Submission to the Senate Legal and Constitutional Legislation Committee regarding the

Migration Amendment (Designated Unauthorised Arrivals) Bill 2006

22 May 2006

Set out below are submissions to the Senate Legal and Constitutional Legislation Committee (**'Committee'**) regarding the *Migration Amendment (Designated Unauthorised Arrivals) Bill 2006* (**'Bill'**). Our centre is strongly opposed to the Bill.

1. ABOUT THE IMMIGRATION ADVICE AND RIGHTS CENTRE

1.1 Established in 1986, the Immigration Advice and Rights Centre (**IARC**) is a specialist community legal centre in New South Wales providing free advice, assistance, education, training, and advocacy in law and policy reform in the area of immigration and refugee law. Engaging the services of around 50 volunteer migration agents and administrative staff, IARC provides free and independent advice to almost 5,000 socio-economically disadvantaged people each year. A further 1,000 people or so attend our training seminars annually, while thousands more subscribe to or access IARC's plain English publications which seek to demystify Australia's immigration law and policy.

1.2 In keeping with its goal of maximizing access to immigration legal information, IARC produces several plain English publications including:

- *The Immigration Kit*, a practical guide for immigration advisers;
- The *Immigration News*, a quarterly publication setting out the latest Australian immigration law and policy developments;
- IARC Information Sheets which provide a step-by-step guide to the application and review process for various visas and other aspects of Australia's immigration processes;
- IARC's website, which provides access to the above Information Sheets, and to the latest information regarding IARC's services.

1.3 IARC also conducts training /information seminars for members of the public, the migration profession, community service providers and community groups. These seminars range in content and objectives from raising awareness of IARC's services to informing communities of their immigration rights and obligations.

1.4 Users of IARC's services are generally low or nil income earners and frequently have other disadvantages including low level English language skills, past torture/ trauma, domestic violence etc.

1.5 Since its establishment in 1986 IARC has developed a high level of specialist expertise in the area of immigration law and procedure. We have also gained considerable experience of the administrative and review processes applicable to Australia's immigration law. IARC uses its expertise to promote the interests of the most vulnerable participants in Australia's immigration system, and advocates, through forums such as this enquiry, to maximize access and equity in Australia's migration processes.

2 HOW THE BILL OPERATES

2.1 This Bill effectively excises the entire Australian mainland and creates an new category of people who, while technically having reached Australian territory:

- will not be able to make any valid visa application in Australia, including but not limited to refugee applications;
- will not have access to any of Australia's immigration process at the primary, merits review or judicial review stage;
- may be taken to offshore processing centres (most likely Nauru) where they will be detained indefinitely without access to legal advice or assistance;
- may claim refugee status in offshore processing centres where officers of unspecified qualifications and training will engage in an unspecified process of assessing refugee claims. These processes and, ultimately, decisions, will not be subject to external or independent review;
- if found to be a refugee within the meaning of the United Nations Convention on the status of Refugees (as amended by the subsequent protocol), remain detained in the offshore processing centre until such time as another country (having the same obligations as Australia does under the Refugee Convention) accepts to resettle that refugee. There are no time limits specifed for the process of assessment and resettlement, meaning that asylum seekers and refugees, including women and children, could remain in detention for years.

2.2 These people, likely to include women, children, sufferers of torture and trauma and people with physical and psychological care needs, are categorized under the Bill as 'designated unathorised arrivals' (**'DUA'**). They are defined by the circumstances in which they arrived in Australia, ie, persons who either:

(a) entered Australia at an excised offshore place after the excising time; or
(b) entered Australia by sea on or after 13 April 2006.

2.3 A person is taken to have 'entered Australia by sea' if they traveled to Australia by sea and entered the Migration Zone (whether or not by sea), or entered the Migration Zone by air after being found at sea and rescued or detained.

2.4 A DUA may then be taken from Australia to a country in relation to which a declaration is in force. It is expected, from the Minister for Immigration's Budget

media release on 9 May 2006, that processing will take place on Nauru, the Minister stating that:

> the OPC's (offshore processing centres) will be consolidated on Nauru, through closing one site and maintaining the other in a state of high readiness. This reflects the recent changes to processing arrangements for unauthorized boat arrivals.

Unfortunately, this statement presumptuously presupposes the successful enactment of this Bill.

The Minister also stated that "Manus (Island) will be retained as a contingency facility'.

3 CONCERNS REGARDING THE BILL

3.1 Not merely an extension of the Pacific Solution

3.1.1 This Bill is not merely an extension of the Pacific Solution. The Pacific Solution was promoted by the Government as a deterrence initiative intended to provide a disincentive for secondary movement, ie, to send the message that asylum seekers should seek refugee status in the first country in which they could obtain effective protection, rather than 'forum shopping' or making an onward journey to Australia to seek protection. This Bill goes further, targeting those for whom Australia is the first country of asylum, and who have no other country in which to obtain effective protection. This Bill does not seek to deter secondary movement, it seeks to limit access to Australia's immigration and refugee determination processes by those who have sought protection in Australia as a first place of asylum in circumstances where there are no other obvious options for protection.

3.2 Balancing Human Rights, Border Control and Diplomatic Relations

3.2.1 IARC supports an immigration system which balances the interests of human rights and border control. The Bill, however, does not provide any balance and simply denies access to Australia's immigration processes based on a persons mode of arrival.

3.2.2 We recognise the importance of law and policy which clearly asserts Australia's right as a sovereign nation to determine who travels to, enters and remains within our borders. It must also be recognized, however, that Australia is part of a global environment and has undertaken, through various international conventions which have been ratified under Australian law, to recognise and uphold fundamental human rights, and to share responsibility with other nation states for providing protection to refugees. This Bill, if passed, will undermine Australia's commitment to the international human rights standards it has undertaken to uphold.

3.2.3 What is more concerning is the perception, both domestically and internationally, that Australia is willing to sacrifice its commitment to human rights, to the extent that this is reflected in its immigration and refugee determination processes, at the behest of Indonesia, the authorities of whom the recent West Papuan asylum feared persecution. Allowing an internationally recognized instrument for the protection of refugees to be manipulated by political pressure exerted by a refugee producing nation (and in this

case, the authority in relation to whom persecution was claimed) sends a dangerous message which undermines the purpose of the convention and should not be supported.

3.3 Australia's International Obligations

3.3.1 As a signatory to the:

- *Convention Relating to The Status of Refugees* and the subsequent *Protocol Relating to The Status Of Refugees* (jointly referred to in this submission as the **'Refugee Convention'**);
- *Convention on the Rights of the Child* (**'CROC')**, and
- *International Covenant on Civil and Political Rights* (**'ICCPR')**.

Australia has made a commitment to uphold the principles and obligations stated in those conventions. Several core obligations and principles reflected in these instruments are grossly compromised by the Bill. They are discussed in detail below.

3.4 Detention of Children

3..4.1 While the Bill allows the Minister to exempt specified persons from being caught by the definition of DUA and therefore from being detained in an offshore processing centre, the Minister's discretion is:

- non-compellable;
- is contingent on the existence of regulations (see proposed Section 5F (6) of the Bill). There is no indication as to what the content of those regulations, if any, may be;
- not subject to any accountability or transparency mechanisms or review;
- not subject to any parameters or guidelines, leaving it open to political influence.

The EM provides no indication that children will be treated any differently from other DUA's, meaning that children could be detained for extensive periods in remote processing centres, without access to basic facilities such as education or health.

3.5 Rights of the Child

3.5.1 While the Bill offends the entire underlying principle of the Convention on the Rights of the Child (**'CROC')**, in particular it violates the following provisions (our emphasis):

Article 2

1. State Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction **without discrimination of any kind**, **irrespective of** the child's or his or her parent's or legal guardian's **race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.**

2. States Parties shall take all appropriate measures to ensure that the **child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.**

Contrary to these provisions, this Bill discriminates against children whose parents have fled a country in which they are persecuted because of their race, religion, ethnicity, membership to a particular social group or political opinions, or who, in the words of the Minister for Immigration, may use Australia as a 'staging post' to voice political opinions. Further, the Bill establishes a process by which such children will be punished by:

- imposing indefinite detention;
- denying them access to Australia's onshore immigration processes (and, accordingly, the only means by which they can regularize their immigration status)
- denying them access to independent merits and to judicial review;
- potentially exposing them to the risk of refoulement (see section 3.10 below).

3.5.2 Not only does the prospect of any length of detention offend these articles, it also flies in the face of the principle asserted in section 4AA of the *Migration Act 1958*, that:

> The Parliament affirms as a principle that a minor shall only be detained as a measure of last resort.

3.5.3 Article 3 of CROC provides that:

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, **the best interests of the child shall be a primary consideration.**

2. States Parties undertake to ensure the child **such protection and care as is necessary for his or her well-being**, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

3.5.4 Article 6 provides that

2. States Parties shall ensure to the maximum extent possible the survival and development of the child.

Detention of children, or their parents, is fundamentally inconsistent with the positive development of a child. This is particularly so in circumstances where the duration of detention is undefined and potentially extensive, and where children and parents have no certainty regarding their immigration status.

3.5.5 Article 9 provides that

1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.

The Bill creates an irreconcilable predicament. It necessitates either detaining children in offshore processing centres for extensive periods, with their parents, or separating children from their parents if children are to remain out of detention. Either option violates Article 9 of CROC.

3.5.6 Article 37 provides that:

> States Parties shall ensure that:
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> (b) **No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time**;

This principle is also reflected in section 4AA of the *Migration Act 1958* which states that 'a minor shall only be detained as a measure of last resort'. Yet the Bill and Explanatory Memorandum (**'EM'**) provide no comment on how this principle will be reconciled with offshore processing and the inevitable detention of children which will result.

3.6 The Refugee Convention – Responsibility sharing between States

3.6.1 The preamble to the Refugee Convention states that:

> Expressing the wish that all States, recognizing the social and humanitarian nature of the problem of refugees, will do everything in their power to prevent this problem from becoming a cause of tension between states.

This fundamental principle of responsibility-sharing between states underpins the effective operation of the Refugee Convention. Such a principle requires each signatory state to honour its obligations under the Refugee Convention, and to accept shared responsibility for those who seek protection within their countries.

3.6.2 By effectively:

- excising the entirety of Australia:
- subjecting DUA's to removal to offshore 'declared countries' for processing;
- taking the position that, if DUA's are found to be refugees, resettlement will be sought in a 'third country',

Australia is taking the position that it will not only remove asylum seekers, but it will not necessarily accept for resettlement those found to be refugees. This position was made clear by Minister Vanstone, who stated in a recent interview:

> We'll be looking to place them [ie those found to be refugees] in other countries. It'll be as effective as the Pacific Solution has been in the past. Namely, it'll be a deterrence to people using Australia as a staging post…[1]

In response to the further question ' Will it be the first preference to resettle them to a third country, or will the first preference be to resettle them in Australia? The Minister responded:

[1] ABC Radio, PM, *Asylum seekers to be pushed offshore for processing'* 13 April 2006

> No, the press release means what it says, they'll be resettled to a third country, that's clearly the first preference. [2]

3.6.3 This manifests a reluctance on the part of the Australian government to accept responsibility to offer protection to those found to be genuine refugees and whose first place of asylum was Australia. The Minister's position places the primary obligation on other nations first, and failing that, Australia may or may not consider offering protection. The Minister's statement assumes that Australia will not be a first option for asylum for boat arrivals and erroneously assumes tiers of responsibility under the Convention, ie that other countries should accept responsibility for refugees who first sought protection from Australia. This is inconsistent with the principle of shared responsibility which is essential for the continued integrity and operation of the Refugee Convention. The Bill attempts to shift responsibility for refugee protection to other countries first, and adopts the position that Australia may consider offering protection if other 'preferred' options fail. Not only is this offensive to other states which the Bill assumes will carry Australia's share of the responsibility, it also sets the scene for a protracted period of detention for those found to be refugees while States debate who should take responsibility.

3.7 Non-Discrimination

3.7.1 Article 3 of the Refugee Convention provides that:

> The Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin.

3.7.2 This Bill is clearly aimed at asylum seekers from West Papua, and has been introduced as a direct and immediate response to political pressure applied by Indonesia following the grant of protection visas to 42 West Papuans in Australia in March 2006. Accordingly, the Bill Article 3 of the Refugee Convention. Any doubt as to the intended target group was removed by the Minister for Immigration's comment that the changes to processing will 'be a deterrence to people using Australia as a staging post' (referring to the West Papuans' position on independence from Indonesia). She added "Should there be people who would, were this change not made, seek to use the Australian mainland as a means for voicing protests about other countries will not be able to do that. We will not allow that to happen." [3]

3.8 Access to Merits and Judicial review

3.8.1 Article 16 of the Refugee Convention provides that:

> 1. A refugee shall have free access to the courts of law on the territory of all Contracting States.
> 2. A refugee shall enjoy, in the Contracting State in which he has his habitual residence the same treatment as a national in matters pertaining to access to the courts, including legal assistance…'

3.8.2 The Bill excludes all DUA's (at least some of whom can be assumed will meet the refugee definition) from access to legal assistance and to participation in independent merits (other than internal review) and judicial review. This is extremely concerning given:

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[2] ibid
[3] ibid

- That the consequences of a wrong decision could result in an applicant being returned to a situation in which their life and human rights are at risk;
- It is unclear what qualifications or training assessing officers will have, and what procedures will be followed to ensure procedural fairness;
- It is unclear whether applicants will have access to interpreters in order to articulate their claims;
- It is unclear what processes will be employed to test document authenticity;
- Statistics from the Refugee Review Tribunal (**'RRT'**) Annual Report 2004/5 indicate that 33% of primary decisions (ie decisions made by the Department of Immigration) were set aside. That is 33% of 3,033 cases finalized by the RRT. That is approximately 1000 cases where the primary decision was found to be wrong, and where, in the absence of independent merits review, the applicant would have been returned to a situation of persecution and violation of their human rights.

3.8.3 The absence of access to independent merits and judicial review is not only contrary to the Refugee Convention, but also to the recommendations made in the Palmer and Comrie reports regarding accountability and transparency. It is contradictory for the Government to commit an enormous $735 million budget to ensure openness and accountability in Australia's immigration processes while simultaneously pursuing expensive measures to remove asylum seeker processing from public or independent scrutiny.

3.8.4 While the Explanatory Memorandum (**'EM'**) to the Bill states that DUA's will be subject to "a reliable refugee determination process, including a merits review opportunity for those found not to be refugees at first instance"[4], it does not make clear what that process is. Item 28 of the Bill clearly states that DUA's are prohibited from instituting or continuing court proceedings. Further, asylum seekers processed offshore are currently prohibited from seeking merits review at the RRT, and there is nothing in the Bill to alter this. The statistics referred to in paragraph 3.8.2 make the importance of independent review clear. The absence of independent merits and judicial review is also contrary to the Minister's statement contained in her Budget media release on 9 May 2006 that:

> My department has committed to change, the Government recognises this and has backed us to implement new initiatives to become more open and accountable, with better systems, better trained staff, and more satisfied clients." [5]

3.9 Penalising Refugees Unlawfully in the Country of Refuge

3.9.1 Article 31 of the Refugee Convention states:

> 1. 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 in the sense of article 1, 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.

[4] EM, para 10
[5] Palmer and Comrie Reports Guide DIMA Budget, 9 May 2006

2. The Contracting States shall not apply to the movements of such refugees, restrictions other than those which are necessary and such restrictions shall only be applied until their status is regularized or they obtain admission into another country.

3.9.2 This Bill clearly contravenes this obligation. The Bill targets those who have come directly from a territory where their life was threatened and have entered Australian territory without authorization.

3.9.2 The Bill removes such people to remote offshore processing centres and denies them access to Australian immigration processes and the mechanisms through which they can regularized their status (Item 10 of the Bill prohibits DUA's from making a valid application in Australia) thereby restricting the persons movement indefinitely.

3.9.3 Indefinite detention and the denial of access to legal assistance, merits or judicial review can only be viewed as a penalty. Such processes are contrary to the principles set out in subparagraph 2 of Article 31.

3.10 Expulsion

3.10.1 Article 33 of the Refugee Convention provided:

1 No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

As stated above, it is most likely that DUA's will be removed to offshore processing centres in Nauru. Nauru is not a signatory to the Refugee Convention. Accordingly, there is no guarantee that refugees will not be refouled in contravention of Article 33. By sending asylum seekers to a country (ie Nauru) which offers no protection or promise of non-refoulement, Australia is being derelict in its obligations under Article 33 of the Refugee Convention.

Further, the absence of independent review of decisions, when considered with the RRT's set aside rate of 33% of primary refugee decisions, means that asylum seeker processed offshore and whose cases may have been successful if independently reviewed, may be refouled.

3.11 Co-operation of the National Authorities with the United Nations

3.11.1 Article 35 of the Refugee Convention provides:

1. The Contracting States undertake to co-operate with the office of the United Nations High Commissioner for Refugees, or any other agency of the Untied Nations which mace succeed it, in the exercise of its functions, and shall in particular, facilitate its duty of supervising the application of the provisions of this convention.

In a UNHCR Briefing Note dates 22 May 2006, it was noted that it had been given, effectively six working days in which to make submissions to this inquiry. This short timeframe in which to make comments on such a significant piece of proposed legislation does not reflect well on the Government's commitment to engage in meaningful dialogue with the UNHCR, or to 'facilitate its duty of supervision the applications of the provisions' of the Refugee Convention.

4 OTHER CONCERNS

4.1 Annual Reporting

4.1.1 Part 8D of the Bill proposes a new section 486R to the *Migration Act 1958*, setting out reporting requirements under the Bill. It provides that the Secretary must report to the Minister annually regarding arrangements for DUA's (including arrangements for assessing refugee claims, accommodation, health care and education of DUA's, the number of asylum claims assessed during the financial year, and the number of DUA's found to be refugees.)

4.1.3 Interestingly, there is no express mention of processing times, the number of minors held in detention, any independent assessment of the arrangements, any transparency regarding the processes in place to assess asylum claims. As the only mechanism resembling anything close to transparency, this annual reporting requirement is inadequate in its prescribed content, its lack of independence and its infrequency.

4.2 Offshore Processing Problems Generally

It is anticipated that offshore processing of DUA's will form part of the Department of Immigration's Offshore Humanitarian program and processing arrangements. Processing within that program has its own problems which we expect will also be experienced DUA's who are processed offshore.

4.2.1 ***Program Numbers***

According to the Department of Immigration's 2004/5 Annual Report, 90,539 offshore humanitarian applications were made during that financial year. 12,096 visas were granted to offshore applicants. 114,060 applications were finalized in that year (combination of applications lodged in 2004/5 and those lodged earlier). This means that 101,964 applications were refused.

4.2.2 Inadequate Content of Refusal Letters – Absence of Accountability

Those refused offshore humanitarian visas receive a standard 2-3 page refusal letter (see attachment 1 and 2). The letters provide very little information regarding the reasons for the refusal. This has been an ongoing transparency and accountability issue in offshore refugee processing. Onshore refugee refusals, by comparison, contain far more detail. A sample onshore refusal letter is attached and marked 3.

Interestingly, the caseload which can access merits review is the onshore refugee caseload, yet their refusal decisions contain much more detail and provide some opportunity to assess whether the decision maker correctly applied the law and considered all relevant facts.

The Offshore humanitarian caseload, which cannot access merits review, are given very little information in their refusal letters. The information is so inadequate that it is impossible to assess whether the case-officer has understood the law, applied the law correctly, taken into account all relevant facts, taken into account irrelevant facts,

applied procedural fairness, etc. The absence of merits review makes it impossible to ascertain whether a matter has been properly processed.

If DUA's processed offshore receive the same limited information in refusal decisions there will effectively be no way to ascertain how cases are being processed. This lack of transparency cannot be supported, especially where the consequences are potential refoulement of an applicant to a situation in which they may be harmed.

4.3 Contrary to the Government's Commitment to 'Cultural Change' in Immigration matters

4.3.1 Given the systemic problems within the Department, identified by the Palmer and Comrie reports, various Ombudsman and National Audit Office reports, it is impossible to justify a Bill which limits accountability and access to independent review particularly in respect of such a vulnerable category of people.

4.3.2 The lack of legal knowledge and training amongst those delegated to apply complex legislation is a criticism which has been accepted by the Department and the Government, as reflected by the $735 million budget increase to the Department. In this context it is a disappointing contradiction in policy for the Department, on the one hand to state and fund a commitment to cultural change, transparency and accountability, while on the other hand, removing refugee processing from public scrutiny and independent review.

We thank the Committee for the opportunity to comment on the Bill.

IMMIGRATION ADVICE AND RIGHTS CENTRE INC.

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Attachments 1-3 follow