice

1 Law Council of Australia - answer to a question taken on notice from the public hearing on 3 September 2018, Melbourne.

2 Refugee Council of Australia and the Asylum Seeker Resource Centre - answer to a question taken on notice from the public hearing on 3 September 2018, Melbourne.

3 Department of Home Affairs - answers to questions taken on notice from the public hearing on 3 September 2018, Melbourne.

4 Department of Home Affairs - answers to questions taken on notice from the public hearing on 10 September 2018, Melbourne.

Additional information

1 Additional information provided by Mr Min Guo - clarification of evidence .

Appendix 2

Public hearings and witnesses

Monday, 3 September 2018 – Melbourne

BRUCK, Mr Simon, Senior Solicitor, Refugee Advice and Casework Service (Australia) Incorporated

DEANE, Mr Ian, Special Counsel, Department of Home Affairs

EDGERTON, Mr Graeme, Deputy General Counsel, Australian Human Rights Commission

FORD, Ms Carina, Deputy Chair, Migration Law Committee, Law Council of Australia

GRAYDON, Dr Caroline, Principal Solicitor, Asylum Seeker Resource Centre

GUO, Mr Min, Private capacity

HIRSCH, Mr Asher, Senior Policy Officer, Refugee Council of Australia

LANGBIEN, Ms Josephine, Solicitor, Asylum Seeker Resource Centre

MacDONALD, Mr Nathan, Senior Policy Lawyer, Law Council of Australia

MORGAN, Ms Lucy, Specialist Adviser—Immigration, Australian Human Rights Commission

RINGI, Ms Heimura, Assistant Secretary, Legislation Branch, Department of Home Affairs

SANTOW, Mr Edward, Human Rights Commissioner, Australian Human Rights Commission

WESTE, Mrs Kerry, President, Australian Lawyers for Human Rights

Monday, 10 September 2018 – Canberra

DEANE, Mr Ian PSM, Special Counsel, Department of Home Affairs

LAUMAN, Ms Miranda, Assistant Secretary, Humanitarian Program Capability Branch, Department of Home Affairs

RINGI, Ms Heimura, Assistant Secretary, Legislation Branch, Department of Home Affairs