



Refugee Council
of Australia

SUBMISSION TO THE SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS INQUIRY INTO THE *MIGRATION AMENDMENT (UNAUTHORISED MARITIME ARRIVALS AND OTHER MEASURES) BILL 2012*

The Refugee Council of Australia (RCOA) is the national umbrella body for refugees, asylum seekers and the organisations and individuals who work with them, representing over 160 organisations and 650 individual members. RCOA promotes the adoption of humane, lawful and constructive policies by governments and communities in Australia and internationally towards refugees, asylum seekers and humanitarian entrants. RCOA consults regularly with its members and refugee background communities and this submission is informed by their views.

RCOA welcomes the opportunity to provide feedback on the *Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012* (hereafter, the Bill). RCOA has consistently opposed the policy of excision since its introduction and the many concerns we have voiced over the ensuing decade remain relevant to the legislation under review. These concerns relate largely to existing legislation rather than the proposed amendments but we believe they are highly relevant given that the Bill's essential purpose is to extend existing provisions over a larger jurisdiction.

While RCOA agrees that the loss of life resulting from dangerous sea journeys to Australia must be urgently addressed, we do not believe that the Bill presents an effective or justifiable means of addressing this issue. Past experience has shown the excision policy to compromise the integrity of Australia's asylum systems, impede access to effective protection and contravene Australia's obligations under the Refugee Convention. It is also questionable whether an expansion of the excision policy will act as an effective means of discouraging dangerous journeys; indeed, it could well compound the factors which drive asylum seekers to undertake these journeys.

RCOA strongly recommends that the Bill not be passed. Moreover, we recommend (as we have done consistently since the policy was introduced) that all existing provisions of the *Migration Act 1958* relating to excision be repealed to restore the integrity of Australia's asylum systems.

1. Contravention of Refugee Convention obligations

- 1.1. In relation to the proposed legislation, the United Nations High Commissioner for Refugees (UNHCR) has clearly stated that "under international law any excision of territory for a specific purpose has no bearing on the obligation of a country to abide by its international treaty obligations which apply to all of its territory."¹ RCOA believes that the excision policy contravenes these obligations in several respects.

¹ United Nations High Commissioner for Refugees (2012). *UNHCR Statement: Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012* [media release]. Issued 31 October, http://unhcr.org.au/unhcr/index.php?option=com_content&view=article&id=277&catid=35&Itemid=63.

- 1.2. Article 31 of the Refugee Convention prohibits states from imposing penalties on refugees who enter or are present in their territory without authorisation, provided that they have come directly from a territory where their life or freedom was threatened, present themselves to authorities without delay and can provide a reasonable explanation for their unauthorised entry or presence. The excision policy directly violates this provision by imposing penalties on some asylum seekers specifically on the basis of their status. For example:
- Refugees falling under the excision provisions who remain in Australia will be subject to status determination and visa application procedures that are far less robust and transparent than Australia's standard statutory refugee status determination procedure.
 - Refugees transferred to offshore processing facilities will face prolonged, indefinite exile in remote territories under conditions which are likely to have serious implications for their health (particularly mental health) and wellbeing.
- 1.3. Article 33 of the Refugee Convention prohibits refoulement, or forcible return of refugees to situations where they may face persecution. RCOA is concerned that the Bill creates conditions which heighten the risk of refoulement. Specifically, the Bill:
- Subjects asylum seekers to a less robust and transparent procedure of status determination, thus creating conditions under which erroneous decision-making is more likely to occur;
 - Invests too high a level of discretionary power in the Minister for Immigration and Citizenship (see further detail in Section 5); and
 - Facilitates the transfer of asylum seekers to territories where human rights protections, including non-refoulement, are tenuous, unclear or cannot be assured.
- 1.4. In relation to the latter point, RCOA is also concerned that the transfer of asylum seekers to offshore processing facilities in the absence legal safeguards may result in violations of other articles on the Convention. It is unclear, for example, whether asylum seekers found to be refugees will have the right to work in these countries or whether the receiving countries have the capacity to provide access to meaningful employment opportunities. This is of particular concern given that Papua New Guinea currently has reservations against a number of key provisions of the Refugee Convention, including those relating to employment.

2. Erosion of protection standards

- 2.1. RCOA's core concern relating to excision is that it significantly erodes safeguards and protections for asylum seekers. There is indeed an urgent need to address the conditions which compel asylum seekers to undertake dangerous boat journeys. However, it is fundamentally inconsistent with the principles of refugee protection and Australia's international obligations to deliberately impede access to protection and disqualify some asylum seekers from fair and reasonable treatment as a means of achieving this goal.
- 2.2. The excision policy arbitrarily denies some asylum seekers access to reviewable, legally-bound processes for status determination and visa processing, which in turn impedes access to protection and undermines the integrity of Australia's asylum processes. Past experience has clearly (and tragically) demonstrated the consequences of eroding Australia's protection systems in this manner. In recent years, questionable decision-making at the primary stage of non-statutory assessment

processes has resulted in a large number of cases progressing to the review stage. This has resulted in the status determination process becoming unnecessarily prolonged for some individuals, often to the detriment of their health and wellbeing (particularly for those remaining in closed detention).

- 2.3. Even more serious were the consequences of non-statutory decision-making under the Pacific Solution, which was facilitated by the excision policy. Many asylum seekers whose claims for protection were rejected under these offshore status determination processes experienced persecution or serious threats to their safety and security after returning to their countries of origin.² As many as 20 of them are believed to have been killed.³
- 2.4. Also of concern are the broader implications of the excision policy for the treatment of asylum seekers who arrive by boat. For example, while Australia's mandatory detention policy does not apply solely to asylum seekers arriving by boat without authorisation, RCOA believes that the excision policy places this group at heightened risk of prolonged indefinite detention:
- Asylum seekers subject to the excision policy cannot lodge a valid visa application except at the discretion of the Minister for Immigration and Citizenship. As such, it is more difficult for these asylum seekers to resolve their unlawful status, with the result that they may face prolonged periods in detention.
 - Asylum seekers transferred to offshore processing facilities will face prolonged, indefinite exile in remote territories where their freedom of movement is likely to be restricted. While those found to be refugees may eventually be allowed greater freedom of movement, the remote location and physical conditions in Nauru and Papua New Guinea's Manus Island are likely to create a detention-like environment for these individuals, even if they are not physically detained.
- 2.5. RCOA acknowledges that the Bill includes a provision to introduce discretion and flexibility in the decision to detain. However, we reject the Government's assertion that this amendment alone is sufficient to prevent arbitrary detention. RCOA considers detention which is not based on an individual assessment of risk, is not subject to regular judicial review and is not time-limited to be arbitrary. As the Bill does not seek to amend provisions of the Migration Act under which detention remains lawful until a person is granted a visa or leave the country (regardless of the risks posed by a particular individual), there remains very real potential for arbitrary detention to occur.
- 2.6. RCOA is particularly troubled by the application of the excision policy to children and unaccompanied minors. RCOA cannot imagine any circumstances in which it can be in the best interests of the child to be denied the full protection of Australian law or be transferred to an offshore processing facility for an indefinite period of time. In light of recent legislative amendments which removed the Minister for Immigration's guardianship responsibilities towards unaccompanied minors transferred to offshore processing facilities, the potential impacts of excision on children and young people are of great concern.

² See Glendenning, P., Leavey, C., Hetherington, M., Britt, M. & Morris, P. (2004). *Deported to Danger: A study of Australia's treatment of 40 rejected asylum seekers*. Edmund Rice Centre for Justice and Community Education, www.erc.org.au/index.php?module=documents&JAS_DocumentManager_op=downloadFile&JAS_File_id=208; and Glendenning, P., Leavey, C., Hetherington, M. & Britt, M. (2006). *Deported to Danger II: The continuing study of Australia's treatment of rejected asylum seekers*. Edmund Rice Centre for Justice and Community Education, www.erc.org.au/index.php?module=documents&JAS_DocumentManager_op=downloadFile&JAS_File_id=153

³ Banham, C. (2008). "Afghans sent home to die." *Sydney Morning Herald*, 27 October. Available at www.smh.com.au/news/national/afghans-sent-home-to-die/2008/10/26/1224955853319.html

3. Offshore processing

- 3.1. The excision policy provides an essential prerequisite for the transfer of asylum seekers to offshore processing facilities. RCOA has grave concerns that the reinstatement of offshore processing in Nauru and Papua New Guinea's Manus Island is likely to have serious consequences for the wellbeing of asylum seekers, as demonstrated by Australia's previous experiences under the Pacific Solution.
- 3.2. People affected by the Pacific Solution were detained in remote facilities for often lengthy periods (up to six years in some cases), to the serious and well-documented detriment of their health and wellbeing. Throughout the duration of the Pacific Solution, there were multiple incidents of self-harm, 45 detainees engaged in a serious and debilitating hunger strike and dozens suffered from depression or experienced psychotic episodes.⁴
- 3.3. While it may be the case that there will eventually be some differences between the current incarnation of offshore processing and its predecessor (in that the facilities will not be closed detention centres, for example), the factors which had the greatest impact on mental health in the past – isolation, limited services and support, restricted freedom of movement, separation from family members and constant uncertainty – remain features of the current model. Indeed, these features are not merely unfortunate “side effects”, but are central to the model's underlying logic of deterrence. As such, there is little reason to believe that the significant human costs of the Pacific Solution can be avoided under Australia's new offshore processing regime, particularly in light of the fact that hunger strikes, self-harm and suicide attempts are already occurring in the Nauru facility.
- 3.4. RCOA was particularly alarmed by reports from Amnesty International Australia and UNHCR on conditions in the Nauru facility. The Amnesty International report highlighted the “harsh and repressive” physical conditions, lack of privacy, inappropriate accommodation and lack of adequate services, including legal advice and health services.⁵ UNHCR also expressed concerns about the harshness of physical conditions and inadequacy of reception conditions, as well as the capacity of health providers on Nauru to provide adequate support to survivors of torture and trauma.⁶ Clearly, the extant provisions on excision in the *Migration Act* do not contain adequate safeguards to prevent the removal of asylum seekers to situations where their rights and wellbeing cannot be assured. It can thus hardly be viewed as a functional, effective policy in its existing form, let alone under the expanded arrangements proposed in the Bill.
- 3.5. RCOA is also concerned that offshore processing will greatly hamper the ability of refugees to access effective protection. Neither Nauru nor Papua New Guinea has well-established legislative provisions or infrastructure to provide effective protection and support to refugees and asylum seekers and both lack a functioning system of refugee status determination. Furthermore, in line with the “no advantage” test,

⁴ Bem, K., Field, N., Maclellan, N., Meyer, S. & Morris, T. (2007). *A Price Too High: The cost of Australia's approach to asylum seekers*. Published by A Just Australia, Oxfam Australia and Oxfam Novib, available at pandora.nla.gov.au/pan/76526/20070910-1523/www.oxfam.org.au/media/files/APriceTooHigh.pdf

⁵ Amnesty International Australia (2012). *Nauru Offshore Processing Facility Review 2012* [media briefing]. Issued 23 November, <http://www.amnesty.org.au/images/uploads/news/NauruOffshoreProcessingFacilityReview2012.pdf>

⁶ United Nations High Commissioner for Refugees (2012). UNHCR Mission to the Republic of Nauru. Lyons: United Nations High Commissioner for Refugees, http://unhcr.org.au/unhcr/index.php?option=com_content&view=article&id=282&catid=35&Itemid=63.

refugees subject to offshore processing will be denied access to durable solutions for an indefinite and prolonged period of time, remaining in conditions which are likely to be difficult at best.

4. Discretionary powers

- 4.1. Another of RCOA's key concerns relating to the excision policy is that it grants a high degree of discretionary power to the Minister for Immigration. Under the expanded policy, any person arriving in Australia by sea without authorisation will not be permitted to lodge a valid visa application unless the Minister believes it is in the "public interest" to allow them to do so. The Minister's powers are both non-compellable and non-reviewable and the legislation provides no guidance as to on what basis such a decision can be determined to be in the "public interest".
- 4.2. RCOA believes that the current policy invests too high a level of discretionary power in the Minister, particularly in relation to applications for refugee status. The vast majority of asylum seekers arriving in Australia by boat are found to have a well-founded fear of persecution. For many, being returned to their country of origin could place their freedom, wellbeing or even their life in jeopardy. When the consequences of an incorrect decision are of this magnitude, it cannot be considered satisfactory for the power to allow or disallow a Protection Visa application to rest with a single person under a non-reviewable process. Such administrative discretion is the antithesis of the Rule of Law.

5. Failure to adequately assess human rights implications

- 5.1. RCOA believes that the Statement of Compatibility accompanying the Bill is misleading, superficial and fails adequately to assess the human rights implications of this legislation. The Statement, for example, argues that several provisions of the ICCPR do not apply to the individuals affected by excision because they are not lawfully in Australia's territory. The Statement fails to acknowledge, however, that the Bill deliberately erects barriers to prevent these individuals from being able to resolve their unlawful status except at the direction of the Minister for Immigration. Furthermore, from the viewpoint of international law (and as noted by UNHCR), the 'legal fiction' of excision cannot be used to evade obligations which Australia has voluntarily assumed.
- 5.2. The Statement also fails adequately to consider the compatibility of the legislation with Australia's obligations relating to non-refoulement and the rights of families and children, arguing that the Bill does not alter legislative provisions specifically relating to these issues. RCOA believes that this is an unacceptably narrow interpretation of the legislation. As demonstrated by the examples above, the human rights implications of the excision policy often stem from its relationship to other legislative provisions, such as those relating to detention and offshore processing. To provide an accurate assessment of the compatibility of the Bill with human rights, the broader consequences of the excision policy must be taken into account.

6. Ineffective measure for saving lives

- 6.1. The stated aim of the Bill is to "avoid creating an incentive for people to take even greater risks with their lives by seeking to bypass excised offshore places to reach the Australian mainland" by creating a consistent legal status for all asylum seekers arriving by boat without authorisation, regardless of where in Australia they first arrive. RCOA does not believe that the Bill achieves this aim.

- 6.2. The excision policy does nothing to address the central factor which compels asylum seekers to undertake dangerous boat journeys in the first place, that is, the lack of protection afforded to refugees and asylum seekers across much of Asia-Pacific. Addressing these low standards of protection will require Australia to work constructively with other countries to improve conditions and broker solutions for people seeking protection. RCOA is concerned, however, that Australia's capacity to negotiate successfully for these improved protections is seriously hampered by its current approach to asylum policy. It will be difficult for Australia to encourage other countries in the region to lift standards of protection for refugees and asylum seekers while simultaneously lowering its own. Paradoxically, rather than reducing the risk of dangerous boat journeys, the Bill is likely to compound the factors which drive asylum seekers to undertake these journeys.
- 6.3. Moreover, the excision policy and, by extension, offshore processing set a damaging precedent of differential treatment and lower standards of protection for asylum seekers who arrive without prior authorisation or valid travel documents, or who undertake risky journeys to seek asylum. If this approach to policy-making was adopted by all countries in the region, the consequences for people seeking protection would be disastrous.
- 6.4. RCOA wishes to note, however, that even if the excision policy did prove to be an effective deterrent (or had done so in the past), it does not present an acceptable means of preventing dangerous boat journeys. The policy does not strike an appropriate balance between preventing harm and causing harm. In fact, as is typical of deterrence-based policies, it aims to prevent harm *by* causing harm. This cannot be considered a justifiable response, particularly when far more humane and constructive policy alternatives are available.
- 6.5. RCOA has consistently maintained that the most sustainable and effective strategy for addressing the complex protection issues across the region, including dangerous boat journeys to Australia, is the development of a sustainable and constructive regional framework for cooperation on refugee protection.⁷ We strongly encourage the Australian Government to withdraw the Bill and reorient its current policy approach to focus on the development of this framework and, most importantly, the protection of people fleeing persecution.

⁷ For further information and recommendations from RCOA on the development of a regional framework for refugee protection, see RCOA's annual submissions on Australia's Refugee and Humanitarian Program for 2011-12 and 2012-13, available at <http://www.refugeecouncil.org.au/r/isub.php>. Information is also included in RCOA's July 2012 submission to the Expert Panel on Asylum Seekers, available at <http://refugeecouncil.org.au/r/sub/1207-Expert-Panel.pdf>