New South Wales
Council for Civil Liberties

NSW Council for Civil Liberties

Submission regarding the

Regional Processing Cohort Bill 2019

7 August 2019

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Regional Processing Cohort Bill 2019 (the Bill)

Introduction

The Bill proposes to ban permanently from Australia any person who entered Australia as an unauthorised maritime arrival after 19 July 2013, was transferred to the Republic of Nauru (Nauru) or Papua New Guinea (PNG) for "regional processing", and was at least 18 years of age at the time of their first (or only) transfer (the Cohort). Such people were forcibly transferred to Nauru or PNG against their will, detained indefinitely, and subjected to serious human rights violations after their transfer.

The effect of this Bill is thus to punish a group of extremely vulnerable people indefinitely, simply for seeking protection—people whom we have already harmed, in their mental health and the suffering we have inflicted, by their being confined in inhumane conditions on Manus Island and Nauru. Many will never recover from our treatment.

The Bill would apply to asylum seekers and refugees who are currently in Nauru or PNG, and others who were transferred to those countries after July 2013 but are now in Australia. It would also apply to those who have found subsequently found refuge in other countries, such as the United States of America. And it would apply to any fresh "unauthorised maritime arrival" who is transferred to offshore processing centres.

Summary

1 The aims of the Bill do not hold water. In any case, it is unnecessary.
2 The Bill applies retrospectively, freshly penalising people for actions done in the past. The supposed justification for this is misconceived.
3 The Bill would have serious consequences beyond its intended purpose. The remedy proposed, giving the Minister the option of waiving the bans, is flawed in the processes proposed, and contrary to natural justice.
4 The Bill infringes international law, in several respects. The supposed justification is inadequate.
5 The Bill should be rejected because it is unnecessary.
6 The Bill should be rejected because it is punitive.
7 The Bill should be rejected because it is retrospective.
8 The Bill should be rejected because it would have harmful consequences.
9 The Bill should be rejected because, contrary to international law, it illegally penalises refugees for entering Australia by boat without visas.
10 The Bill should be rejected because it infringes the principle of equality before the law.

A. The aims of the Bill.

i. With its threat of keeping refugees permanently in Nauru or Manus Island, in poor conditions and where their mental health is being damaged, the Bill infringes on their human rights; both in the ordinary sense of those words, and by being clearly contrary to the provisions of the International Covenant on Civil and Political Rights, and the Conventions on Refugees and on the Rights of the Child.

We discuss these matters below, in section D. Before we do, however, we will address the principal argument that is advanced for the Bill, as well as for the cruel treatment of refugees who came here by boat before 2013. That argument is that the only way of stopping people paying people smuggler and getting into unseaworthy boats, is to be cruel to those who survived and arrived here.

The latest enunciation of these views has been by the Minister for Home Affairs, the Hon Peter Dutton. 'I have never ruled out the New Zealand option [to take 150 refugees from offshore detention] but I've made the point and I make it again today - now is not the right time for us to be sending people to New Zealand. There may be a time when we can exercise the New Zealand option—we're grateful for it, but we will exercise that option when and if it is in our national interest and it's not going to restart boats.'[1]

Such arguments are not as straightforward as is assumed in many public statements, and in the simplistic versions that appear in the human rights sections of Explanatory Memoranda—including the one supporting this Bill. To use some standard examples, you would not be justified in killing a healthy person in order to use his/her organs to save several other lives. Nor would you be justified in torturing a child to death in order to force his parents to reveal the location of a terrorist.

Yet that is what we were repeatedly doing. Adults and children alike were being driven to mental illness by the treatment we have meted out to them—as exquisite a torture as you can imagine.[2] And fourteen people died on Manus Island and Nauru as a result of our treatment.

For many Australians, that is the end of the argument. The end cannot justify the means.[3]

[1] Sydney Morning Herald, July 24, 2019, at 2.00 p.m.
[2] At least there are now no children in overseas detention.
[3] The neo-Aristotelian view of ethics, which is the official position of the Catholic Church, is promulgated by their ethicists, moral theologians, bishops and priests, and is accepted by most devout Catholics. Doing evil in the hopes of achieving good is anathema on that view. The deontological (e.g. Kantian) approach similarly prohibits using people for the sake of others. Substantial numbers of Australians hold one or other of these views.

It might be said that the sheer numbers overwhelm this argument. About 12,000 people drowned at sea between 2007 and 2013. About 760 drowned at sea during the Howard years. But though the boats have not entirely stopped, there have been no reports of drownings since the ALP introduced the Pacific solution and the subsequent Liberal Governments continued it.

The argument, however, is inadequate. If the consequence of our cruelty is that people are deterred from leaving the countries where they are subject to persecution, many will be killed. If instead they head north towards Europe, many will be killed in hostile countries on the way, and more will drown in the Mediterranean or the Atlantic. As Julian Burnside pointed out[4] they are just as dead as if they had drowned on their way to Australia. If they stay in countries where they do not have access to adequate food, shelter and medicine, many will die from malnutrition or preventable or curable diseases. (And there are the 14 refugees who have died on Manus Island or Nauru since July 2013.[5])

Let us suppose, however (without evidence), that significantly more people will die from leaky boats heading for Australia than from these other causes. Even then, more is required to justify infringing one set of rights in order to protect another—or as CCL prefers to put it, doing evil in order to prevent worse. The Explanatory Memorandum stops after saying the measures proposed in the Bill are for a legitimate purpose. A full justification, however, is required to show that the infringement of rights, the evil, is necessary, in that no lesser infringement could achieve the same result, and that there are no alternative measures that could achieve the same result.[6] That has conspicuously not been attempted in the Explanatory Memorandum for this Bill, nor in the 2016 version.

And that is for good reason. If, as we are led to believe, there have been no deaths by drowning in the Pacific since the Pacific solution was adopted, the imposition of additional hardship and further breaches of rights are not justified. The result has already been achieved.

ii. A second aim, variously expressed, is that it is desirable to maintain the integrity of the migration program.[7] For instance, on page 22, the Explanatory Memorandum asserts

> 'Preventing UMAs in the designated regional processing cohort from applying for a visa to enter Australia will strengthen the Government's ability to reduce the risk of non-citizens circumventing Australia's migration laws. It will also prevent non-citizens undermining the Australian Government's return and reintegration and assistance packages and resettlement arrangements.'

[4] In his submission (number 30) to the Legal and Constitutional Committee inquiry concerning the Migration Legislation Amendment (Regional Processing Cohort) Bill 2016) (the 2016 inquiry).
[5] Monash University: Australian Border Deaths Database. Arts.monash.edu, accessed 1/8/2019. A further 36 have died on the mainland, and one was killed after being returned to Vietnam.
[6] It is also necessary to show that the measure is proportionate to the evil prevented; but we are assuming that the preponderance of deaths is sufficient for that.
[7] Explanatory Memorandum p.23.

This is not an acceptable aim in relation to refugees. Refugees fleeing persecution and in fear for their lives or subject to torture, both in international law and in ordinary decency, should be able to enter the nearest country which has signed the Refugee Convention and where they will be safe, by whatever means they can. To argue that a person thus in desperation should seek a visa before travelling—even supposing that they could do so without exposing themselves and their relatives to mortal danger, or even at all, and to pretend that they are seeking to avoid Australia's orderly immigration processes—is to foster a prejudice. Policy and law should not be based on such. This bill should not be defended in this fashion.

There are, it is true, a minority of the regional processing Cohort who are found not to be refugees. Current law, which permits visas to be denied if they are sought on false pretences, is quite sufficient to deny them visas; and should they seek to enter Australia in the future, they can be denied visas on character grounds. If these are the principal intended target, people who are found to be refugees should be excluded from the provisions of the Bill.
There should come a time, however, when the past sins of those who seek to circumvent the migration law can be forgotten, given exemplary lives in the meantime. A permanent ban, perhaps lasting decades, is neither charitable nor reasonable.

But are there not other ways of interfering with the people smugglers' business plan? Could Australia not do more to assist the United Nations Commission for Refugees in processing asylum seekers in Indonesia? Could we not assist Indonesia in providing access to employment and education[8] for asylum seekers who wait to be processed, and for those found to be refugees? (In fact, though, the Australian government last year *reduced* its assistance to new refugees, or those who failed to register with the United Nations' International Organization for Migration last year, forcing about 5,000 refugees to live in dire poverty on the streets of Indonesia.[9])

Only 1% of the 14,000 refugees and asylum seekers in Indonesia are resettled in a third country each year.[10] But 14,000 is not such a huge number. Could we not create a genuine queue in Indonesia, so that refugees would know when their turn was likely to come up? Could we not provide transport, by sea or air, enabling people safely to reach our shores safely? If these things are possible, we should do them; if they are not, we should give up the cant about the integrity of the immigration program.

iii. In any case, the Bill is not necessary to discourage those few people who are not refugees, but who seek to enter Australia on false pretences. There are already many grounds on which a visa can be refused: if a person cannot meet character requirements or there is some sham or

[8] Refugees in Indonesia have no right to either.
[9] Australian Broadcasting Corporation, AM July 10 and August 2, 2019.
[10] Ibid.

illegitimate reason for applying for a visa. There is no reason to believe that the current law is inadequate for this purpose.

It is hard to avoid the conclusion that this Bill is punitive for the sake of being punitive.

B. Retrospective application.

The Bill is contrary to the rule of law. In applying a new penalty to all persons who arrived by boat without visas after July 19, 2013, it penalises actions that were not subject to penalty when they were performed. That is, it is retrospective.

In a response to this objection, The Department offered a justification that on July 19, 2013 the then Prime Minister, Kevin Rudd, declared that no persons who arrived by boat unauthorised would ever be settled in Australia.[11] That is supposed to have given appropriate warning to potential unauthorised maritime arrivals that the law would be changed, to prevent them ever settling in Australia.

However, a distinction is commonly made with respect to retrospective legislation between criminal matters and financial matters. Changes in financial law commonly apply from the date they are announced, to avoid a rush of people and institutions taking unfair advantage of the change in the law.

On the other hand, would plainly be unjust to criminalise actions that were legal when performed, subjecting people to fines or imprisonment in consequence. Retrospective legislation that does this is unacceptable, and a breach of the rule of law, which requires that the law be knowable.

The proposed law is in all essentials the same as the criminalisation case. Refugees who set out for Australia by boat (as they were entitled to under international law and should be permitted to in common decency) are now to be subjected to a significant penalty for the rest of their lives.

The justification therefore, as proposed by the Department, does not apply. The Bill should be rejected on the grounds of its retrospectivity alone.

C. Harmful consequences and the option of waiving the ban.

[11] Legal and Constitutional Affairs Legislation Committee: Report on the inquiry into the Migration Legislation Amendment (Regional Processing Cohort) Bill 2016 [Provisions], 2.26-2.30 (the 2016 inquiry).

i. The Bill targets the most vulnerable of people, who have fled persecution in their own countries, who in some cases have had relatives and friends killed, who have taken risks seeking safety, and who have been mistreated by Australia. Our treatment of them has led to numerous cases of serious mental illness. This Bill punishes these people for life, for doing something which is not only legal, but a human right—claiming asylum. Its provisions are disproportionately harsh and excessive.

Various submissions to the 2016 inquiry noted the consequences of banning members of the Cohort from ever entering Australia. Banned people will be separated from their families, and never be able to reunite with them in Australia 'The greatest impact of this Bill will be on those people on Nauru and Manus Island who have been separated from family in Australia, including: people who arrived many years ago, who already have citizenship, a permanent protection visa or another permanent humanitarian or migration visa.'[12] 'The ban imposed by the Bill, if enacted, does not apply to children, but would cast out their parents. If enacted, the Bill would have the effect of ensuring that families are broken up and also may prevent families from travelling to Australia together in the future. That is, where refugees already have close family members in Australia, by introducing a permanent ban on other family members from coming to live with them, Australian law would ensure that parents are separated from their children.'[13] This arrangement constitutes a breach of international law. That the Minister *may* lift the ban if he thinks it is in the public interest is no defence.[14]

Cohort members will not even be able to return for funerals, or other family occasions.

The disruption to families, robbing children of their parents and parents of their children, will exacerbate their health problems.

These consequences are cruel—and are penalties, just as much as imprisonment would be.

In addition to the disruptive effects on families, the Bill will also prevent others from coming here, that we should welcome. An example, quoted by the Refugee Council of Australia in its submission to the 2016 inquiry,[15] is that of Associate Professor Munjed Al Muderis MB ChB FRACS FAOrthA, who came to Australia by boat, seeking asylum. After being granted protection, he later applied to re-enter Australia as a skilled migrant, and is now a leading surgeon. If this Bill had been passed when he applied, he could not have been allowed into Australia, depriving us of his skills. He could not even have come to Australia to attend a professional conference.

[12] Law Council of Australia, Submission 8, to the 2016 inquiry.
[13] Members of the Victorian Bar Human Rights Committee, Submission 64 to the 2016 inquiry.
[14] See below, in subsection ii.
[15] Submission 26, p. 2 to the 2016 inquiry.

The Bill does provide that the Minister has discretion to accept a visa application that would be otherwise prohibited, if she/he considers it in the public interest.

But as was noted in 2016, politicians undertaking a political exchange, elite athletes hoping to compete in Australian sports events, business owners or employees visiting Australia to discuss the expansion of companies and businesses into the Australian market would have to apply to the Minister to have their bans lifted. Not only will that be embarrassing for them, and for their sponsors, a very busy minister will not always be able to attend to urgent applicants in the timeframe required by the applicant.

As was also noted, the existence of such problems may adversely impact future Olympic bids, or bids to stage other international events such as football world cups.

ii. There are problems of a different kind with the proposed remedy. The Minister is able to lift a ban if it is in 'the public interest'. The term 'public interest' is undefined in the Bill. How is a person to demonstrate that their entry into Australia is in the public interest? Moreover, how does this relate to Australia's commitments made in its signing up to the Convention relating to the Status of Refugees (the Refugees Convention), the Convention on the Rights of the Child (CRC) and other treaties—commitments that should always be given consideration when the Minister is making decisions that affect a person's wellbeing and livelihood? Is the term 'public interest' meant to include these?[16]

And how do the interests of affected children in being part of a complete family unit relate to the public interest?

iii. Proposed subsections 46A(2AA) and 46B(2AA) prevent persons from the Cohort from making a valid application for a visa at all. This will have the effect of excluding a review by the Administrative Appeals Tribunal, and possibly by the Federal Courts. They are contrary to the Rule of Law, and to the principle of the supremacy of Parliament.

The Minister's discretion is non-compellable. There is, explicitly, no obligation upon her/him even to consider whether to waive a ban.[17] It is obviously expected that the Minister will simply ignore some, or many, requests for a waiver. It will be arbitrary whether a given case is even brought to his/her attention. This is a formula for unpredictability and inconsistency and, ultimately, accusations of partiality.

[16] Paragraph 36 of the Explanatory Memorandum asserts 'the Minster may, for example, wish to consider whether to lift the bar…to ensure that Australia's international obligations are met.' It is unclear that this is even permitted by the Bill.

[17] Proposed amendments to subsections 46A(7) and 46B(7) and proposed new subsection 46A(8).

The rule of law requires both citizens and governments to be subject to known and accessible laws. It presupposes that no one who rules can make their own laws, but must govern according to established laws. But here, the Minister's arbitrary decisions, including decisions not to make decisions, are to be dictats.

D. Infringements of international law.

The Bill violates a number of human rights obligations under the Refugees Convention, the Convention on the Rights of the Child (CRC), the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR).

i. Article 31(1) of the Refugees Convention states:

> The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees 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.

The article recognises that people fleeing persecution are often not in a position to seek appropriate travel documents from the government that is trying to harm them and that there will be times when refugees have to bypass immigration controls in order to reach safety. This is of fundamental importance to the Refugee Convention.

But the bans proposed by the Bill are to be imposed because of illegal entry. That is, they are flagrantly in in breach of article 31(1).[18]

ii. The impact of the Bill on families would put Australia in breach of several other provisions of treaties we are committed to—the CRC, the ICESCR and the ICCPR.

a) Article 3(1) of the CRC:

> In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.[19]

[18] For an elaboration of this basic point, see the submission by members of the Victorian Bar Human Rights Committee to the 2016 inquiry—submission 64.
Extraordinarily in a Bill dealing mainly with refugees, and in spite of the matters raised in by the Joint Standing Committee on Human rights and in various submissions in 2016, the Statement of Compatibility with Human Rights still does not so much as mention the Refugee Convention.

b) Article 10(1) of the CRC:

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

c) Article 10(1) of ICESCR:

> The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children.[20]

d) Article 17(1) of the ICCPR:

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

e) Article 23(1) of the ICCPR:

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

f) Article 24(1) of the ICCPR:

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

These provisions require governments to allow close family members to live together.

iii. The various international instruments permit their provisions to be overridden by laws if the laws are necessary, justified and proportionate to achieving a legitimate purpose. The statement of compatibility with human rights that is an appendix to the Explanatory Memorandum asserts

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[20] The Government and the Department both claim to take the interests of children "extremely seriously". It is apparent that that concern does not extend to protection and assistance of their families.

> The Government is of the view that this continued differential treatment is for a legitimate purpose and based on relevant objective criteria and that is reasonable and proportionate in the circumstances. This measure 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 as a UMA from applying for a visa to enter Australia.

As we have argued in section A, the purposes of this Bill are not legitimate, and the assertion about people having sought to circumvent Australia's migration program does not apply to refugees, and as such, is an expression of prejudice. The Bill is unnecessary for dealing with non-refugees. It is not proportionate, for it causes harms without preventing any. Its flagrant breaches of provisions of the Convention on Refugees, the CRC, the IESCR and the ICCPR are not justified. It should be rejected.

E. Equality before the law.

The Bill applies only to refugees who arrived by boat, and was taken to a regional processing country. There is no reason why these refugees are treated differently from those arriving by other means, any more than the colour of their skin would be.

As the Report of the Parliamentary Joint Committee on Human Rights on the 2016 Bill says, 'The statement of compatibility does not state that banning this cohort of people from making a valid visa application to enter Australia is based on any reason why these particular people should not be allowed to visit Australia in the future. There is no suggestion that they present any danger to Australia, or that a future visit would have any adverse effect on Australia. There appears no evidence for such a suggestion, and, in any event, there are other powers under the Migration Act that would allow visa applications to be declined if the circumstances justified it in a particular case.'[21]

In other words, the disqualification of the Cohort is pure discrimination.

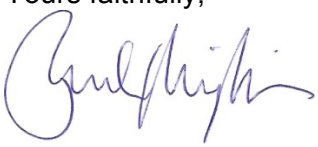
Withdrawal of the ability to ever obtain an Australian visa would therefore become a form of discriminatory administrative punishment of those who are subject to the Bill, without due process.

Recommendation: The Bill should be rejected.

[21] Report 9 of 2016, 1.69

We thank you for the opportunity to make this submission.

Yours faithfully,



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