AUSTRALIAN
LAWYERS
FOR
HUMAN RIGHTS

PO Box A147
Sydney South
NSW 1235
info@alhr.org.au
www.alhr.org.au

30 August 2018

Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

By email: legcon.sen@aph.gov.au

Dear Committee Secretary

Migration (Validation of Port Appointment) Bill 2018

Australian Lawyers for Human Rights (**ALHR**) welcomes the opportunity to make this submission in relation to the Migration (Validation of Port Appointment) Bill 2018 (the **Bill**).

Summary

1. The effect of the Bill is to retrospectively apply the status of *unauthorised maritime arrival* under Australian law to a category of people to whom it does not currently apply. Whether or not a person is classified as an *unauthorised maritime arrival* (or **UMA**) has serious consequences for that person. Legislation that seeks to apply this category to a person retrospectively raises serious concerns in relation to human rights and the rule of law and should not be supported.

2. ALHR recommends that the Bill not be passed and that detailed information about the current circumstances of those who would be affected by the Bill should be sought from government.

Background

3. The group of people affected by the Bill is finite in number, and comprised of non-citizens 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.

4. The practical consequences of classification as a UMA for a person who arrived in 2012 or 2013 varied according to timing and fortune. The range of consequences variously included:
   - a statutory bar on visa applications and associated periods of open-ended detention in Australia;
   - transfer to a regional processing country (Nauru or Papua New Guinea);
   - ineligibility for a permanent protection visa; and
   - for protection visa applicants, the status of fast track applicant, resulting in limitations on merits review rights.

5. The practical impact of the Bill depends significantly on the current status and circumstances of those affected, as well as the consequences of their mistaken historical classification as UMAs. This information will be subject to detailed analysis by the Department of Home Affairs, and ALHR considers that this analysis should be sought in full and adequately considered by the Committee prior to reporting.

6. The Bill would both have both retrospective and forward-looking impacts. It would interfere with rights that have accrued in the past, authorise treatment that was otherwise unlawful and impose the adverse consequences of UMA status upon those in Australia whose refugee status remains unresolved.

Human rights implications of the Bill

7. Many of the people affected by the Bill are likely to have been permitted to apply for protection visas since 2015. For them, the Bill would have the effect that they are also fast track applicants. The result of this is that a decision to refuse a person's protection visa application is reviewable only according to the deficient form of merits review provided by the fast track process (as opposed to ordinary review rights under Part 7 of the Migration Act).

8. The fast track process has been consistently found to fall short of international human rights standards. Both the Parliamentary Joint Committee on Human Rights and the UN High Commissioner for Refugees have stated that limitations on the ability of the fast track process to adequately identify risks of harm render it incompatible with Australia's *non-refoulement* obligations.[1] The UN Human Rights Committee has raised similar concerns and recommended that the government consider repealing the legislation that established it.[2] The risk of *refoulement* that the Bill would create by stripping those affected of access to procedural safeguards is not justified by any other consequence of the Bill.

9. By classifying a person affected 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. 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.

The retrospective effect of the Bill

10. The common law is wary of retrospective laws for good reason. Legislation that redefines rights and obligations in the past threatens to undermine the rule of law. Retrospective civil laws require a compelling justification. In ALHR's view, no compelling justification has been presented in this case. Although many laws that adversely affect people seeking asylum have been supported on the basis that they may discourage future boat arrivals, the delimited and historical nature of the group affected by the Bill means that such an argument is particularly weak in this case. The seriousness of the actions that may be authorised by the Bill gives rise to a strong presumption that retrospective legislation is inappropriate, inconsistent with the rule of law and should not be supported.

---

[1] Parliamentary Joint Committee on Human Rights, Thirty-sixth report of the 44th Parliament (16 March 2016) 174-187; Ninth report of the 44th Parliament (15 July 2014), 43-44; Fourteenth report of the 44th Parliament (28 October 2014) 88; Report 2 of 2017 (21 March 2017), 10-17; UNHCR, *Fact sheet on the protection of Australia's so-called "Legacy Caseload" asylum-seekers*, February 2018, available at http://www.unhcr.org/en-my/5ac5790a7.pdf

[2] UN Human Rights Committee, 121st session, Concluding observations on the sixth periodic report of Australia, November 2017, CCPR/C/AUS/CO/6, [33]-[34].

11. Although the legal tradition's disapproval of retrospective *criminal* laws is stronger than its disapproval for other retrospective laws,[3] it is appropriate to recognise that the nature and severity of treatment resulting from classification as a UMA has for many people been no less injurious than many criminal penalties. This treatment has included exposure to unjustifiable and unnecessarily lengthy periods of deprivation of liberty. For people who arrived in Australia on or after 13 August 2012, UMA status has also meant liability to be transferred to detention in other countries. Irrespective of its administrative character in Australian law, the treatment of UMAs permitted under the Migration Act is severely damaging. Unlike criminal penalties, this treatment is imposed for actions that have no criminal content, and which are in keeping with the both the letter and spirit of a body of international law which Australia is bound to respect and uphold. Accordingly, the extent to which this Bill approximates the retrospective imposition and authorisation of punitive measures should not be lost on the Committee.

Recommendations

1. **The Bill should not be passed and should be withdrawn.**

2. **The Committee should request detailed information about the status of and impact upon those affected by the Bill.** The size and composition of the category of individuals that will be affected by the Bill is finite, and its subcategories are capable of definition. Because the impact of the Bill depends significantly on the number, location and current immigration situation of the individuals in the group of people it affects, this information should be sought in full from government. ALHR recommends that neither the Committee nor the Senate support the Bill before this information is provided and adequately considered.

If you would like to discuss any aspect of this submission, please contact Kerry Weste, President of Australian Lawyers for Human Rights, by email at

Yours sincerely,

Kerry Weste
President
Australian Lawyers for Human Rights

About ALHR

ALHR was established in 1993 and is a national association of Australian solicitors, barristers, academics, judicial officers and law students who practise and promote international human rights law in Australia. ALHR has active and engaged National, State and Territory committees and specialist thematic committees. Through advocacy, media engagement, education, networking, research and training, ALHR promotes, practices and protects universally accepted standards of human rights throughout Australia and overseas.

[3] See eg *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 642-3 (Deane J).