

REFUGEE COUNCIL OF AUSTRALIA

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POSITION PAPER

MIGRATION AMENDMENT (DESIGNATED UNAUTHORISED ARRIVALS) BILL 2006

17 MAY 2006

1. The Refugee Council of Australia wishes to record its serious objections to the Bill, the statutory purpose of which is set out in the Explanatory Memorandum clarified by Ministerial pronouncements as to its deterrent purpose. It is the Council's view that it is an ill-conceived piece of legislation which should never become law.
2. The law which the Government seeks to put in place, coupled with various administrative arrangements cutting across a number of Ministerial portfolios, raise the prospect of breaches of international law and violations of Australia's international obligations. The previous legislative and regulatory scheme which put in place the so-called "Pacific Solution", concerned 'secondary movers' — refugees who had fled from their countries of origin and had transited other countries before attempting to land in Australia. The catalyst for the introduction of the Bill is the flight of West Papuan refugees – refugees fleeing directly from a country of persecution. They are in a

qualitatively different position to any previous boat arrivals on the mainland (save for Timorese coming directly from Indonesia). The Bill is designed to curb any further movements of this kind.

3. Even if the process contemplated by the Bill is again applied to asylum seekers other than West Papuans from Indonesia, it will still retain all the shortcomings experienced in the earlier use of the "Pacific Solution". It should be noted that 25 of the last 27 remaining failed asylum seekers on Nauru were brought to Australia last year, on the expert advice of health professionals, because of serious mental health concerns.
4. The Bill directly targets people who are fleeing well-documented persecution. It has been introduced because 42 West Papuan refugees were granted protection visas. They were granted protection on the basis of credible evidence of persecution and upon information from authoritative sources. This occurred in a transparent and open process and with full legal representation.
5. Despite the assurance by the Minister for Immigration and Multicultural Affairs, Senator Vanstone, that "Australia's approach to unauthorised arrivals will continue to reflect our commitment to our international protection obligations" there are strong arguments for saying that the Bill both in its content and in its implementation will breach these obligations.
6. Any act of turning back boats which reach Australian waters coming directly from a country of persecution and returning its

occupants to that country, or providing intelligence, information or identifying boats to the Indonesian navy enabling them to be turned back, would be a clear breach of Article 33 of the Refugees Convention. While this is not a necessary result of the Bill the policy of deterrence which lies behind the proposed excision of the mainland from the migration zone will have the effect of creating a risk of such situations arising. There are serious issues as to the rules of engagement which will apply to Australian naval and coastguard craft. It is vital that there is no repetition of the use of the operational procedures in place during Operation Relex which authorised boats being towed into international waters irrespective of whether claims for asylum had been made. On no account should the Australian navy or coastguard be permitted to intercept or interdict boats and hand back its occupants to an alleged persecutor without an assessment of their fears or need for protection.

7. As with 'Children Overboard' and the use of the military during the Tampa crisis, our service personnel particularly in the navy and coastguard will again be placed in extremely difficult moral and legal situations — with the same potential for creating morale problems as happened during that period.
8. The Bill targets persons fleeing from the island of New Guinea, who may attempt to cross the Torres Strait in traditional boats and be found in life-threatening situations. Our service personnel have international obligations under maritime conventions to assist persons at risk, not to put them at greater risk by refusing to bring them to the Australian mainland.

9. Treating unauthorised boat arrivals coming directly from a country where their lives and freedoms are threatened in the manner proposed by the Bill, and thus creating two classes of "refugees", is contrary to the spirit and purpose of the Convention. It will have the effect that no unauthorised boat arrival in Australia, notwithstanding how strong their claims are, will be processed under the Australian domestic refugee determination system. Any person arriving with a visa, no matter how weak their claim, will be entitled to be processed under the Australian domestic refugee determination system. A temporary visa holder who becomes unlawful after visa expiry and applies for protection while in detention will be afforded legal advice, merits review and judicial review (if required), in contrast to the denial of rights for asylum seekers arriving in an unauthorised manner by boat.

10. The Bill can be seen to contravene Article 31 of the Refugee Convention by imposing a penalty on account of illegal entry due to a combination of:

- I) a clear policy of deterrence, acknowledged by the Minister, which will be coupled with physical measures to affect this
- II) specifically targeted legislative changes to cope with a particular group of asylum seekers coming from West Papua which also directly discriminate against any unauthorised arrivals on the basis of their mode of their arrival(cf arrivals by plane)

- III) the notional excision of the whole of Australia from the Migration zone which is squarely directed at the above group coming directly from a country of persecution by boat and does not apply to unauthorised plane arrivals (if they manage to reach Australia) or visa holders arriving conventionally by plane or ship.
- IV) the transfer of any asylum seekers to a third State (Nauru) where they will be denied the full benefits of the status determination system otherwise available to them in Australia and will be processed under a system which does not meet the standards Australia has set for its own domestic processes. Such a system without any checks and balances may lead to *refoulement* of claimants who would be successful under the existing system)
- V) the placement of asylum seekers in a detention situation with **proven and well-known** destructive long-term mental and physical effects for an indefinite period with very little prospect of re-settlement. Other states will as they have in the past see this as Australia's problem for it to solve.

11. There is a further possible breach of Article 3 of the Convention given the clear purpose of the proposed Amendments. That article is breached if Australia applies the provisions of the Convention in a discriminatory manner against persons on the grounds of their country of origin.

12. Nauru, which is not a signatory to the 1951 Refugee Convention is under no legal obligation not to return or expel refugees.
13. As has been noted by the United Nations High Commissioner for Refugees in the absence of anything approximating a mass influx, the proposed changes involve a State with a fully functioning and credible asylum system deflecting elsewhere the responsibility to handle claims made **on its own territory**.
14. Unauthorised asylum seekers will no longer be detained in Australia and under Australian law. This in itself opens up serious questions as to detention standards, length of detention and accountability of those responsible for detention. The Bill reflects an indefensible double standard in relation to detention. As a matter of principle it renders meaningless much of the constructive reform introduced in response to the cultural problems in DIMA, identified in the Palmer and Comrie Reports and noted in successive reports by the Commonwealth Ombudsman, insofar as the significantly improved detention standards being put in place in Australia will not apply to Nauru.
15. Despite the insertion into the Migration Act of the principle that "children shall be detained as a measure of last resort" this proposal will see all boat arrival children detained as a measure of "first resort" with the same risks of serious health damage as occurred in the past (notwithstanding day release). Exposure to psychological harm will not be removed no matter how "liberal"

the detention regime is. The Council shares the concerns of the President of the Human Rights and Equal Opportunity Commission (HREOC) and the Human Rights Commissioner that the proposed changes breach Australia's obligations under the Convention of the Rights of the Child including the obligation to act in the best interests of the child (Article 3(1)) and the principle (enshrined in our domestic legislation) that children should only be detained as a measure of last resort (Article 37 (b)).

16. Human rights reports on West Papua stress the continuing repression of political opponents including the use of torture, arbitrary detention and sexual assault. Therefore many of the asylum seekers targeted by the Bill will be victims of trauma whose illness can only be exacerbated by long-term detention on Nauru with limited health care and community contact.
17. Asylum claims will be processed by Australian immigration officials with limited internal review, but not under Australian law, with no independent scrutiny or accountability mechanisms and no access to genuine merits review by the Refugee Review Tribunal or judicial review by the courts. Statistics show that RRT merits review is a necessary part of the domestic asylum procedures. For some countries, the RRT found that 89% of visa refusals by DIMA were wrong. Denying this level of review means many refugees will be denied the protection they need. Since February 2003 the number of judgments setting aside RRT decisions or involving orders remitting matters by consent is somewhere in the range of 500 to 750 cases. The risk of

wrong decisions being made with fatal consequences of *refoulement* will be magnified in the proposed system which has no checks and balances.

18. Australia will accept no obligations towards any refugees other than to see whether a 'third' country will take them. Under the proposed scheme there is no set time for offshore processing of claims for asylum and no set time in which a person who is determined to be a refugee must be re-settled in a third country. In the previous incarnation of the Pacific Solution, of the 1063 refugees eventually resettled only 46 (4.3%) were accepted into countries other than Australia and New Zealand. There is genuine concern that other countries are unlikely to accept any resettlements from this new "Pacific Solution". This will lead to indefinite detention.

19. The potential for asylum seekers to be detained for an excessive period raises serious concerns about arbitrary detention in breach of Article 9(1) of the International Covenant of Civil and Political Rights as noted by HREOC.

20. Government estimates are \$240 million has been spent so far on Nauru - that comes to approx \$195,000 per asylum seeker housed on Nauru.

21. The proposed Amendments to the Migration Act contained in the Bill harm Australia's international reputation. They will again create the impression that we are seeking to dump our 'problems' on small less-developed and/or dependent nations.

We will be seen as an unwelcoming country particularly in our treatment of a people with whom we have a special relationship and to whom we have a lasting sense of obligation given their sacrifices of the Second World War.

22. The proposed changes are a denial of Australia's involvement in regional burden-sharing of refugees. Papua New Guinea has been the country of first asylum for more than 10,000 West Papuan refugees since 1985. In 2005, 185 West Papuan asylum seekers underwent refugee status determination in Papua New Guinea and have been granted permissive residency permits. The number of West Papuans arriving in Australia is small by comparison to the burden carried for over two decades by Papua New Guinea.

23. Perceptions of Australia as lacking compassion and violating international law could undermine Australia's efforts to promote human rights, good governance and the rule of law abroad in future circumstances where it is in our national interest to do so.

24. In signalling a further withdrawal from the international system of protection, the proposal sets a negative precedent that could encourage other developed countries to abrogate their responsibilities as has happened before.

25. The introduction of this Bill demonstrates that our refugee laws are being determined and rewritten by a foreign State. This is not an initiative of the responsible Department seeking to

improve the quality of our asylum processes. There is no doubt that the proposed law is in direct response to Indonesian anger over the grant of protection visas to the 42 West Papuans. Australian laws should not be enacted at the dictate of a country which itself falls significantly short of democratic and human rights standards and yet who rejects any criticism of its own – particularly criminal – justice system. The introduction in this way of foreign policy considerations into an asylum determination process giving effect to Australia's treaty obligations under the Refugee Convention will render these obligations meaningless in practice.

26. Moreover, Australia is not helping those democratic forces which do exist in Indonesia by not making an improvement in human rights conditions in West Papua a *sine qua non* for a sound bilateral relationship. Instead we are indicating that we are prepared to endorse the activities of the TNI and other anti-democratic forces engaged in repression. This can only serve to generate more pressure for refugee flows from West Papua, both to Australia and to Papua New-Guinea. The approach of placating Indonesia nationalism does nothing to encourage genuine democratic forces within Indonesia.

27. It is vital to our national interest and our ethical values as a democratic country that we do not bow to external pressure to compromise our commitment to protecting human rights. As an international citizen, Australia will not be respected for repudiating those values. The proposed law sets a very bad precedent for future relations with other States

28. We should be making it known to Indonesia that we consider it is fundamental to peace and stability in the region that the human rights and welfare of all Indonesians be fully protected and differences resolved peacefully
- 29.** The Bill runs counter to all the positive changes which the Department of Immigration and Multicultural Affairs is currently implementing, including the major improvements in the treatment of detainees in Australia, and turns the clock back to a situation which most Australians believed had ended.
30. The effect of these proposed changes amount to a de facto reservation on Australia's accession to the Refugees Convention.
31. The Bill in its present form or, in any amended form which denies asylum seekers access on Australian territory to the full benefits of the refugee determination processes which would otherwise be available to them as asylum seekers arriving on mainland Australia, or involves any form of detention or a detention-like conditions for children and families, represents bad policy and is simply put - bad law.

John A. Gibson

President

