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Submission to the Senate Legal and Constitutional Affairs Committee

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

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The Castan Centre for Human Rights Law welcomes the opportunity to make a submission in relation to the *Migration Legislation Amendment (Regional Processing Cohort) Bill 2016.* The Castan Centre's mission includes the promotion and protection of human rights. It is from this perspective that we make this submission.

SUMMARY OF SUBMISSION

We believe that the Bill should not be passed. It lacks a sounds policy basis and is inconsistent with Australia's obligations under international law. We underline the following points:

1. We believe that the Bill presents significant limitations on key human rights standards which are unnecessary, unreasonable and disproportionate to its aims. It constitutes an extreme and unnecessary interference with fundamental rights and should not be passed.

2. Retrospective legislation brings uncertainty to the law and undermines the rule of law. This is exacerbated by the power placed in the hands of the Minister for Immigration to 'lift the bar'. We argue that Australia should not place compliance with international human rights obligations within the realm of personal executive discretion.

3. The recently-announced resettlement deal with the United States cannot be used to justify passing this bill which threatens the human rights of a vulnerable group. There is nothing legally tying any resettlement deal with this bill and there is thus nothing stopping the Australian government from resettling refugees in the United States should this bill fail. It should also be noted that a number of questions remain about the viability and feasibility of the resettlement arrangements. Passing this bill out of a benevolent desire to resettle this cohort in the United States is therefore highly misguided.

DETAILED COMMENTS

1. The Bill breaches rights to equality and non-discrimination

Article 26 of the *International Covenant on Civil and Political Rights* (ICCPR) provides as follows:

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any

> discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The Bill seeks to discriminate in the grant of visas between people who fall within the cohort (unauthorised maritime arrivals aged 18 years or over who were taken to a regional processing country after 19 July 2013) and people who do not. Article 26 prohibits discrimination on grounds including 'other status' which encompasses citizenship or nationality.[1] Restrictions based on national or ethnic origin are included within the ambit of racial discrimination in article 1(1) of the Convention on the Elimination of all Forms of Racial Discrimination and proscribed by article 2.

Differential treatment of people in similar circumstances will not constitute discrimination if it serves a legitimate aim, can be justified with reference to reasonable and objective criteria[2] and is proportionate to the aim pursued.[3] Restrictions on future entry do not serve the legitimate aim of maintaining Australia's lawful migration programs and discouraging hazardous boat journeys. It remains unclear how the imposition of a lifetime restriction on a cohort of people would achieve either purpose.

Furthermore, the restriction is wholly disproportionate and ill-adapted to the pursuit of such aims and cannot be justified with reference to reasonable and objective criteria. The Minister has not provided any such criteria. It would appear that the Bill has been rationalised by the untested assumption that the grant of a visa to any member of the cohort 'has the potential to provide a pathway to permanent residence' which may be tantamount to 'leav[ing] the door open for people smugglers to find a backdoor once again into our country.'[4] On the basis of the perceived danger that a presumably small number of people may come to Australia and achieve permanent residence, a lifetime ban is extended to all members of the cohort.

The lifetime visa ban is an extreme, discriminatory and punitive measure. It does not fall within the permissible limitations to the right to equality and non-discrimination.

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1 A. P. Johannes Vos v. The Netherlands, Communication No. 786/1997, U.N. Doc. CCPR/C/66/D/786/1997 (29 July 1999).

2 Committee on the Elimination of Racial Discrimination, General Recommendation No. 14: Definition of discrimination, 22/03/1993 [2]; Human Rights Committee, General Comment No. 18: Non-discrimination 11/10/1989 [13].

3 See generally G Goodwin-Gill, International Law and the Movement of Persons between States (Clarendon, Oxford, 1978) 78.

4 House of Representatives Proof Bills Migration Legislation Amendment (Regional Processing Cohort) Bill 2016 Second Reading Speech Tuesday, 8 November 2016 at 2.

2. The Bill represents an arbitrary interference with family

The ICCPR recognises the family as being entitled to protection by society and the State (article 23(1)). Article 17 of the ICCPR states that '(1) [n]o 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', and '(2) [e]veryone has the right to the protection of the law against such interference or attacks.'

The Bill would operate to bar cohort members from visiting any family members they may have in Australia. While people who were minors at the time of their arrival are excluded from the cohort, the Bill could have the effect of **separating children residing in Australia from their parents**. This is likely to result in breaches of article 10(1) of the Convention on the Rights of the Child, which provides that *applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner*. The Ministerial power to lift the bar in order to facilitate family reunification is not expeditious and lacks transparency and certainty.

We believe that the **barriers to family reunification** which would be created by the Bill are inconsistent with the best interests of the child principle which underpins the Convention on the Rights of the Child and cannot be justified by the objectives of the legislation. The interference with family is furthermore arbitrary and in breach of the ICCPR. The United Nations Human Rights Committee has observed that interference provided for under the law may be arbitrary if it does not accord with the provisions, aims and objectives of the ICCPR.[5]

3. The Bill represents a prohibited penalty

Australia is a party to the 1951 *Convention Relating to the Status of Refugees* (Refugee Convention). Article 31 of this treaty provides as follows:

> 1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence. 2. The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain

[5] Human Rights Committee, General Comment 16, (Twenty-third session, 1988), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 21 (1994) at [4].

> admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.

Banning refugees from coming to Australia would comprise an unlawful penalty which places Australia in breach of Article 31. It is widely accepted that the term 'penalty' does not need to be a criminal punishment.[6] Therefore administrative sanctions and a restriction on freedom of movement would constitute a penalty for the purpose of Article 31.

The requirements of Article 31 are met in the case of the cohort of refugees affected by this Bill. In particular, Article 31 applies even though the cohort may have transited through countries such as Malaysia or Indonesia. We note that neither of these countries are signatories to the Refugee Convention. It is accepted by leading international commentators on refugee law that it is not necessary that refugees have come directly from a country of persecution in order to claim the protection of Article 31. For instance, Professor Goodwin-Gill of the University of Oxford states that:

> Article 31 was intended to apply, and has been interpreted to apply, to persons who have briefly transited other countries, who are unable to find protection from persecution in the first country or countries to which they flee, or who have 'good cause' for not applying in such country or countries. The mere fact of UNHCR being operational in a certain country cannot be decisive as to the availability of effective protection in that country.[7]

4. Retrospectivity and the rule of law

The Bill seeks to operate prospectively and retrospectively, reaching back to all unauthorised maritime arrivals aged 18 years or over who were taken to a regional processing country *after 19 July 2013***.** Retrospective legislation brings uncertainty to the law and has been seen to undermine the rule of law.[8] This position is embodied in the common law, particularly with respect to criminal offences.[9] This position is also embodied in international human rights law - Article 15 of the ICCPR - which provides that

> No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or

[6] See discussion in G Thom, 'Australia's Obligations Under Articles 31(1) of The Refugees Convention' (2006) 31(3) *Alternative Law Journal* 142, http://www.austlii.edu.au/au/journals/AltLawJl/2006/35.html.
[7] Guy Goodwin-Gill, 'Article 31: Non-Penalization, Detention, and Protection', in E Feller, V Turk, and F Nicholson, (eds), *Refugee Protection in International Law* (2003) at 218 http://www.refworld.org/docid/470a33b10.html.
[8] See for example Tom Bingham, The Rule of Law (Penguin UK, 2011).
[9] *Director of Public Prosecutions (Cth) v Keating* (2013) 248 CLR 459.

> international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed.

While the Bill does not create retrospective criminal offences, it is harsh and punitive in effect. We accept that Article 15 of the ICCPR does not apply to legislation which does not create criminal offences. Nevertheless, we believe that retrospective legislation should be reserved for exceptional circumstances and avoided in legislation that limits human rights. Indeed, Dixon CJ observed in *Maxwell v Murphy*[10] that 'the general rule of the common law is that a statute changing the law ought not, unless the intention appears with reasonable certainty, to be understood as applying to facts or events that have already occurred in such a way as to confer or impose or otherwise affect rights or liabilities which the law had defined by reference to past events.'

The Bill introduces severe restrictions on the rights of cohort members, including those who arrived after 19 July 2013 but before the commencement of the Bill. While there is no Constitutional impediment to such legislation, it is inconsistent with well-established common law principles and undermines the rule of law.

5. Parliament should not trade away the rights of individuals and resettlement of refugees in the United States is uncertain

The recently announced resettlement deal between Australia and the United States cannot justify the passing of this bill. Resettlement deals cannot and should not be conditional on retrospective limitations on fundamental human rights.

Furthermore, a number of questions remain regarding the viability and feasibility of the resettlement arrangements. First, it is uncertain whether the deal can in fact take place given that the Republican administration, under President-elect Donald Trump, has indicated it is averse to Muslim migration to the United States. In the alternative, it is uncertain whether it is feasible to resettle refugees in the United States prior to the inauguration of Donald Trump, given the many administrative hurdles inherent in the resettlement of a large cohort.

Even if the deal is successful, there is also a great deal of uncertainty regarding how many refugees and who the United States will in fact accept for resettlement. Therefore it is

[10] (1957) 96 CLR 261 at 267.

possible, indeed likely, that the resettlement deal will not include everyone in the cohort captured by this current bill. Thus if the current bill is passed, there may well be some refugees who must languish indefinitely in Nauru or Manus, since they cannot be resettled in the United States or any other viable resettlement country, and can never be permitted into Australia.

Conversely, passing this bill does not improve the likelihood of successfully resettling refugees in the United States, since there is no impediment on the executive resettling refugees in the United States even if this bill is unsuccessful. As such, there is nothing to be gained by passing this bill in the hope of ensuring a better future for refugees in the processing facilities of Nauru and Manus Island. Any alleged obstacle to the resettlement of refugees in the United States from Nauru and Manus Island should this bill be unsuccessful, has no legal basis and is purely political in nature.