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

BY ELECTRONIC SUBMISSION

11 November 2016

Dear Committee Secretary,

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

We welcome the opportunity to provide a submission to the Committee's Inquiry into the Migration Legislation Amendment (Regional Processing Cohort) Bill 2016 [Provisions]. Our submission focuses on the international law dimensions of the Bill, although we also comment briefly on some of its other aspects.

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. Such people were forcibly transferred to Nauru or PNG against their will, detained indefinitely, and subjected to serious human rights violations as a result of their transfer.

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 – either in detention or living in the Australian community.

We agree with the view articulated by many critics that the Bill is harsh, excessive and would prevent refugees resettled in other countries from ever visiting Australia – even for business, tourism or to visit friends or family. It would require the deportation of people currently living in the community in Australia, without making any provision for where they might go or what safeguards would be in place to ensure they were not sent somewhere they could face a risk of persecution or other serious harm.

We strongly disagree with the government's claims that the Bill is compatible with Australia's international human rights obligations, and recommend that the Bill should **not** be passed. In summary, it is our assessment that the Bill would:

- undermine basic principles of international human rights and refugee law (including the right to seek asylum);

- unlawfully discriminate against and punish refugees for entering Australia by boat, in direct contravention of Article 31(1) of the 1951 Convention relating to the Status of Refugees (Refugee Convention) and its 1967 Protocol;
- unlawfully deny refugees their right to reunite with close family members, and interfere with the rights of refugee children; and
- undermine efforts to build regional cooperation on refugee protection based on fair and genuine responsibility-sharing with Australia's neighbours in the Asia-Pacific.

Unlawful discrimination and penalty

The Bill would punish refugees for entering Australia by boat in violation of Article 31(1) of the Refugee Convention, which requires Australia not to 'impose penalties, on account of… illegal entry' to Australia on refugees who have come 'directly' from a place of persecution, as long as they 'present themselves without delay to the authorities and show good cause for their illegal entry'.

Prevailing international legal authority supports our assessment that the Bill imposes an unlawful penalty.[1] In this regard, we note, first, that a 'penalty' is not limited to criminal sanctions but includes any serious unfavourable treatment. The proposed ban on entering Australia is punitive in this sense, particularly given its severity – a permanent ban on entry, for any purpose, and irrespective of the personal circumstances of individual refugees.

Secondly, the ban would only apply to refugees who sought to enter Australia 'illegally' under Australia's immigration law. It would not apply to refugees who entered 'legally' on any visa, including under Australia's refugee resettlement program. As such, the penalty of a lifetime ban would be imposed 'on account of' illegal entry. Article 31(1) prohibits punishing such refugees because even if entry is technically 'illegal' under Australian law, everyone has the right to seek asylum under international law – with or without a visa.

Thirdly, while Article 31(1) applies to refugees 'coming directly' from persecution, this does not mean that refugees are only protected from punishment if they travel immediately to Australia from their home country. Rather, the protection still applies to refugees who transit through other countries on their way to Australia, so long as those other countries did not offer effective protection. Refugees cannot be expected to remain in transit countries which do not recognise refugee status or the Refugee Convention, and where they are classed as 'illegal' migrants and remain vulnerable to expulsion to persecution at any time. Nor can refugees be expected to remain in countries which will not, or cannot, ensure they are safe from physical violence, or provide basic humanitarian needs such as adequate food, water, housing and health care.

[1] This legal authority includes UNHCR and ExCom standards, state practice, drafting history, and the jurisprudence of leading national courts; and is reflected in commentary in Andreas Zimmerman (ed), *The 1951* Convention *relating to the Status of Refugees and its 1967 Protocol: A Commentary* (Oxford University Press, 2011), article 31; and Guy S Goodwin-Gill, 'Article 31: Non-Penalization, Detention, and Protection' in Erika Feller, Volker Turk, and Frances Nicholson (eds), *Refugee Protection in International Law* (Cambridge University Press, 2003), 185.

Legal authority in the United Kingdom has confirmed that even a protracted delay in an unsafe transit country is permissible if a refugee was trying to obtain the means to travel onwards. In *R v Uxbridge Magistrates' Court and Another, Ex parte Adimi,* Simon Brown LJ concluded 'that any merely short term stopover en route to such intended sanctuary cannot forfeit the protection of the Article, and that the main touchstones by which exclusion from protection should be judged are the length of stay in the intermediate country, the reasons for delaying there (even a substantial delay in an unsafe third country would be reasonable were the time spent trying to acquire the means of travelling on), and whether or not the refugee sought or found there protection de jure or de facto from the persecution they were fleeing'.[2]

Fourthly, situations like those above count as 'good reasons', under Article 31(1), for 'illegal' entry to Australia. There is no visa available for people travelling to Australia to seek asylum. Nor is there an orderly international queue for recognised refugees. For most refugees, the chances of being resettled are extremely low. Only where a refugee already has effective protection in another country would the Refugee Convention allow penalties to be imposed.

Fifthly, the proposed ban would constitute unlawful discrimination against refugees on the basis of their method of arrival, which international law prohibits in very clear terms.[3]

Finally, the Bill is overbroad in its reach. If people have found permanent protection elsewhere – including as citizens of another country – and subsequently seek to travel to Australia, they would have no basis on which to remain here beyond the term of their visitor (or other) visa. Australia could deport someone who overstayed their visa, and it could cancel – or refuse at the outset to issue – a visa to someone considered to be of bad character. The Bill is therefore excessive and unnecessary.

Unlawful interference with the rights of families and children

The Bill would violate Australia's international human rights obligations to protect families and children. The world's governments have agreed that 'the family is the natural and fundamental group unit of society and is entitled to protection by society and the State',[4] and repeatedly reaffirmed the need to ensure that families are accorded the widest possible protection and assistance.[5] Governments have explicitly acknowledged that this protection extends to refugee families.[6] These commitments require governments to allow close family members to live together.

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[2] *R v Uxbridge Magistrates' Court and Another, Ex parte Adimi* [1999] 4 All ER 520, [18] (Simon Brown LJ). A full extract of this part of the judgment is included at the end of this submission.

[3] International Covenant on Civil and Political Rights, arts 2(1), 3, 26.

[4] Universal Declaration of Human Rights, art 16(3).

[5] See, for example: International Covenant on Civil and Political Rights, art 23; International Covenant on Economic, Social and Cultural Rights, art 10.

[6] Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, 1951, UN doc A/CONF.2/108/Rev.1 (26 November 1952), Recommendation B; Executive Committee of

Australia also has an obligation under Article 3(1) of the UN Convention on the Rights of the Child (CROC) to ensure that the best interests of children are taken into account as a primary consideration in all matters concerning them, whether undertaken by public or private institutions, courts of law, administrative authorities or legislative bodies. This protection applies equally to all children, regardless of their legal status. As the UN Committee on the Rights of the Child has explained, the strong position given to the best interests of children is justified by their levels of dependency, maturity and voicelessness. Since children are less able than adults to make a strong case for their own interests, it falls to governments to ensure that their rights are adequately protected.[7]

The CROC is the most widely and rapidly ratified human rights treaty in history, reflecting universal acknowledgment of children's rights as an important and integral component of all societies. A concern to protect children's interests is certainly in line with Australian domestic law and values.

The Bill does not ban children on Nauru from ever entering Australia, and does not appear to require their deportation from Australia. However, it could be used to exile their parents and other members of their immediate families. For any person subject to the Bill with family members already in Australia, a permanent ban would flagrantly violate the abovementioned provisions of international law. Australian law would entrench the division of families, which is already an issue of great concern, and could result in parents being permanently separated from their children.

Undermining efforts to build regional cooperation on refugee protection

Despite being called 'regional processing', Australia's bilateral arrangements with Nauru and PNG for the transfer, (previous) detention and processing of asylum seekers has in fact undermined efforts to build true regional cooperation on refugee protection based on fair and genuine responsibility-sharing with Australia's neighbours in the Asia-Pacific. Australia's suite of asylum policies – including mandatory detention, maritime interceptions, 'push backs', and offshore processing in Nauru and PNG – have done significant damage to its moral standing and relationships with its neighbours in the region on this issue. Australia's disrespect for basic principles of international human rights and refugee law, including the right to seek asylum, has also set a precedent for the erosion of these principles in the region.

If Australia is truly committed to enhancing regional cooperation on refugee protection, its priorities should be to rebuild goodwill and credibility, and to ensure that it has a positive impact on asylum policies and effective practices in the region. There are a range of ways in which these outcomes could be achieved, including by modelling best practice and repealing those aspects of Australian immigration law and policy that violate international law. The first

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the High Commissioner's Programme, *Conclusion No 88(L) on Protection of the Refugee's Family* (8 October 1999).

[7] UN Committee on the Rights of the Child, *General Comment No 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art 3, para 1)*, UN Doc CRC/C/GC/14 (29 May 2013), [37] <http://www2.ohchr.org/English/bodies/crc/docs/GC/CRC_C_GC_14_ENG.pdf>.

step towards these goals would be a resolution of the untenable situations in Nauru and PNG. However, rather than move closer to a resolution of these situations, the Bill and its proposed ban would move Australia further away from it.

Offshore processing in Nauru and PNG in its present form is cruel, has no discernible future, and should be brought to an end as soon as possible. Responsibility for resolving this situation lies primarily with Australia, and an exit strategy should be fundamentally about linking people to appropriate durable solutions. There may need to be a suite of options, rather than relocating everyone to the same place under the same conditions, but these options should also include at least some solutions within Australia where appropriate or legally necessary (for example where families have been divided or where it would be in the best interests of refugee children). The focus should be on where people can go *to,* rather than where they excluded from.

Discretionary power to lift the ban

The Bill gives a discretionary power to the Minister for Immigration and Border Protection to lift the ban as an exceptional measure in individual cases, if s/he believes it is 'in the public interest' to do so. This power is inadequate to address the concerns outlined above. The Bill offers no guidance as to the meaning of the 'public interest', which is an amorphous and largely discretionary test that is not amenable to judicial scrutiny. Moreover, the Bill includes no requirement for the Minister to take into account Australia's international human rights obligations as part of that assessment, which is particularly concerning given that the human rights outlined above, including the right to family unity, are objective criteria and must be legally enforceable as rights. Their protection or otherwise cannot be reliant on the grace of a politician, and Australia will not have satisfied its international obligations with merely an optional, discretionary measure. Finally, we note that such broad discretions in decision-making of this kind have proven to result in arbitrariness, and are not conducive to transparent public administration.

Please do not hesitate to contact us at kaldorcentre@unsw.edu.au or on (02) 9385 3337 if we can provide any further information.

Yours sincerely,

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R v Uxbridge Magistrates' Court and Another, Ex parte Adimi [1999] 4 All ER 520

Extract from the judgment of Simon Brown LJ

17. The respondents accept that a literal construction of "directly" would contravene the clear purpose of the Article and they accordingly accept that this condition can be satisfied even if the refugee passes through intermediate countries on his way to the United Kingdom. But that is only so, they argue, provided that he could not reasonably have been expected to seek protection in any such intermediate country and this will not be the case unless he has actually needed, rather than merely desired, to come to the United Kingdom. In short it is the respondents' contention that Article 31 allows the refugee no element of choice as to where he should claim asylum. He must claim it where first he may: only considerations of continuing safety would justify impunity for further travel.

18. For my part I would reject this argument. Rather I am persuaded by the applicants' contrary submission, drawing as it does on the travaux préparatoires, various Conclusions adopted by UNHCR's executive committee (ExCom), and the writings of well respected academics and commentators (most notably Professor Guy Goodwin-Gill, Atle Grahl-Madsen, Professor James Hathaway and Dr Paul Weis), that some element of choice is indeed open to refugees as to where they may properly claim asylum. I conclude that any merely short term stopover en route to such intended sanctuary cannot forfeit the protection of the Article, and that the main touchstones by which exclusion from protection should be judged are the length of stay in the intermediate country, the reasons for delaying there (even a substantial delay in an unsafe third country would be reasonable were the time spent trying to acquire the means of travelling on), and whether or not the refugee sought or found there protection de jure or de facto from the persecution they were fleeing.

19. It is worth quoting in this regard the UNHCR's own Guidelines with regard to the Detention of Asylum Seekers:

> "The expression 'coming directly' in Article 31(1) covers the situation of a person who enters the country in which asylum is sought directly from the country of origin, or from another country where his protection, safety and security could not be assured. It is understood that this term also covers a person who transits an intermediate country for a short period of time without having applied for, or received, asylum there. No strict time limit can be applied to the concept 'coming directly' and each case must be judged on its merits."

20. Having regard to Article 35(1) of the Convention, it seems to me that such Guidelines should be accorded considerable weight. Article 35(1) provides: "The contracting States undertake to cooperate with the Office of the United Nations High Commissioner for Refugees, ... in the exercise of its functions and shall in particular facilitate its duty of supervising the application of the provisions of this Convention."