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NSWCCL SUBMISSION

SENATE LEGAL AND CONSTITUTIONAL AFFAIRS COMMITTEE

MIGRATION AMENDMENT (EVACUATION TO SAFETY) BILL 2023

24 February 2023

Acknowledgement of Country

In the spirit of reconciliation, the NSW Council for Civil Liberties acknowledges the Traditional Custodians of Country throughout Australia and their connections to land, sea and community. We pay our respect to their Elders past and present and extend that respect to all First Nations peoples across Australia. We recognise that sovereignty was never ceded.

About NSW Council for Civil Liberties

NSWCCL is one of Australia's leading human rights and civil liberties organisations, founded in 1963. We are a non-political, non-religious and non-sectarian organisation that champions the rights of all to express their views and beliefs without suppression. We also listen to individual complaints and, through volunteer efforts, attempt to help members of the public with civil liberties problems. We prepare submissions to government, conduct court cases defending infringements of civil liberties, engage regularly in public debates, produce publications, and conduct many other activities.

CCL is a Non-Government Organisation in Special Consultative Status with the Economic and Social Council of the United Nations, by resolution 2006/221 (21 July 2006).

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The NSW Council for Civil Liberties (NSWCCL) welcomes the opportunity to make a submission to the Senate Legal and Constitutional Affairs Committee in regard to the Migration Amendment (Evacuation to Safety) Bill 2023.

THE BILL

The Migration Amendment (Evacuation to Safety) Bill 2023 ('The Bill') compels the Australian Government to offer people caught up in offshore processing the opportunity to transfer to Australia, provided they are not subject to an adverse security assessment by the Australian Security Intelligence Organisation (ASIO) under the *Australian Security Intelligence Organisation Act 1979*.

Persons who accept the Government's offer to be transferred to Australia will be placed into community detention until they are provided with a durable third-country solution with a state party to the United Nations' 1951 Convention Relating to the Status of Refugees ('the Refugee Convention') or the 1967 Protocol relating to the Status of Refugees.[1] Those who are evacuated will also be provided with medical assessments and treatment as required.

It is necessary to pass the Bill in order to correct the deviation from human rights and international norms in the course the government has taken in its treatment of refugees under the domestic legislative framework.[2] The provisions within the Bill will only apply to persons who are in an offshore processing country at the time that the Bill commences, and will not cover persons who arrive after the Bill commences. Additionally, the Bill will not change any existing requirements for new arrivals to be taken to regional processing countries for new arrivals to be taken to regional processing countries for offshore processing.

NSW COUNCIL FOR CIVIL LIBERTIES VIEW

Australian asylum seeker policy is a gross breach of human rights and decency and is inconsistent with its obligations under international law. It is our view that this Bill is required to urgently resolve the situation of those refugees and asylum seekers still living in Papua New Guinea and Nauru.

The Bill offers the chance to reform the law to bring Australia's immigration policies in line with our international obligations under the Refugee Convention, by bringing all refugees and people seeking asylum to Australia while determinations are made about durable solutions.

This submission will focus on the following five compelling reasons to pass the Bill into law:

1. The Bill better accords with international law than the current legislation and will repair Australia's standing amongst the community of nations.

[1] Explanatory Memorandum, Migration Amendment (Evacuation to Safety) Bill 2023, 2.

[2] *Migration Act 1958* (Cth) ('*Migration Act*').

2. The Bill reduces the risk of unnecessary harm to refugees and asylum seekers.

3. The Bill will reduce the exorbitant costs of the current offshore processing program.

4. The Bill restores the integrity of the rule of law and the procedural fairness rule, which are the bedrock of the common law.

5. The positive effects on the Bill will have on the Australian Community.

1. AUSTRALIA'S STANDING AMONGST THE COMMUNITY OF NATIONS

Australia's disregard for international law undermines Australia's diplomatic standing amongst the community of nations, especially considering Australia is failing to uphold laws it has formally agreed are worthy of upholding. While the High Court recognises that international conventions Australian has signed are not binding on domestic law unless the government passes a statute that explicitly enacts the convention into domestic law,[3] this does not excuse the Australian Government's failure to do so.

The failure to enact international convention Australia has signed into domestic law makes Australia's actions look both hollow and reprehensible from the perspective of the international community. Australia is a country that does not protect human rights. Australia is a country that does not keep its promises. Thus, Australia's ability to be respected and trusted diplomatically is damaged.

The Bill will repair Australia's international standing. Although the refugees and asylum seekers in Nauru and PNG are not in indefinite detention anymore, they experience a limbo which does not provide them with any certainty for their future. The UNHCR describes Australia's system of indefinite detention as punitive, despite the Australian Government's claims to the contrary.

2. THE EXTRAORDINARY HARM CAUSED BY OFFSHORE PROCESSING

"This soul-destroying prison is made with a mix of lime and dirt. Everywhere, fine white sand sticks to one's feet, particularly to the plastic flip-flops. From one of the camps to the other drainpipes protrude from the kitchen and bathrooms. They create a potion of rotten excrement … the stench of sludge, a multicoloured spread laid out for both microscopic and mammoth mosquitoes which linger regularly around the troposphere above the drains….The untreated sewage spilling out around the facility produces a 'smell … so vile that one feels ashamed to be part of the human species….From their perspective, we are nothing more than numbers. I will have to forget about my name."[4] Excerpt from

[3] *Minister of State for Immigration and Ethnic Affairs v* Teoh (1995) 183 CLR 273, 286-7 (Mason CJ, Deane J).

[4] Boochani, B. (2018). *No friend but the mountains: Writing from Manus prison*. Picador Australia.

Kurdish Journalist Behrouz Boochani's memoir *No friend but the mountains: Writing from Manus prison*.

Australia's multi-billion-dollar offshore processing system has demonstrably failed to stop boats, save lives or break the business model of people smugglers.[5] The Bill must be passed because it will help to mitigate the profoundly destructive harm offshore processing has caused asylum seekers and refugees. The mental health effects of detention and now the limited prospects offered by living in limbo are demonstrably acute. As a 2021 study found, adults in detention had prevalence rates of 68% for depression, 54% for anxiety, and 42% for PTSD.[6] As the report concludes, this 'suggests that immigration detention independently and adversely affects the mental health of refugees and migrants'.[7]

While higher rates of mental health are universal amongst all countries that detain unauthorised entrants,[8] this does not excuse Australia's practice of indefinite immigration detention. If anything, it impugns all governments for resorting to such a harmful method of controlling its borders.

In the case of Australia, there are also particularly severe mental health effects inherent to its system of indefinite offshore processing and the vulnerability of asylum seekers. The psychological effects of detention have been exacerbated as refugees and asylum seekers have been released from detention centres and joined the Nauru and Manus Island localities in indefinite community detention. The length of detention is frequently reported as a salient predictive factor in the mental wellbeing of detainees.[9]

By providing medical care which has often been denied while in detention and in the Nauru and Manus Island communities, the Government has the opportunity to rectify the harm caused to these people.[10]

- This bill is an urgent mechanism for providing safety for more than 150 people who have been stuck in the hell of indefinite offshore detention and offshore processing for the past decade.

- They have struggled to have access to necessities like food, medicine and clean water.

- When they are in the Australian community, this harm can be alleviated. Furthermore, they will have the opportunity to contribute to the community of Australia at a time where we are experiencing skills shortages.

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[5] Gleeson, M., & Yacoub, N. (2021). Cruel, costly and ineffective: The failure of offshore processing in Australia. *Policy Brief, Kaldor Centre for International Refugee Law*, 6-7.

[6] Irina Verhulsdonk, Mona Shahab and Marc Molendijk, 'Prevalence of Psychiatric Disorders among Refugees and Migrants in Immigration Detention: Systematic Review with Meta-Analysis' (2021) 7(6) *BJPsych Open* 1, 1.

[7] Ibid.

[8] M. von Werthern et al, 'The Impact of Immigration Detention on Mental Health: A Systematic Review' (2018) 18:382 *BMC Psychiatry* 1, 1.

[9] Mary Bosworth, 'The Impact of Immigration Detention on Mental Health: A Systematic Review' (2018) 18:382 *BMC Psychiatry* 1, 1.

[10] Asylum Seeker Resource Centre, *Evacuate PNG & Nauru* (Website) <https://action.asrc.org.au/evacuate-png-nauru>.

3. COST OF OFFSHORE PROCESSING

Whilst the Australian Government has only ever provided a high-level and incomplete indication of the actual costs, it is well documented that offshore processing is extraordinarily expensive, costing more than $1 billion per year,[11] and it is estimated that it has cost the Australian Government $9.65 billion since July 2013.[12] Contrastingly, it is far more cost effective to allow a refugee or asylum seeker to live in the Australian community.

If sensible economic management matters to the government, then it must allow for the transfer of refugees and asylum seekers to live in the Australian community while their long-term claims are being processed. Countries such as Switzerland and New Zealand demonstrate that releasing a larger number of asylum seekers into the community is feasible and does not significantly jeopardise the safety of the community.[13] In fact, allowing a larger number of refugees and asylum seekers into the Australian community will allow them to make valuable economic, scientific, academic and artistic contributions to Australia like so many other refugees that have come before them.[14]

The legal and administrative costs associated with visa fees also contribute to the economic costs of offshore processing. While reported costs have not been updated since the last refugees were released into community detention, it is estimated that the Australian government paid $87 million in visa fees to the Nauruan government from when the policy commenced in 2012 to 30 September 2018. Australia pays Nauru a visa fee of $2000 a month for each refugee, and $1000 a month for each person seeking asylum, as well as an additional $1050 annually for each service provider.[15] In addition to visa fees and administrative costs, Australia has also spent $38.5 million upgrading the Nauru hospital and $23.1 million building the Bomana immigration detention centre in PNG.

4. THE RULE OF LAW AND PROCEDURAL FAIRNESS

A *Rule of Law*

Passing the Bill into law heals the some of the injury current migration laws cause to the rule of law. The rule of law itself presents an ambiguous concept, but the High Court recognises the rule of law as a

[11] Refugee Council of Australia, Offshore Processing Statistics (Website) <https://www.refugeecouncil.org.au/operation-sovereign-borders-offshore-detention-statistics/6/>.

[12] Ibid.

[13] Lauren Y. Jackson, 'Restructuring Australia's Indefinite Mandatory Detention Policy to Comply with international Refugee and Human Rights Law', (2019) 50 *University of Toledo Law Review* 525, 533-6.

[14] Refugee Council of Australia, *Do Refugees Contribute to Australian Society?* (Website) < https://www.refugeecouncil.org.au/contribution-to-australia/>.

[15] Refugee Council of Australia (n 10).

foundation assumption of the *Australian Constitution*.[16] Dicey's tripartite definition is widely accepted for common law systems such as Australia.[17] The three elements of Dicey's formulation of the rule of law are the supremacy of law as opposed to arbitrary power; equality before the law in the sense of equal subjection of all to the law; and the right of the courts to interpret and enforce the law.[18] Lord Bingham expands upon these three elements in his definition of the rule of law, which emphasises principles such as the law being 'intelligible, clear and predictable', the law affording 'adequate protection for fundamental human rights', and even 'compliance by the state withs its international obligations'.[19] The Australian Government may disagree with the last of these principles. Nevertheless, the government proudly declares it protects the rule of law in this country.[20] The Attorney-General's Department echoes Lord Bingham's description of the precepts that compromise the rule of law when it declares it upholds the rule of law through ensuring 'laws are clear, predictable and accessible'. But by its nature, an indefinite period of offshore processing is unpredictable and contradicts the rule of law.

B *Procedural Fairness*

The current migration laws violate the principle of procedural fairness because the Migration Act denies non-citizens a right to a hearing. The principle of procedural fairness is fundamental to the common law of Australia and closely related to the rule of law, which seeks to guarantee fairness and consistency before the law to all. One of the components of this principle is the prior hearing rule, which provides a person concerned by a government decision 'should have a reasonable opportunity of presenting' his or her 'case'.[21] For example, Chapter III of the Constitution guarantees that only a court in a hearing can determine the deprivation of liberty of a person as a punishment.[22] Furthermore, s 80 guarantees the right to a trial by jury for indictable offences.[23] Evidently, the Constitution venerates the right to a hearing. However, Australia's courts hold the Migration Act validly permits the detention of non-citizens so long as the detention is not penal or punitive.[24] According to the High Court, if the detention is for an administrative purpose, such as to assess the claim of an unauthorised entrant into the country or to arrange deportation, then it is not the kind of deprivation of liberty that must be determined by a court at a hearing. While the courts can do nothing to change the Migration Act, the government can. Bosworth argues 'in liberal democracies, punishment is meant to be restrained by due process. It must be

[16] Australian Communist Party v Commonwealth (1951) 83 CLR 1, 193 (Dixon J), cited in NAAV v Minister for Immigration and Multicultural and Indigenous Affairs (2002) 123 FCR 298, 415 (French J).

[17] Michael Kirby, 'The Rule of Law beyond the Law or Rules'(2010) 33 *Australian Bar Review* 195, 197.

[18] Lord Bingham, 'The Rule of Law' (2007) 66 *Cambridge Law Journal* 67, 69-94.

[19] Attorney-General, *Rule of Law* (Website) <https://www.ag.gov.au/about-us/what-we-do/rule-law>.

[20] Ibid.

[21] *Russell v Duke of Norfolk* [1949] 1 All ER 109, 118 (Tucker LJ), for further discussion of procedural fairness see *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514, 622 (Gageler J).

[22] *Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 28 (Brennan, Deane and Dawson JJ) ('*Lim*').

[23] *Australian Constitution* s 80.

[24] *Lim* (n

predictable and transparent in order to be defensible and legitimate. Those who are punished have rights. People are equal before the law.'[25]

While the word 'punishment' might be disputed in so much as the government nominally detains unauthorised entrants for an administrative purpose and not a punitive one, the practical effect of the law is punitive. Moreover, the UNHCR observes Australia's system of indefinite mandatory detention is punitive.[26] The fact that a citizen then has a protected right to procedural fairness in the form of a hearing for extended periods of punitive detention but a non-citizen has no such right to a hearing is inconsistent. People who are detained on administrative grounds are entitled to the same standards of fairness as people who are subject to imprisonment. The current offshore processing regime interferes with the right for due process or predictability. The Bill proposes that transfers to Australia, undertaken on a voluntary basis only, will work to remedy the loss of due process and predictability that has been experienced under the indefinite offshore processing scheme. In providing refugees and people seeking asylum the offer to live in Australia while they await a long-term solution in a third-country, the right to procedural fairness can be enhanced under the Migration Act.

5. POSITIVE EFFECTS ON THE AUSTRALIAN COMMUNITY

There are positive effects on the Australian community to passing the Bill. Releasing eligible asylum seekers and refugees into the community builds community relations between asylum seekers and Australians with the help of volunteer agencies. It offers the opportunity to boost community inclusivity and good will.[27] Allowing in more immigrants also improves cultural diversity, which the government champions as a virtue of Australian society.[28] The majority of asylum seekers released into the community are in time valuable tax paying contributors to our economy, their children especially, becoming model citizens and high achievers.

On the other hand, credible evidence demonstrates that long term detainees who are eventually released into the community are unnecessarily handicapped in their efforts to acclimatise and recover from being institutionalised for such a lengthy period.[29] This short sightedness is costly to the Australian public. There are between 400 to 500 people who have been in community detention more than 730 days.[30] There is currently, to the best of our knowledge, no data available that demonstrates any of them are there to protect the public interest or pose any kind of threat to the Australian public.

[25] Mary Bosworth, 'Immigration Detention, Punishment and the Transformation of Justice' (2019) 28(1) *Social & Legal Studies* 81, 87.

[26] UNCHR, 'Monitoring Asylum in Australia' (Website) <https://www.unhcr.org/en-au/asylum-in-australia.html>.

[27] Claire Higgins, 'Australian Community Attitudes to Asylum Seekers and Refugees' (2016) 25(2) Human Rights Defender 25, 27

[28] Australian Government, 'Our Country' (Website)

[29] von Werthern (n 24)

[30] Refugee Council of Australia, 'Statistics on People in Detention: Community Detention' (Website, 8 January 2022)

The restrictive detention environment has created a prison like culture in which it is difficult to avoid negatively transforming individuals. The Australian community suffers because of this. Thus, the Bill must be passed into law.

RECOMMENDATIONS

On the basis that the Commonwealth's position regarding asylum seekers is inconsistent with its obligations under international law, NSWCCL makes the following submissions to reform the current position.

1. The Migration Amendment (Evacuation to Safety) Bill 2023 be passed into law.
2. That the Bill be amended to allow people who are refugees without any security risk to have the choice of settlement in Australia.
3. Pathways to permanent protection visas for all categories of asylum seekers are reinstated.

This submission was prepared by Sophie Belmonte on behalf of the New South Wales Council for Civil Liberties.

Yours sincerely,

Sarah Baker
Secretary
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