

NSWCCL SUBMISSION

JOINT PARLIAMENTARY COMMITTEE ON MIGRATION

INQUIRY INTO ENDING INDEFINITE AND ARBITRARY IMMIGRATION DETENTION BILL 2021

28 January 2022

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The Council for Civil Liberties (NSWCCL) thanks the Joint Parliamentary Committee on Migration for the opportunity to make submissions concerning the Ending Indefinite and Arbitrary Immigration Detention Bill.¹

I KEY ISSUES

Passing the Ending Indefinite and Arbitrary Immigration Detention Bill into law is morally and legally necessary. The Bill corrects the deviation from human rights and international norms in the course the government has taken in its treatment of refugees and unauthorised arrivals under the domestic legislative framework.² There are 1,513 people in immigration detention facilities, including 1,276 in immigration detention on the mainland and 237 people in immigration detention on Christmas Island. There are also 137 people effectively in detention on Nauru and another 145 people effectively in detention on Manus Island and PNG.³ The suffering of unauthorised entrants to this country under Australia's system of indefinite mandatory detention is well documented. Indefinite detention is inhumane and cruel. Loss of liberty is one of the greatest punishments that humans bestow on each other. As a nation, we are guilty. During the recent Novak Djokovic detention controversy, the words 'stop the torturer centre' were visible on the window of a room in the hotel where Djokovic was being detained.⁴ The UNHCR describes Australia's system of indefinite mandatory detention as punitive, despite the Australian Government's claims to the contrary.⁵ Evidently, the law is in need of reform. The Bill offers the chance to do so. These submissions will focus on the following six compelling reasons to pass the Bill into law. First, the Bill better accords with international law than the current legislation. Second, the Bill reduces the risk of unnecessary harm to refugees. Third, reducing the exorbitant costs of the current detention program warrants passing the Bill into law. Fourth, there are benefits to the Australian community in allowing more refugees to enter it, such as cultural diversity. Fifth, the Bill restores the integrity of the rule of law and the procedural fairness rule,

¹ Ending Indefinite and Arbitrary Immigration Detention Bill 2021 (Cth) ('the Bill').

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

³ Commonwealth, *Parliamentary Debates*, House of Representatives, 22 February 2021, 1384 (Andrew Wilkie).

⁴ Erin Handley, 'Refugee Who Escaped the Taliban and Self-Immolated on Nauru Speaks from Melbourne's Park Hotel' *ABC News* (online, 13 January 2022) <<https://www.abc.net.au/news/2022-01-13/refugee-escaped-taliban-detention-nauru-park-hotel-mental-toll/100689994>>.

⁵ UNHCR, 'Monitoring Asylum in Australia' (Website) <<https://www.unhcr.org/en-au/asylum-in-australia.html>>.

which are the bedrock of the common law. Sixth, the Bill addresses the deficiencies of the current law as a deterrent against human trafficking.

II INTERNATIONAL OBLIGATIONS

The Bill addresses the fact that Australia's current immigration laws offend multiple international conventions and treaties to which Australia is a signatory. These include the *Refugee Convention*, the *ICCPR*, and the *ICESCR* amongst many others.⁶ The significant violation of human rights and international norms that this represents alone makes the Bill's reform of the law necessary. In the interests of time, these submissions will only briefly deal with two of Australia's contraventions of international laws, those in regards to refugees specifically and those in regards to the human rights of all detainees. The submissions will also briefly consider the impact these violations have on Australia's diplomatic standing.

A Violations of Treaties

Certainly, international law recognises the government's right to control entry to its borders and to detain unlawful entrants.⁷ However, refugees are recognised as being a special case under the *Refugee Convention*.⁸ In this context, the term refugee means a person who genuinely fears persecution in their country of origin and whose fear is founded on legitimate grounds.⁹ This type of unauthorised immigrant to

⁶ *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1948); *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) ('*Refugee Convention*'); *Protocol Relating to the Status of Refugees*, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967) ('*Refugee Protocol*'); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) ('*ICESCR*'); *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('*ICCPR*'); *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981); *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987); *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990); *Convention on the Rights of Persons with Disabilities*, opened for signature 3 May 2008, 2515 UNTS 3 (entered into force 3 May 2008); *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 18 December 2002, 2375 UNTS 237 (entered into force 22 June 2006); *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002).

⁷ *Refugee Convention* art 31(2).

⁸ *Ibid* Preamble.

⁹ 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, 528-9.

Australia may be considered a discrete category in the class of people referred to as 'illegal immigrants'. Under the *Refugee Convention*, Australia must provide protection to genuine refugees and only restrict their movements as is 'necessary'.¹⁰ Countries such as New Zealand, Lithuania, and Switzerland all process refugees without resort to the system of indefinite mandatory detention Australia uses. For example, in New Zealand, immigration officials may allow unauthorised entrants to find their own housing while their claims are being processed rather than immediately and indefinitely detaining them.¹¹ It follows that Australia's practice of indefinite mandatory detention is not 'necessary' to assess the claims of refugees. Yet the Refugee Council of Australia identifies detainees who have been found to be refugees in detention.¹² This violates international law. Australia detains refugees automatically when other countries demonstrate that alternatives are possible. Given that the Bill 'prioritises... refugee and international human rights law',¹³ its passage is necessary to cease Australia's contravention of the law in regards to refugees.

Regarding all detainees, whether technically refugees or not, Australia's detention policy transgresses international laws Australia has ratified and the human rights the laws protect. This is apparent in the *ICCPR*, derived from the *Universal Declaration of Human Rights*, which guarantees an individual's right to 'liberty and security of person' and that 'all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person'.¹⁴ The indefinite detention and unnecessary restrictions on detainees' movements that occur in detention facilities violate these rights impermissibly. The UN has declared that immigration detention must be limited, that is, not indefinite, to be legitimate.¹⁵ Additionally, the government must perform an individual assessment of the circumstances of the person seeking to immigrate to verify the need for detention in the individual person's case.¹⁶ As the Australian Government does not comply with these strictures, its practice of indefinite mandatory detention is illegitimate and

¹⁰ Ibid 541; *Refugee Convention* (n 6) art 31(2).

¹¹ Ibid 533-6.

¹² Refugee Council of Australia, 'Statistics on People in Detention in Australia: Reasons for Detention' (Website, 8 January 2022) <<https://www.refugeecouncil.org.au/detention-australia-statistics/6/>>.

¹³ The Bill (n 1) s 3(2)(b).

¹⁴ *ICCPR* (n 6) arts 9-10.

¹⁵ UNHRC, Communication No 560/1993, UN Doc CCPR/C/59/D/560/1993 (1997), para 9.4.

¹⁶ Ibid.

unlawful. The UN Human Rights Committee itself has found Australia's practice of indefinite mandatory immigration detention contravenes international law.¹⁷ Beyond the violation of these requirements at international law, the lack of access to medical care and the constant threat of violence compound the violations of detainees' rights, as do the general standards of living in the camps.¹⁸ Detainees are not being treated with humanity or with respect for their inherent dignity in contravention of the *ICCPR*. As a former detainee resettled to the United States observed, "Even prison is better [than Manus Island]. Why? Because a criminal knows how long they have to stay there, but we didn't know that".¹⁹ Such inhumane treatment and violations of human rights make the passage of the Ending Indefinite and Arbitrary Immigration Detention Bill necessary as its provisions uphold human rights enshrined under international law.²⁰

B 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 Australia has signed are not binding on domestic law unless the government passes a statute that explicitly enacts the convention into domestic law,²¹ this does not excuse the Australian Government's failure to do so. The failure to enact international conventions 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.

¹⁷ *Baban v Australia*, Communication No. 1014/2001, U.N. Doc. CCPR/C/78/D/1014/2001 (6 August 2003); *FKAG eta/. v Australia*, Communication No. 2094/2011, U.N. Doc. CCPR/C/ 108/D/2094/2011 (20 August 2013).

¹⁸ Jackson (n 9) 542.

¹⁹ Stephanie March, 'Manus Island Refugees Put "That Hell" Behind Them for Fresh Start in the United States' *ABC* (online, 3 October 2017) <<https://www.abc.net.au/news/2017-10-02/manus-island-refugees-in-the-united-states/9006460>>.

²⁰ The Bill (n 1).

²¹ *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 286-7 (Mason CJ, Deane J).

III HARM TO DETAINEES

The bill must be passed because it helps mitigate the harm detainees suffer in detention. The mental health effects of detention 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.²² As the report concludes, this ‘suggests that immigration detention independently and adversely affects the mental health of refugees and migrants’.²³ While higher rates of mental health are universal amongst all countries that detain unauthorised entrants,²⁴ 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 mandatory detention due to length of detention and the vulnerability of asylum seekers discussed in the following paragraphs.

A Length of Detention

Australia’s system of indefinite mandatory detention for unauthorised entrants exacerbates the adverse psychological effects of detention. Length of detention is frequently reported as a salient predictive factor in the mental wellbeing of detainees.²⁵ Studies have observed that spending over six months in detention increases the likelihood of suffering from mental illness.²⁶ Data from the Department of Home Affairs indicates that 538 detainees have been held for over 2 years.²⁷ This brings the inadequacies of the mental health and health services provided in detention into stark relief.²⁸ The examples of countries such as New Zealand, Lithuania, and Switzerland processing unauthorised entrants much more speedily

²² 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.

²³ *Ibid.*

²⁴ M. von Werthern et al, ‘The Impact of Immigration Detention on Mental Health: A Systematic Review’ (2018) 18:382 *BMC Psychiatry* 1, 1.

²⁵ Mary Bosworth, ‘The Impact of Immigration Detention on Mental Health: A Literature Review’ (Research Paper No. 2732892, University of Oxford, 2016) 17.

²⁶ *Ibid.*

²⁷ Refugee Council of Australia, ‘Statistics on People in Detention in Australia: Length of Detention’ (Website, 8 January 2022) <<https://www.refugeecouncil.org.au/detention-australia-statistics/5/>>.

²⁸ Jackson (n 9) 542.

and in alternative ways to mandatory detention shows that it would be possible for Australia to do the same.²⁹ Thus, the government's practice of holding detainees for extended periods of time, such as over 10 years, exposes its detainees to higher risks of mental illness than is necessary. Periods of detention must be limited. Sufficient levels of mental health services must be provided. Passing the Bill helps to do this.

B *Asylum Seekers*

Australia's detention of asylum seekers aggravates mental health issues. Asylum seekers are 'consistently identified across all the literature as a particular vulnerable group in detention'.³⁰ This vulnerability relates to the pre-existing trauma asylum seekers suffered in the country from which they have fled, health problems,³¹ and the fact that very few have received psychiatric care prior to detention.³² Placing trauma survivors in detention as soon as they arrive can heighten mental distress and detention itself is traumatising.³³ For example, a refugee that fled the Taliban for safety in Australia attributes his permanent scarring to his experiences of ongoing and indefinite detention in Australia.³⁴ He set himself on fire while in detention on Nauru. He had been detained for almost nine years. Unsurprisingly, mental health professionals have long called for better treatment for asylum seekers and for asylum seekers to be released into the community.³⁵ Thus, the Bill must be passed into legislation to help address the severe mental health effects of both asylum seekers and detainees in indefinite mandatory detention, especially as s 19(2) of the Bill addresses this very issue in making health and mental health services mandatory and s 17 operates to limit the maximum possible length of detention.

²⁹ Ibid 533-6.

³⁰ Bosworth (n 25) 25-6.

³¹ Emily J. Hadkiss and Andre M. N. Renzaho, 'The Physical Health Status, Service Utilisation and Barriers to Accessing Care for Asylum Seekers Residing in the Community: A Systematic Review of the Literature' (2014) 38(2) *Australian Health Review* 142, 145.

³² Linda Piwowarczyk, 'Asylum Seekers Seeking Mental Health Services in the United States: Clinical and Legal Implications' (2007) 195(9) *The Journal of Nervous and Mental Disease* 715, 720.

³³ Katy Robjant, Rita Robbins and Cornelius Katona, 'Mental Health Implications of Detaining Asylum Seekers: Systematic Review' (2009) 194(4) *The British Journal of Psychiatry* 306, 309.

³⁴ Handley (n 4).

³⁵ Louise Newman, Nicholas Proctor and Michael Dudley, 'Seeking Asylum in Australia: Immigration Detention, Human Rights and Mental Health Care' (2013) 21(4) *Australasian Psychiatry* 315, 319.

IV ECONOMIC COST OF DETENTION

The Bill will help reduce the economic costs of detention. The costs of mandatory immigration detention are significant. As Andrew Wilkie notes, it costs approximately \$346,000 to hold someone in immigration detention in Australia for one year.³⁶ It costs only around \$10,221 for a refugee or an asylum seeker to live in the community. The budget for offshore detention is about \$1 billion per year. The Nauru offshore detention facility will cost \$220 million over the next six months.³⁷ It is \$335,779 cheaper to allow a refugee or an asylum seeker to live in the community than to keep that refugee or asylum seeker in detention. Even if more conservative figures are used, such as those the Refugee Council of Australia suggests, it is still \$315,345 per person cheaper.³⁸ If sensible economic management matters to the government, then it must allow more refugees and asylum seekers to live in the community while their claims are being processed. Countries such as Switzerland and New Zealand demonstrate that releasing a larger number of unauthorised asylum seekers into the community is feasible and does not significantly jeopardise the safety of the community.³⁹ As the Bill facilitates this cost cutting measure, such as in encouraging alternatives to detention at s 12, it must be passed into law.

Legal and administrative costs associated with running migration cases in court also contribute to the economic cost of detention. The Bill would address the cost of running cases in court concerning the wrongful detention of an unauthorised entrant as it would reduce the need for such cases. It would also help decrease the cases seeking compensation for harm suffered in detention because there would be fewer people in detention to suffer harm in the first place. While it is difficult to precisely calculate these costs without further data, it is possible to make some estimations. For example, the Federal Court reports 67.1% of appeals and related actions were run in the migration jurisdiction for the 2020-2021 financial year.⁴⁰ In the Federal

³⁶ Commonwealth (n 3) 1384.

³⁷ Ben Doherty, 'Nauru Offshore Regime to Cost Australian Taxpayers Nearly \$220m over Next Six Months' *The Guardian* (online, 24 January 2022) <https://www.theguardian.com/world/2022/jan/24/nauru-offshore-regime-to-cost-australian-taxpayers-nearly-220m-over-next-six-months?CMP=soc_567&fbclid=IwAR3zq4Qj0aLVsIvh-kcVz3admuHzcFc9_IkGvobUc-402PE9JYG1bHu74w>.

³⁸ Refugee Council of Australia, 'Statistics on People in Detention in Australia: Costs of Detention' (Website, 8 January 2022) <<https://www.refugeecouncil.org.au/detention-australia-statistics/9/>>.

³⁹ Jackson (n 9) 533-6.

⁴⁰ Federal Court of Australia, *Annual Report 2020-2021* (Annual Report, 10 September 2021) 24.

Circuit Court, migration law matters comprised 5,236 filings for the same period.⁴¹ While the actual cost to the government requires further data to calculate, it is not difficult to imagine millions of dollars being spent on legal costs to run these cases, such as the government having to collect evidence, brief counsel, and pay solicitors for the work done in court. The administrative costs of the court also require government funding, which the Federal Court calculated as \$359,182 for 2020-2021.⁴² Part of these administrative costs could be reduced if more unauthorised entrants were kept out of detention because there would be fewer unauthorised entrants to challenge detention decisions and treatment. The legal costs of Bileola family dispute are estimated at \$1,000,000.⁴³ If the government was willing to cease its policy of mandatory detention, it could potentially save millions of dollars on legal costs. Passing the Bill assists cutting these costs.

V THE RULE OF LAW AND PROCEDURAL FAIRNESS

The Bill will restore the integrity of the rule of law and the related principle of procedural fairness as key tenets of Australia's common law. If Australia is to be a country that treats all people equally before the law, then the law must treat all people equally. It is this very concept that the rule of law and procedural fairness preserve.

A Rule of Law

Passing the Bill into law heals 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 foundation assumption of the *Australian Constitution*.⁴⁴ Dicey's tripartite definition is widely accepted for common law systems such as Australia.⁴⁵ 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

⁴¹ Federal Circuit Court of Australia, *Annual Report 2020-2021* (Annual Report, 8 September 2021) 21.

⁴² Federal Court of Australia (n 40) 85.

⁴³ Refugee Council of Australia, (n 38).

⁴⁴ *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).

⁴⁵ Michael Kirby, 'The Rule of Law beyond the Law or Rules' (2010) 33 *Australian Bar Review* 195, 197.

in the sense of equal subjection of all to the law; and the right of the courts to interpret and enforce the law.⁴⁶ 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 with its international obligations’.⁴⁷ 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.⁴⁸ The Attorney-General’s Department echoes Lord Bingham’s description of the precepts that comprise the rule of law when it declares it upholds the rule of law through ensuring ‘laws are clear, predictable and accessible’.⁴⁹ But by its nature, an indefinite period of immigration detention is unpredictable. In contrast a finite period is predictable, such as the three months with exceptions mandated at s 17 of the Bill. As indefinite mandatory detention is unpredictable, it violates the rule of law. Thus, Australia’s laws violate the very principles the government making the laws considers fundamental to the law’s operation. The Bill addresses this paradox at s 16(4) where it states ‘[n]o non-citizen may be subjected to arbitrary or mandatory detention’. In order to restore the rule of law in Australia, it must be passed.

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’.⁵⁰ For example, Chapter III of the *Constitution* guarantees that only a court in a hearing can determine the deprivation of liberty of a

⁴⁶ A V Dicey, *An Introduction to the Study of the Law of the Constitution* (Macmillan, 1959 reprint) Pt II.

⁴⁷ Lord Bingham, ‘The Rule of Law’ (2007) 66 *Cambridge Law Journal* 67, 69-84.

⁴⁸ Attorney-General, *Rule of Law* (Website) <<https://www.ag.gov.au/about-us/what-we-do/rule-law#:~:text=We%20uphold%20the%20rule%20of%20law%20through%20our%20daily%20work,the%20executive%20arm%20of%20government>>.

⁴⁹ Ibid.

⁵⁰ *Ruseell 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).

person as a punishment.⁵¹ Furthermore, s 80 guarantees the right to a trial by jury for indictable offences.⁵² 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.⁵³ 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 '[i]n liberal democracies, punishment is meant to be restrained by due process. It must be predictable and transparent in order to be defensible and legitimate. Those who are punished have rights. People are equal before the law.'⁵⁴ 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, as the earlier discussion concerning experiences of detention being worse than prison proves.⁵⁵ Moreover, the Prime Minister asserts the laws were designed to deter human trafficking.⁵⁶ Deterrence is the language of punishment. Deterrence is an objective of punishment, not an objective of administrative processing of migration claims.⁵⁷ Moreover, the UNHCR observes Australia's system of indefinite mandatory immigration detention is punitive.⁵⁸ 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. That is a matter of equality before the law. As argued in the above paragraph, if equality before the law is worth protecting in this country, then this

⁵¹ *Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 28 (Brennan, Deane and Dawson JJ) ('*Lim*').

⁵² *Australian Constitution* s 80.

⁵³ *Lim* (n 51); *Al-Kateb v Godwin* (2004) 219 CLR 562; *Minister for Immigration and Multicultural and Indigenous Affairs v Al Khafaji* (2004) 219 CLR 664.

⁵⁴ Mary Bosworth, 'Immigration Detention, Punishment and the Transformation of Justice' (2019) 28(1) *Social & Legal Studies* 81, 87.

⁵⁵ March (n 19).

⁵⁶ Damien Cave, 'How Scott Morrison's Boat Trophy Burst into Public View and Why It Matters', *New York Times* (online, 19 September 2018) <<https://www.nytimes.com/2018/09/19/world/australia/scott-morrison-boat-trophy-refugees.html>>.

⁵⁷ Amy Elton et al, 'Mandatory Practices and Transformation of Due Process' 44(3) *Monash University Law Review* 621, 642.

⁵⁸ UNHCR (n 5).

country should extend procedural fairness and the right to a hearing for extended periods of imprisonment to both citizens and non-citizens. The Bill offers this opportunity under ss 16(4), 17, and 18.

VI 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.⁵⁹ Allowing in more immigrants also improves cultural diversity, which the government champions as a virtue of Australian society.⁶⁰

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.⁶¹ 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.⁶² 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. What is the benefit to the Australian public in continuing to keep unauthorised entrants locked up? As discussed earlier in our submission, it costs approximately 30 times more to hold a person in a closed facility than it does in the community; why not release them into the community while their claims are being processed? The restrictive detention environment has created a prison like culture in which it is difficult to avoid negatively

⁵⁹ Claire Higgins, 'Australian Community Attitudes to Asylum Seekers and Refugees' (2016) 25(2) *Human Rights Defender* 25, 27.

⁶⁰ Australian Government, 'Our Country' (Website) <<https://info.australia.gov.au/about-australia/our-country>>.

⁶¹ von Werthern (n 24) 11.

⁶² Refugee Council of Australia, 'Statistics on People in Detention: Community Detention' (Website, 8 January 2022) <<https://www.refugeecouncil.org.au/detention-australia-statistics/7/>>.

transforming individuals. The Australian community suffers because of this. Thus, the Bill must be passed into law.

VII FLAWS IN DETERRENT ARGUMENT

The Bill must be passed because the argument that current immigration laws deter human trafficking and the arrival of unauthorised immigrants is flawed. Similarly, the argument that current laws stop deaths at sea is fallacious.

A Deterrence of Human Traffickers and Unauthorised Arrivals

As noted above, the Prime Minister is on the record as promoting the view indefinite mandatory immigration detention deters human trafficking.⁶³ This is despite the United Nations calling for immigration detention not to be used for such a purpose.⁶⁴ Indeed, such a purpose is fundamentally abhorrent when considering the harms to detainees and human rights violations outlined above. The cost of deterrence is too great given the realities of immigration detention facilities. In the case of refugees who have committed no crime at international law, indefinite mandatory immigration detention punishes and ‘dehumanises’ them, despite their lack of guilt.⁶⁵ To extend this argument further, even if the detainees have committed a crime, that cannot justify the imprisonment of human beings in conditions that fall far below satisfactory standards of health and safety. This is effectively torture. How can deterrence be used to justify detaining human beings in conditions worse than domestic prisons? How can deterrence justify torture when the individuals suffering are not even directly responsible for human trafficking or the conditions that cause forced migration?

There are doubts surrounding the effectiveness of the regime as a deterrent in the first place. Even if the laws do have some deterrent effect, as the Director of the

⁶³ Cave (n 56).

⁶⁴ United Nations High Commissioner for Refugees, *Guidelines on the Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers and Alternatives to Detention* (Report, 2012) 7 [3].

⁶⁵ Elton (n 57) 644.

International Organization for Migration's Global Migration Data Analysis Centre in Berlin claims,⁶⁶ the fact that unauthorised immigrants continue to attempt to enter Australia proves that the laws are not a complete deterrent.⁶⁷ The immense human and economic cost that is paid to continue the operation of a law that is only partially effective at best then becomes even more absurd. Moreover, the fact that unauthorised immigration still occurs around the globe suggests that Australia's laws do not deter human trafficking, the laws only redirect it. Thus, the Bill must be passed to overturn a legislative regime that is ineffective in achieving its deterrent purpose.

B Prevention of Deaths

The position that current immigration laws help reduce the number of deaths at sea is similarly flawed. Peter Dutton has promoted this view.⁶⁸ The causal link is tenuous. If Australia's laws have stopped people smugglers from targeting Australia, they have not stopped dangerous sea voyages to other countries. At best, Australia's laws redirect the sea traffic. Just because nobody or fewer people have drowned on the voyage to Australia does not mean that people are not drowning on other voyages. Indeed, at least 27 people drowned on a boat headed towards the United Kingdom in 2021.⁶⁹ Moreover, Australia's current laws also cause deaths. 12 people have died on Nauru and Manus Island, primarily due to inadequate healthcare or by suicide.⁷⁰ Even if the laws did absolutely deter unauthorised immigrants, this itself could lead to deaths as some of these desperate individuals would have no choice but to remain in a country where they are being violently persecuted and face death. Thus, the laws will actually cause deaths if the intended deterrent effect ever became absolutely effective.

⁶⁶ Australian Government, 'Operation Sovereign Borders Reinforced' (Website, 9 September 2018) <<https://minister.homeaffairs.gov.au/peterdutton/Pages/operation-sovereign-borders-reinforced.aspx>>.

⁶⁷ Department of Home Affairs, *Immigration Detention and Community Statistics Summary* (Report, 30 September 2021) 7.

⁶⁸ Australian Government (n 66).

⁶⁹ Rajeev Syal, Angelique Chrisafis and Diane Taylor, 'Tragedy at Sea Claims Dozens of Lives in Deadliest Day of Channel Crisis' *The Guardian* (online, 25 November 2021) <<https://www.theguardian.com/world/2021/nov/24/several-people-dead-migrant-boat-capsizes-channel>>.

⁷⁰ Refugee Council of Australia, 'Recent Changes in Australian Refugee Policy: Offshore Processing' (Website, 8 January 2022) <<https://www.refugeecouncil.org.au/recent-changes-australian-refugee-policy/9/>>.

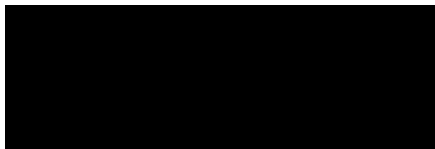
For all of the above reasons, the operation of the current law as a deterrent and as life-saving is rejected as a justification for the law's continued existence. Thus, the Bill is a welcome and necessary reform.

VII RECOMMENDATION

The NSW Council for Civil Liberties recommends that the Ending Indefinite and Arbitrary Immigration Detention Bill be passed without amendment.

This submission was prepared by Tomas Ditton on behalf of the NSW Council for Civil Liberties. We hope it is of assistance to the Attorney-General's Department.

Yours sincerely,



Michelle Falstein

Secretary

NSW Council for Civil Liberties

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