Australian Tamil Congress

A Unified Voice for All Tamils

Senate Standing Committees on Legal and
Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

17th December 2012

Dear Committee Members

Inquiry into the Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012

The Australia Tamil Congress (ATC) welcomes the opportunity to provide this submission to the Senate Standing Committee Members on Legal and Constitutional Affairs Committee.

ATC was established in 2009 and encourages the positive participation of Tamils in Australian society, as well as highlighting the issues of importance to Tamils, upholding core Australian values and engaging other communities, governments and organisations in addressing the socio-cultural and political concerns of Tamils in Australia and in Sri Lanka.

ATC members actively participate and engage visiting detention camps and community detention centres, community engagements and assistances to the Tamil asylum seekers / refugees. Key ATC Office bearers involved in consultations conducted by the Expert Panel on Asylum Seekers, which the Government established to make recommendations on Asylum Seeker policy and the final report on the 13th of August 2012.

We urge the Committee to adopt the following principles during the amendment of the *Migration Act 1958* based on the Recommendation 14 of the Report of the Expert Panel on Asylum Seekers:

1. Comply with the Universal Declaration of Human Rights;
2. Comply with the UN Convention Rights of the Child;
3. Comply with the Geneva Refugee Convention; and
4. Comply with the International Covenant on Civil and Political Rights (ICCPR).

This submission will focus upon elements of human rights which are relevant to the above inquiry of the Bill. Our arguments and recommendations on selected areas of the Bill are:

#1. Australia's non-refoulement obligations

Apart from Australia's *non-refoulement* (non-return) obligations under the Refugees Convention (which is not one of the treaties specified in the definition of 'human rights' in the *Human Rights (Parliamentary Scrutiny) Act 2011*), Australia also has an obligation to not send a person to a country where they are at a real risk of the death penalty, arbitrary deprivation of life, torture, or cruel, inhuman or degrading treatment or punishment (Articles 6 and 7 of the ICCPR, Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)) or to a country which would send the person to another country where they would face such a risk.

However, the Bill does not contain or amend any existing provisions which relate to removal that already exist with the Act. To that extent, the provisions in the Bill only contemplate increasing the scheme to those people who arrive directly at the Australian mainland. They do not affect the substantive current operation of the Act in relation to removal or regional processing arrangements nor impact on the protections against *non-refoulement* which already exist in legislation, policies and procedures.

Our explanation to the Committee

As a signatory to the UN Refugees Convention, Australia has a fundamental obligation not to expel or return ('refouler') a refugee to any place where that person's life or freedom would be threatened as a direct result of his or her race, religion, nationality, membership of a particular social group or political opinion. Article 33 of the Refugee Convention specifically prohibits this, as does the ICCPR and the Torture Convention.

By legislating for the status determination of irregular arrivals on offshore processing centres, Nauru and PNG Australia is directly contravening its human rights obligations. Nauru and PNG are not signatories to the Torture Convention nor is Nauru a party to the ICCPR. As such, it is concerning that the Minister would think it acceptable to allow the status determination procedure to take place here. This would leave too much room for

ill-advised decision making, therefore increasing the risk of refoulement. The UNHCR has explicitly advised the Minister of Immigration against processing asylum seekers in Nauru due to its questionable conditions and lack of expertise in the status determination of these people,[1] and similar conditions have been found to exist in PNG, a country that has failed to establish a positive human rights record for itself. These countries are therefore unable to provide the effective protection needed to prevent Australia from breaching its human rights obligations, in particular the principle of non-refoulement.

#2. Right to freedom of movement

The Bill provides that the measures in the Bill are relevant to Article 12 (1) and Article 12(4) of the International Covenant on Civil and Political Rights 1966 (ICCPR). Article 12(1) provides that:

'Everyone lawfully in the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence'. (emphasis added). Further, Article 12(4) of the ICCPR provides that:

'No one shall be arbitrarily deprived of the right to enter his own country'. (emphasis added)

As outlined above, the definition of 'unauthorised maritime arrival' envisages that certain persons who have entered Australia by sea will become an unlawful non-citizens, that is, persons who did not have a lawful right to travel to, enter into, or remain, in Australia.

In accordance with Article 12(1), an unauthorised maritime arrival will not, upon entering Australian territory, be in Australia lawfully, so Article 12(1) is not engaged. Similarly, in an assessment under Article 12(4), an unauthorised maritime arrival has neither the right to enter into Australia (as it cannot be considered his or her own country as properly understood at international law).

[1] Letter from High Commissioner, Mr Antonio Guterres to Minister Chris Bowen dated 5 September 2012.

Our explanation to the Committee

The use of terms such as “illegal,” or “unauthorised”—are titles traditionally employed in referring to the unauthorised or irregular migrant. Whereas “asylum seeker” is well defined terminology under the international conventions to which Australia is a signatory.

A refugee has the right to be free from penalties pertaining to the illegality of their entry to or presence within a country, if it can be shown that they acted in good faith; if the refugee believes that there was ample cause for their illegal entry / presence, i.e. to escape threats upon their life or freedom, and if they swiftly declare their presence. This right is protected in Article 31:

"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; 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. (Article 31, (1))

Unfortunately “illegal immigrants” and “asylum seekers” terminology have been deliberately blended to such an extent that their meanings, though distinct, are no longer distinguishable. Asylum and any individual seeking to claim this basic human right have come to be synonymous with illegality—operating within a discourse of criminality and securitisation as opposed to one of humanitarian concern and respect. While the mystification of these terms has been greatly aided by the media and political rhetoric, perhaps more seriously is the little distinction made between these different types of migrants at the level of policy and enforcement. Indeed, equating asylum seekers with criminality is a common practice that is regularly reproduced in the wider public discussions.

The unfair processing of asylum claims, enactment of increasingly restrictive legislation, limited recourse to work or other means of survival for those who are awaiting or appealing decisions on their asylum claims, and the widespread confinement of asylum seekers appear to punish those fleeing persecution rather than protect them. Another reason this confusion to occur is because commonly, asylum seekers are unauthorised at some point in their asylum-seeking process, either before or after they have made their claim. Because asylum seekers may be both categories simultaneously, this further complicates clarity in properly distinguishing them from other migrant groups.

#3. Rights relating to families and children

Australia also has an obligation to treat the best interests of the child as a primary consideration in all actions concerning children (Article 3 of the Convention on the Rights of the Child (CROC)). In addition, Australia must not unlawfully or arbitrarily interfere with the family (Articles 17 and 23 of the ICCPR). However, for the reasons provided above, provisions relating to removal already exist within the Act and this Bill does not propose to make any amendments to the regional processing scheme or the legislative, policy and procedural protections which already exist.

Our explanation to the Committee

We find it exceptionally concerning that the Minister has chosen not to address Australia's obvious failure to adhere to its obligations under the CROC and ICCPR. Non-interference with family is a significant factor to consider in this process and we believe it has not been considered within the parameters of the nation's human rights obligations. Further, the best interests of the child should always be of primary and paramount importance and we submit that the Minister has failed to identify specifically *which* protection provisions will be available to this category of persons and how they will effectively protect children found in these situations.

The act of placing a child in offshore detention for an unknown period of time and without any real prospect of a timely review of their status is arbitrary, let alone to allow this to happen in a country that has been found in the past to be incapable of offering adequate conditions and which has an extremely dubious human rights record.

It is unlikely that there is any other subgroup more vulnerable in these conditions of asylum seeking than that of children. We believe that the Minister should address these issues in more detail and is expected to ensure that the protection of children is a paramount consideration.

Furthermore, the fact that people who arrive by boat are no longer able to propose their immediate family members through the Humanitarian Program is a directly arbitrary interference with the family and is expressly prohibited under Articles 17 and 23 of the ICCPR. While we appreciate that disincentive of some nature has an important role in deterring people from taking the potentially fatal risk of travelling to Australia by boat in the most dire of conditions, the act of intentionally keeping a family apart for an indefinite period of time is an arbitrary interference with family life and is incompatible with Australia's human rights obligations under the ICCPR.

Conclusion:

The Bill does not meet the international standards on human rights and does not engage obligations under relevant human rights treaties hence, attempts to avoid Australia's obligation to determine the status of refugees who seek asylum by boat.

Yours sincerely,

Yogi Srikhanta, Australian Tamil Congress

Fauve Kurnadi, *BA/LLB*, Independent Researcher.