Submission to the Inquiry into the Migration Amendment (Detention Reform and Procedural Fairness) Bill 2010

Dr Angus Francis

I Introduction

I thank the Committee for this opportunity to comment on the Migration Amendment (Detention Reform and Procedural Fairness) Bill 2010.

By way of background, I am a senior lecturer in law at the Queensland University of Technology where I teach immigration and refugee law and public international law. My profile can be found at http://www.law.qut.edu.au/staff/lsstaff/afrancis.jsp.

I have previously acted as a consultant for Federal Senators on a number of earlier bills and regulations relevant to this inquiry, including: the Migration Legislation Amendment (Transitional Movement) Bill 2002 (Cth); the Migration Legislation Amendment (Procedural Fairness) Bill 2002 (Cth); the Migration Legislation Amendment (Further Border Protection Measures) Bill 2002; and the Migration (Further Excision) Regulations 2003 and 2005.

I should also note that I have been involved in the representation of asylum seekers held at detention facilities at Port Hedland, Nauru and Scherger in my capacity as a volunteer migration agent/solicitor at the Refugee and Immigration Legal Service, Brisbane.

In my comments I will be drawing upon my previous submissions in relation to other relevant inquiries[1] as well as my relevant publications.[2]

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[1] Submission to the Senate Legal and Constitutional Legislation Committee Inquiry into the Migration Legislation Amendment (Designated Unauthorised Arrivals) Bill 2006, June 2006, available at: http://www.aph.gov.au/senate/committee/legcon_ctte/migration_unauthorised_arrivals/submissions/sub60.pdf; Submission to the Senate Legal and Constitutional References Committee Report into the administration and operation of the Migration Act 1958 (Cth), 2 March 2006, available at: http://www.aph.gov.au/senate/committee/legcon_ctte/migration/submissions/sub234.pdf; Submission to the Senate Legal and Constitutional Legislation Committee Inquiry into the Migration Legislation Amendment (Further Border Protection Measures) Bill 2002, October 2002, available at: http://www.aph.gov.au/senate/committee/legcon_ctte/completed_inquiries/2002-04/mig_bp/submissions/sub26.doc; Submission to the Senate Legal and Constitutional Legislation Committee Report into the Migration Legislation Amendment (Procedural Fairness) Bill 2002, June 2002, available at: http://www.aph.gov.au/senate/committee/legcon_ctte/completed_inquiries/2002-04/migration_fairness/submissions/sub14.doc.

[2] Angus Francis, 'Bringing protection home: healing the schism between international obligations and national safeguards created by extraterritorial processing,' (2008) 20 (2) *International Journal of Refugee Law* 253-272; Angus Francis, 'Examining the role of legislators in the protection of refugee rights: toward a better understanding of Australia's interaction with international law,' (2006) 13 *Australian International Law Journal* 147-163; Angus Francis, 'The review of Australia's asylum laws and policies: a case for strengthening

II Purpose of the Bill

As stated in the Explanatory Memorandum, the purpose of the Migration Amendment (Detention Reform and Procedural Fairness) Bill 2010 (**the Bill**) is:

> to improve the way in which the Migration Act currently operates, by ending offshore processing and the excision policy; ensuring that detention is only used as a last resort; ending indefinite and long-term detention that is the legacy of mandatory detention; and introducing a system of judicial review of detention beyond 30 days.

III Ending offshore processing and the excision policy

While I support the broad objectives of the Bill, including those relating to detention, I will be focusing my comments on the Bill's first objective: ending offshore processing and the excision policy.

By 'offshore processing', I understand the EM to the Bill to mean the processing of 'offshore entry persons' extraterritorially (in another country, e.g. Nauru) or in Australia under the Protection Obligation Determination process. I prefer to refer to the 'excision scheme', rather than 'excision policy', to avoid any doubt that the scheme spans both legislation *and* policy.

The excision scheme is detailed in my submission to the Senate Legal and Constitutional Legislation Committee inquiry into the Migration Legislation Amendment (Designated Unauthorised Arrivals) Bill 2006 and the Senate Legal and Constitutional Legislation Committee inquiry into the Migration Legislation Amendment (Further Border Protection Measures) Bill 2002.[3]

In summary, the excision scheme was introduced in 2001 by amending acts to the *Migration Act 1958* (Cth) (the Act).[4] The amending acts introduced the definition of 'offshore entry person': an unlawful non-citizen arriving at an 'excised offshore place'.[5] The effect of the amendments is that an offshore entry person can be taken to a 'declared country' (e.g. Nauru and PNG)[6] for detention and processing *or* detained and processed in Australia.[7]

Parliament's role in protecting rights through post-enactment scrutiny,' (2008) 32 (1) *Melbourne University Law Review* 83-114; Angus Francis and Sonia Caton, 'Access to Protection for 'Offshore Entry Persons' AKA Asylum Seekers,' *Alternative Law Journal* (forthcoming 2011).

[3] See above n 1.

[4] *Migration Amendment (Excision from Migration Zone) Act* 2001 (Cth); *Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act* 2001 (Cth).

[5] Section 5(1) of the Act.

[6] Section 198A of the Act.

It is not clear to what extent the excision scheme authorises or permits the taking of an offshore entry person (or some other person) to a third country that is not a 'declared country' (see, for example, s 7A and s 245F(9) of the Act).

Whether the amendments authorise the indefinite detention in Australia of offshore entry persons without processing or the prospect of removal is currently the subject of litigation in the High Court.[8]

IV The excision scheme and Australia's international obligations

Does the excision scheme comply with Australia's international obligations?

Australia's international protection obligations under the Refugee Convention[9] and cognate rights instruments are well known to this Committee and I will not go into them in detail here. I would highlight only a few main points relevant to this Inquiry:

- The *non-refoulement* obligation found in the Refugee Convention and cognate rights instruments (ICCPR and CAT) applies irrespective of legal designation of a person or place,[10] as well as extraterritorially (i.e. the obligation applies wherever a state acts).[11]
- While States Parties to the Refugee Convention have the discretion to determine what procedure will govern the refugee status determination process, they are obligated to ensure the process is fair and effect and properly identifies those in need of protection.[12]
- States Parties to the Refugee Convention are also obligated to provide refugees with access to the courts to challenge the legality of a decision determining their entitlement to protection – this ensures greater compliance with the Convention and

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[7] Section 46A and section 189 (3) and (4) of the Act.

[8] *Plaintiff M54/2011 & Ors v Minister for Immigration and Citizenship & Ors* [2011] HCATrans 181 (24 June 2011); *Ahmadi v Minister for Immigration and Citizenship & Anor* [2011] HCATrans 183 (13 July 2011).

[9] Convention relating to the Status of Refugees, Adopted 28 July 1951, entered into force 22 Apr. 1954, 189 UNTS 137 (Refugee Convention), read together with the Protocol Relating to the Status of Refugees (adopted 31 Jan. 1967, entered into force 4 Oct. 1967) 606 UNTS 267.

[10] G. Goodwin-Gill, ' The Principle of *Non-Refoulement* : Its Standing and Scope in International Law ', A study prepared for the Division of International Protection Office of the United Nations High Commissioner for Refugees, July 1993, 89.

[11] G. Goodwin-Gill and J. McAdam, *The Refugee in International Law* (Oxford: Oxford University Press, 3rd edn., 2007), 244-53; J. Hathaway, *The Rights of Refugees Under International Law* (Cambridge: Cambridge University Press, 2005), 335-42; E. Lauterpacht and D. Bethlehem, ' The scope and content of the principle of *non-refoulement* : Opinion ' in E. Feller, V. Türk, and F. Nicholson (eds.), *Refugee Protection in International Law* (Cambridge: Cambridge University Press, 2003), 87-177 at para. 67.

[12] UNHCR, Global Consultations on International Protection, 2nd meeting, ' Asylum Processes (Fair and Effi cient Asylum Procedures) ' , EC/GC/01/12, 31 May 2001, paras. 4 – 5; ExCom Conclusions No. 8 (XXVIII)-1977, paras. (d) and (e), No. 28 (XXXIII) – 1982, para. (c), and No. 85 (XLIX - 1998), para. (r).

helps ensure the fairness of determination processes.[13] Access to the courts must be real and practical (including access to legal representation, interpretation etc).[14]

- States Parties to the Refugee Convention are also under an obligation not to discriminate between refugees and not to penalise refugees due to their mode of arrival.[15]
- A State Party must ensure that there will be a case by case assessment - reviewable in a court of law - of whether an asylum seeker transferred to a third country will not in practice be deprived of the rights acquired by the transferee under the Refugee Convention and cognate rights instruments when coming under the jurisdiction of the State Party.[16]

The excision scheme has, in my opinion, fallen short of these obligations for the following key reasons. Firstly, processing of offshore entry persons taken to Nauru and Manus Island PNG was largely undertaken by Australian officials under an administrative procedure that lacked sufficient procedural safeguards (including independent merits review and access to the courts to challenge the lawfulness of decisions).[17]

Secondly, processing of offshore entry persons in Australia under the Refugee Status Assessment process (2008-Feb 2011) sought to substitute a clear legislative basis and criteria for the grant of a protection visa, authoritatively interpreted by the courts, with 'administrative guidelines' – an approach rejected by the High Court in the cases *M61* and *M69*.[18]

Thirdly, processing of offshore entry persons in Australia under the rebadged Protection Obligation Determination process, while now subject to judicial review following the High Court's decisions in *M61* and *M69*, raises a number of practical obstacles to offshore entry persons enjoying a fair and effective refugee status determination and access to the courts.[19]

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[13] Article 16(1) of the Refugee Convention; Article 14 of the ICCPR; UNHCR, Submission to the Senate Legal and Constitutional Legislation Committee, Inquiry into the Migration Litigation Reform Bill 2005, para. 6; Hathaway, above n 11, 644-647.
[14] UNHCR, Submission to the Senate Legal and Constitutional Legislation Committee, Inquiry into the Migration Litigation Reform Bill 2005, para. 6.
[15] Article 31(1) (non-penalisation) and 3 (non-penalisation) of the Refugee Convention.
[16] See the discussion of this point in Francis, 'Bringing protection home', above n 2, 279-280.
[17] Francis, 'Bringing protection home', above n 2.
[18] *Plaintiff M61/2010E v Commonwealth of Australia*; *Plaintiff M69 of 2010 v Commonwealth of Australia* [2010] HCA 41.
[19] Francis and Caton, 'Access to Protection for 'Offshore Entry Persons'', above n 2.

Recent decisions of the Federal Magistrates Court reveal deficiencies in decision-making by independent merits reviewers.[20]

Fourthly, the application of lesser processing standards to offshore entry persons because of their arrival without prior authorisation amounts to an imposition of penalties in contravention of article 31 of the Refugee Convention, and can, especially where processing is suspended for specified nationalities (as happened with Sri Lankan and Afghani claimants), amount to discrimination in contravention of article 3 of the Convention.

Finally, the excision scheme does not provide for any individualised assessment, reviewable in a court of law, of whether an asylum seeker transferred to a declared country (under s 198A of the Act) or some other country (e.g. Malaysia) (under s 7A or s 245F(9) of the Act) will be deprived of his or her rights under the Refugee Convention and other rights instruments.

V Conclusion

In conclusion, the excision scheme breaches Australia's international protection obligations in a number of ways and should be repealed. For these reasons I agree with the Bill's proposal in Part 3 to repeal the legislative provisions containing the excision scheme in the Act.

I would also recommend the repeal or amendment of s 245F(9), (9A), (9B) and s 7A of the Act to ensure that there is no scope under the Act for the 'taking' of an asylum seeker to a country that is not a 'declared country'.

Lastly, in light of the Full Federal Court's decision in *Ruddock v Vadarlis*,[21] I would recommend consideration of an appropriate amendment to the Act removing any residual Executive non-statutory power to detain and expel unlawful non-citizens.

Thank you for consideration of my submission.

[20] *SZPAC v Minister for Immigration & Anor* [2011] FMCA 517 (7 July 2011),
[21] (2001) 110 FCR 491.