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BY ELECTRONIC SUBMISSION

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

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 Uxb* , 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] *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

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."