NSW Council for Civil Liberties Inc.

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7 December 2012

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

Dear Sir/Madam,

Submission in relation to the Inquiry into the Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012

The New South Wales Council for Civil Liberties (NSWCCL) is one of Australia's leading human rights and civil liberties organisations. Founded in 1963, NSWCCL is a non-political, non-religious and non-sectarianorganisation that champions the rights of all to express their views and beliefs without suppression. To this end, the NSWCCL attempts to influence public debate and government policy on a range of human rights issues by preparing submissions to parliament and other relevant bodies.

NSWCCL thanks the Committee for the opportunity to make this submission.

Summary

The object of the Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill is to implement the Expert Panel on Asylum Seekers recommendation 14 that persons seeking asylum who unlawfully arrive in Australia, whether on the mainland or within an excised offshore zone, be subject to the same regional processing arrangements.[1] The Bill also expands the term 'transitory person' to include individuals assessed to be refugees under Article 1A of the Convention Relating to the Status of Refugees 1951.

In effect, the Bill facilitates what has been termed the excision of Australia from its own migration zone through implementation of the 'no advantage' principle, also termed 'one rule for all boat arrivals'.[2]

NSWCCL opposes this Bill on the following grounds:

a) its operation will undermine the very notion of a 'no advantage' principle;
b) it will be ineffective in achieving its purpose to significantly reduce attempts, both complete and incomplete, to bypass excised zones in pursuit of superior legal status currently conferred upon mainland arrivals;

[1] Report of the Expert Panel on Asylum Seekers, August 2012.
[2] Minister for Immigration and Citizenship Chris Bowen MP, 'Government acts to remove incentive for longer boat journeys', (31 October 2012) <http://www.minister.immi.gov.au/media/cb/2012/cb191155.htm>

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c) it offends, and is in direct contravention of, Australia's international obligations under various human rights treaties, namely;
   i) the International Covenant on Civil and Political Rights 1966
   ii) the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1987
   iii) the International Covenant on Economic, Social and Cultural Rights 1976
   iv) the Convention on the Rights of the Child 1991
   v) the Convention Relating to the Status of Refugees 1951;
d) its operation will undoubtedly affect mental health and subsequent deaths which occur whilst individuals seeking asylum are in detention and, similarly, whilst individuals are released into the community on bridging visas; and
e) its implementation will require an excessive and unnecessary cost to the taxpayer.

Submission

It has been acknowledged that the Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012 is, to all intents and purposes, a replication of the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006.

The 2006 Bill proposed a scheme to effect the excision of the Australian mainland from its migration zone, with processing of 'designated unauthorised arrivals' to occur offshore. The 2012 Bill replicates this purpose, with a further object of implementing the Government's 'no advantage' principle.

The Australian Labor Party fervently opposed the Bill on the basis of its unmitigated dismissal of human rights obligations. It was suggested that the prospect of non-compliance was plainly evident upon consideration of the removal of access to review mechanisms undoubtedly necessary to ensure compliance with non-refoulement commitments, alongside insertion of discretionary provisions with respect to substantive protection of individuals assessed as refugees under Article 1A of the Convention on the Status of Refugees 1951 (the Refugee Convention).

Concerns regarding the removal of individuals seeking asylum from the protection of Australian law and, consequently international law obligations, were voiced. Criticisms relating to the discriminatory foundation of the legislation were also raised, in that the legislation specifically excluded individuals seeking asylum in Australia by means of air travel.

A collectively sounded objection raised by Members of Parliament was the insult that such legislation would cause to fundamental Australian values and to the nation's international standing in its entirety. Anthony Albanese MP suggested that implementation of such legislation would 'excise the values of our country. It excises our law. It excises our upholding of human rights. It excises our dignity'.[3]

Whilst it is accepted that some six years have passed since the 2006 Bill was proposed, Australia's obligations under international law have not diminished.

[3] NSW, Parliamentary Debates, House of Representatives, 10 August 2006, 33 (Anthony Albanese MP).

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Chris Bowen, Minister for Immigration and Citizenship, has defended the discriminatory nature of the 2012 Bill on the basis that the content is a direct implementation of the Expert Panel on Asylum Seeker's Report.[4] As the Report's findings focused solely on asylum seekers arriving by maritime means, it is proposed that the amendment of the *Migration Act* 1958 (Cth) should so follow. Yet, in 2006, Chris Bowen opposed the illogical outcome that asylum seekers be 'treated the same regardless of where they land', stating that those seeking asylum 'should be dealt with fairly, swiftly and on Australian shores'.[5] The assertion that the Bill is justified in its discriminatory nature due to being a direct implementation of Expert Panel recommendations is a deficient attempt to argue in favour of a piece of legislation which is unreservedly offensive to human rights.

Chris Bowen expressed the view that individuals reaching the mainland and accepted as having refugee status being denied a visa in Australia was 'a national disgrace'.[6] Under proposed new laws, individuals deemed to be refugees will be denied the right to apply for a visa for a pre-determined exclusionary period. Such a refusal to observe obligations under the Refugee Convention is dismally reflective of the Bill's central purpose, namely attempting to provide a disincentive for individuals to seek asylum in Australia.

DISCRIMINATION ON THE BASIS OF MEANS OF ARRIVAL EFFECTIVELY UNDERMINES 'NO ADVANTAGE' PRINCIPLE

The Bill presents with an undertone of discrimination on the basis of manner of arrival. The notion that persons seeking asylum by air are to be afforded a superior legal status to those arriving by sea is discriminatory in, and of, itself. The Bill directly excludes persons who have entered the migration zone by air, in that it specifically targets those who arrive by maritime vessel. This seems to undermine the notion of a 'no advantage' principle through the operation of differing schemes solely determined by method of arrival.

It is widely accepted that while a number individuals who arrive by 'non-irregular maritime' means are deemed to fall under the assessment of a refugee under Article 1A of the Refugee Convention, a higher percentage of individuals who arrive by 'irregular maritime' means qualify for refugee status. Article 31 of the Refugee Convention places a prohibition on signatories to impose penalties on refugees able to show just cause for presence who enter the signatory country unlawfully. The imposition of punitive measures upon individuals arriving by irregular maritime means is inhumane. The introduction of punitive measures to be forced upon a class of persons seeking asylum by means of arrival by sea is discriminatory, and places prohibitions upon such individuals which affront the Refugee Convention's object and purpose.

As an aside, such legislative discrimination on the basis of method of arrival is likely to compound by the use of the phrase 'illegal boat arrivals' by some politicians and the sections media.

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[4] NSW, Parliamentary Debates, House of Representatives, 27 November 2012, 83 (Chris Bowen MP).
[5] NSW, Parliamentary Debates, House of Representatives, 10 August 2006, 16 (Chris Bowen MP).
[6] NSW, Parliamentary Debates, House of Representatives, 10 August 2006, 15 (Chris Bowen MP).

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INEFFECTIVE IN ACHIEVING PURPOSE

Judi Moylan articulated that in the period since 2001 only five boats, carrying only 86 people, have reached the Australian mainland.[7] The implementation of an excision of the mainland arguably acts as a mechanism of deterrence. Based on such statistics, the suggestion that excision of the Australian mainland would more appositely deter the arrival of 'unauthorised maritime arrivals' than the legislation currently in place is tenuous.

In 2011, the UNCHR reported that 'Pragmatically no evidence is available to give credence to the assumption that the threat of being detained deters irregular migration'.[8] The suggestion that such individuals, fleeing their home country driven fear of persecution, will be deterred by the prospect of detention or refusal of a visa application until a period of exclusion lapses under the 'no advantage' principle is somewhat naïve in its foundations. The Bill will be ineffective in achieving its purpose of deterrence, and will simultaneously violate obligations under international law.

CONTRAVENTION OF OBLIGATIONS UNDER INTERNATIONAL LAW

The Migration Act (Unauthorised Maritime Arrivals and Other Measures) Bill 2012 is subject to seven human rights instruments outlined in section 3 of the *Human Rights (Parliamentary Scrutiny) Act* 2011 (Cth). Whilst the Convention Relating to the Status of Refugees (the Refugee Convention) is not among the instruments prescribed, the principle of 'pacta sunt servanda' applies. Consequently, discussion of obligations under the Refugee Convention will be included in the submission.

As a means of reference, the seven human rights instruments to be considered are as follows:

i) the International Convention on the Elimination of all Forms of Racial Discrimination 1975;
ii) the International Covenant on Economic, Social and Cultural Rights 1976;
iii) the International Covenant on Civil and Political Rights 1980;
iv) the Convention on the Elimination of All Forms of Discrimination Against Women 1983;
v) the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1989;
vi) the Convention on the Rights of the Child 1991;
vii) the Convention on the Rights of Persons with Disabilities 2008.

RIGHT TO LIBERTY AND SECURITY OF PERSON

Section 189(2) is amended to provide for discretionary detention for certain individuals seeking to enter the migration zone. However, it is to be argued that the substitution of 'may detain' for 'must detain' is an amendment aimed at discretion being afforded only to persons

[7] NSW, Parliamentary Debates, House of Representatives, 27 November 2012, 78 (Judi Moylan MP).
[8] UNHCR, 'Back to Basics: The Right to Liberty and Security of Person and "Alternatives to Detention" of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants, April 2011.

of a certain class as opposed to individuals seeking asylum. Although a discretionary provision termed a 'safety valve'[9] is proposed to operate, there is a presumption in favour of detention unless the Minister is satisfied that extenuating circumstances in the public interest are present.

Superficially, the proposed amendment does not appear to engage obligations under Article 9(1) of the International Covenant on Civil and Political Rights 1980 by way of introduction of discretionary mechanisms. However, it is contended that such an amendment, proposed under the guise of complying with a right not to be arbitrarily detained, in fact operates to mandatorily detain persons of a particular class and applies discretion to a limited few. The composition of the amendment is deceptively arbitrary in the detainment of individuals seeking asylum and offends Article 9(1).

RIGHT TO ENGAGE IN WAGE-EARNING EMPLOYMENT

Under the proposed laws, the definition of 'transitory person' will be extended to include individuals deemed to be refugees under Article 1A of the Refugee Convention. Whilst a 'transitory' individual is able to be transferred to Australia from a regional processing country, statutory bars will be placed on the application for protection visas by virtue of the 'transitory person' being classified as an 'unlawful non-citizen'.

Although it is conceded that protection visas are undoubtedly flawed, the provision of allowances to work and to gain access to health services and government benefits are in line with the fostering outlook required of signatories who are seeking to meet their obligations under the Refugee Convention. In a similar vein is allowance for family reunion under the operation of protection visas.

The operation of section 46A prevents 'unauthorised maritime arrivals' from making a valid visa application if in Australia and an 'unlawful non-citizen'.

Abandonment of basic human rights is overwhelmingly apparent upon consideration of the conditions imposed under Bridging Visa E subclass 050 (BVE). It is proposed that individuals granted a BVE will not be afforded the right to work, receive basic accommodation assistance and limited financial support.[10]The proposition that individuals seeking asylum and those found to be refugees following their arrival by irregular maritime means should be denied fundamental human rights is preposterous.

Article 17 of the Refugee Convention relates to the 'favourable treatment of refugees' staying 'lawfully' within a signatory country, and includes explicit reference the right to engage in wage-earning employment. The manipulation of definition of 'transitory person' to include persons deemed refugees attempts to circumvent international obligations relating to the right of refugees to engage in wage-earning employment. This occurs as a consequence of the individual being declared an 'unlawful non-citizen', through the operation of s

[9] NSW, Parliamentary Debates, House of Representatives, 31 October 2012, 12738 (Chris Bowen MP).
[10] Minister for Immigration Chris Bowen MP, 'No advantage onshore for boat arrivals', (21 November 2012) <http://www.minister.immi.gov.au/media/cb/2012/cb191883.htm>

198AH(2).Through denial of such a right, Article 6 of the International Covenant on Economic, Social and Cultural Rights is similarly disregarded.

Further, restrictions upon gaining employment effectively foster the attainment of illegal work in order to attempt to achieve acceptable living standards. Such living standards would be simply unattainable under limitations imposed under BVE's.

It is equally unacceptable that a statutory bar be placed upon the application for a permanent protection visa until a pre-determined period of time lapses, with such a period representative of the time that would have been spent in regional processing. It is proposed that such a period would be within the span of five to seven years. It is questionable as to where such a figure has been obtained, as asylum seeker and refugee matters are dealt with on a case-by-case basis and a mandatory exclusion period in excess of what is considered reasonable could be viewed as punitive in nature.

PROCEDURAL FAIRNESS AND THE REVIEW SYSTEM

The repeal of sections 198C and 198D effectively strips the rights of 'transitory persons' brought to Australia under section 198B to seek appeal from the Refugee Review Tribunal upon remaining in Australia for a continuous period of 6 months. The Government maintains that repealing the sections is will discourage attempts by those seeking asylum to extend their stay in the country through protracted attempts to access the courts and merits review.

Such a denial of procedural fairness is vehemently opposed to Article 16 of the Refugee Convention. Furthermore, the right to bring a matter before a court is contained within Article 9(4) of the International Covenant on Civil and Political Rights. The provision relates to legal entitlement afforded to individuals deprived of their liberty through detention, stating that such an individual 'shall be entitled to take proceedings before a court, in order that the court may delay on the lawfulness of his detention and order his release if the detention is not lawful'. The operation of sections 494AA and 494AB relate to' unauthorised maritime arrivals' and 'transitory persons' respectively. It is arguable that the statutory denial of proceedings relating to the lawfulness of detention is an immediate contravention of international law.

It is to be noted that the matter of *Plaintiff M61/*2010E *v Commonwealth of Australia* [2010] HCA 41[11] held that mechanisms for review are required, and those in positions of review are to afford procedural fairness to the person whose rights and interests to freedom from detention are directly affected. A denial of access to merits review by individuals subject to detention is unlawful and depraved at best.

Furthermore, the placement of statutory bars upon the commencement of legal proceedings is an unmitigated denial of procedural fairness. The limitation placed upon the initiation of legal proceedings is abhorrent, as the nature of matters likely to be heard in such proceedings are likely to be fundamental in the protection of human life.

[11] *Plaintiff M61/2010E v Commonwealth of Australia* [2010] HCA 41.

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In the Immigration Department's Annual Report 2009-10, 572 requests for independent merits review were received, with 184 completed. 81 individuals were found to be refugees, and 103 were found not to be refugees.[12] Without such mechanisms in place to allow for commencement of legal proceedings, particularly in relation to the review of refugee status, powerless individuals in dire need of humanitarian assistance will effectively slip through the cracks of bureaucracy.

RISK OF CONTRAVENTION OF NON-REFOULEMENT OBLIGATIONS

The denial of procedural fairness to individuals seeking merits review of an administrative decision, or simply the right to a fair trial, may in turn lead to breach of both Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and Article 33 of the Refugee Convention.

RIGHTS OF THE CHILD

Whilst there is mention of 'vulnerable' individuals, no explicit mention of children is made. Article 22 of the Convention on the Rights of the Child 1991 relates to children seeking refugee status or children considered a refugee under Article 1A of the Refugee Convention, with appropriate protection and humanitarian assistance deemed necessary. Article 3 states that the rights of the child must be a primary consideration in all actions concerning children.

Placing children in offshore detention for an indefinite period of time, with little prospect of gaining review of status is arguably in utmost disconnect with the best interests of the child. A lack of provision of paediatric medical and mental health services, paired with a significantly increased risk of contraction of parasitic diseases such as malaria, presents a dire outlook for children placed on Nauru and Manus Island.

Deficiency in the provision of mechanisms to ensure the protection of one of the most vulnerable subgroups of asylum seekers is an unmitigated failure in upholding the rights of the child.

IMPACTS UPON MENTAL HEALTH

The devastating impacts upon mental health are apparent upon consideration of the desperate lengths detainees reach, including suicide attempts, hunger strikes and self-harm. The imposition of mandatory detention, albeit to the exclusion of cases in which detention would be against the public interest, upon individuals arriving by unauthorised maritime means, promotes further incidences of detainees attempting suicide or self-harming. The principle of 'no advantage' fails to consider the impact on the mental health of asylum seekers implicated under such a standard.

Such effects are not simply limited to those within detention, with bars placed upon applications for protection visas hindering access to employment and family reunion placing

[12] Department of Immigration and Citizenship Annual Report 2009-10 < http://www.immi.gov.au/about/reports/annual/2009-10/html/outcome-2/departmental2-1-2.htm>

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incomprehensible suffering upon people who are already afflicted with a vulnerable state of mind. The mental health consequences of the Bill are far reaching and merciless upon contemplation of the nature of enduring mental health issues the overwhelming majority of persons seeking asylum are afflicted with.

COST OF THE IMPLEMENTATION OF THE RECOMMENDATION

The Appropriation (Implementation of the Report of the Expert Panel on Asylum Seekers) Bill (No. 1) 2012-2013 and the Appropriation (Implementation of the Report of the Expert Panel on Asylum Seekers) Bill (No. 2) 2012-2012 indicate that the cost of implementing recommendations put forward by the Expert Panel on Asylum Seekers Report are in the order of $1.4 billion and $267, 980, 000, respectively.

The implementation of recommendation 14 of the Expert Panel on Asylum Seekers Report, which is bound to fail in its purpose with its operation as contrary to international law obligations, comes at an exorbitantly high monetary cost of $1.67 billion to Australian tax payers. Such a monetary cost pales when balanced against the personal cost suffered by individuals whom Australia, as a signatory to international treaties, is legally and morally obligated to assist.

Conclusion
The NSWCCL vehemently opposes the Bill for the reasons outlined above.

Yours faithfully,

Stephen Blanks
Secretary
New South Wales Council for Civil Liberties

Josephine Murphy
Co-Convenor of the Asylum Seeker Subcommittee
New South Wales Council for Civil Liberties