Australian Government
Department of Immigration and Multicultural Affairs

MIGRATION AMENDMENT (DESIGNATED UNAUTHORISED ARRIVALS) BILL 2006

Submission of the Department of Immigration and Multicultural Affairs to the Senate Legal and Constitutional Legislation Committee

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INTRODUCTION

The offshore processing arrangements introduced in October 2001 have been extremely successful in contributing to the integrity of Australia's borders and reducing the incentives for people to make unauthorised and hazardous voyages to Australian territories while maintaining Australia's strong commitment to refugee protection.

Under the existing arrangements, unauthorised arrivals at certain offshore parts of Australia identified as 'excised offshore places', are prevented from making valid applications for visas, including protection visas, in Australia, unless the Minister determines that it is in the public interest for unauthorised arrivals to apply for a specified class, or specified classes, of visa. Further, such persons are liable to be removed to a declared country outside Australia for processing of any claims that they are owed refugee protection under the *United Nations 1951 Convention Relating to the Status of Refugees* as amended by the *1967 Protocol Relating to the Status of Refugees* (the Refugees Convention).

These arrangements have proven their worth in ensuring that the integrity of Australia's borders can be maintained, while preserving Australia's strong commitment to refugee protection. However, it is important that the Government continually review its policy and the legislation in this critical area to ensure that proper arrangements are in place to deal with new developments. Border protection requires continued vigilance and the Government has formed the view that there should be some redefining of the persons to whom the offshore processing arrangements will apply.

One criticism of the existing arrangements is that it seems incongruous that an unauthorised boat arrival at an excised offshore place is subject to offshore processing arrangements, while an unauthorised boat arrival travelling, in some cases only a few kilometres further to the Australian mainland, is able to access the onshore protection arrangements.

The essence of this Bill is to broaden the group of people to whom offshore processing arrangements will apply. This expanded group, referred to as 'designated unauthorised arrivals', will now include all people who arrive unauthorised by sea on the Australian mainland (meaning a place other than an excised offshore place) on and from 13 April 2006, regardless of the location at which they are identified by Australian authorities.

AUSTRALIA'S INTERNATIONAL OBLIGATIONS

Commitment to International Protection

Australia's approach to unauthorised arrivals will continue to reflect our commitment to our international protection obligations. Australia has a proud and long tradition as a resettlement destination for refugees from around the world. Australia has taken more than 660 000 refugees since 1945, and today is one of the top three resettlement countries in the world. In 2005-06, 6000 will be resettled in Australia under the refugee program, and another 7000 will arrive under the Special Humanitarian Program.

Australia takes seriously its obligation not to refoule refugees and does not remove people where this would be in breach of its protection obligations under the Refugees Convention or other relevant human rights instruments.

Refugees Convention obligations

The Refugees Convention does not create a right for people to select their preferred country for processing their claims, or the country in which protection will be provided if they are found to be refugees. A succinct authoritative summary of the international law on this matter is provided by Justice Gummow of the High Court in *MIMA v Ibrahim* (2000). (See Attachment A)

The Refugees Convention does not set down any particular process for signatory countries to use in deciding who are refugees. The Convention requires that contracting states shall apply its provisions to refugees without discrimination as to race, religion or country of origin. However, under the Convention, it is open to a country to make different arrangements to address its refugee protection obligations for people on the basis of whether their entry to the country was lawful or unlawful. The Refugees Convention itself differentiates between refugees who are lawfully in the host country and refugees whose entry or presence in the country is illegal. The Convention has different treatment arrangements for refugees depending on that distinction.

Australia's experience has been that unauthorised boat arrivals to Australia can comprise a wide range of asylum seekers with regards to their race, religion and country of origin. Many of these people travel large distances from countries outside the immediate region, but some travel from countries closer to Australia. The features of the unauthorised boat arrival caseload have proven to be subject to substantial and unpredictable changes. The proposed legislative changes will apply to all designated unauthorised arrivals irrespective of their race, religion, or country of origin.

The planned changes to Australian legislation will widen the class of unauthorised arrivals covered by the existing offshore processing arrangements.

Offshore processing arrangements are an administrative measure and do not impose a fine, prosecution, imprisonment or other such penalty on asylum seekers on the basis of illegal entry. There is, accordingly, no ground to consider that the offshore processing arrangements are inconsistent with Australia's obligations under the Refugees Convention, in particular Article 31.

The arrangements ensure that people taken to Offshore Processing Centres (OPCs) have access to a reliable refugee determination process and are safe and cared for. This is also the case while any people found to be refugees await resettlement or plan voluntary return to their homeland. Some 1550 people have been processed under these arrangements since 2001 and not one person found to be a refugee has been returned to their homeland against their will.

The Refugees Convention does not prescribe how states must give effect to their international obligations. The Convention (Article 31(2)) allows a host country, where necessary, to restrict the movements of a refugee who is unlawfully within the country until the person's immigration status is regularised or they are admitted into some other country. The offshore processing arrangements draw on this flexibility, to remove certain unauthorised arrivals from Australia to another country. The Australian arrangements ensure that all people taken offshore for processing will continue to have access to a

reliable refugee assessment process. They will also be protected from return to their homeland if they are found to be refugees.

People transferred to OPCs are not detained under the *Migration Act 1958* or any other Australian law. On Nauru residents of the offshore processing centre are accommodated under Government of Nauru visa arrangements. These visas impose some restrictions on movement and place of residence for the visa holder, in accordance with domestic law in Nauru. While Nauru is not a signatory to the Refugees Convention, these arrangements are consistent with the obligations on signatory states which retain the capacity to limit the place of residence or freedom of movement within their territory of refugees and asylum seekers in accordance with their domestic regulations.

HOW THE OFFSHORE PROCESSING ARRANGEMENTS IMPLEMENT AUSTRALIA'S REFUGEES CONVENTION OBLIGATIONS

Codification of key safeguards in the *Migration Act 1958* (section 198A)

The *Migration Act 1958* provides that a person landing in an excised offshore place is not entitled to make an application for a visa, unless the Minister considers this to be in the public interest. The legislation also provides for people who arrive at an excised offshore place to be taken to a "declared country". Under section 198A, a country can be declared only where it meets conditions set out in that section which ensure that the removal of the individual would not be in breach of Australia's protection obligations.

Section 198A ensures that an offshore entry person can be removed from Australia to another country for processing only where the Minister has formally declared that the country:

- provides access, for persons seeking asylum, to effective procedures for assessing their need for protection;
- provides protection for persons seeking asylum, pending determination of their refugee status;
- provides protection to persons who are recognised as refugees, pending their voluntary repatriation to their country of origin or resettlement in another country; and
- meets relevant human rights standards in providing that protection.

These existing arrangements under section 198A will remain in place under the proposed legislation and will govern any removal of a designated unauthorised arrival from Australia for offshore processing.

Ministerial declarations under section 198A are in place in relation to Papua New Guinea (PNG) and Nauru. Australia has agreements with the governments of Nauru and PNG that people transferred to the OPCs will be allowed to stay while processing of any claims proceed and while resettlement of any refugees is arranged.

OPCs are in place in the two declared countries – in Manus Province in PNG and in Nauru. These facilities were set up with the cooperation of the Governments of Nauru and PNG,

both of which have agreed to provide facilities for the processing of asylum seekers. The International Organization for Migration (IOM) manages the facilities. The facility in PNG is mothballed, but the Nauru facilities are ready to receive new arrivals transferred there, either under the existing offshore entry person arrangements, or under the proposed designated unauthorised arrival arrangements.

Over the period since the establishment of the offshore processing arrangements in PNG and Nauru, the practical outcome has been that:

- effective refugee determination procedures, undertaken either by the United Nations High Commissioner for Refugees (UNHCR) or Australia, have been available;
- care arrangements have been provided by IOM;
- no person awaiting a refugee assessment or found to be a refugee has been returned to their homeland against their will; and
- some 985 refugees have been resettled to third countries.

Offshore Refugee Assessment Processes

The Refugees Convention does not set down any particular process for signatory countries to use in deciding who are refugees. The UNHCR handbook on procedures and criteria for determining refugee status provides non-binding guidance on suggested procedures, principles and methods for the determination of refugee status. The handbook leaves it to each contracting State to establish the arrangements it considers most appropriate for refugee determination, having regard to its particular constitutional and administrative structure.

The Australian offshore refugee assessment process is modelled closely on the process used by the UNHCR and was developed in close consultation with that organisation.

Australia's refugee assessment process has delivered comparable outcomes to the UNHCR process on Nauru, and to Australia's onshore refugee assessment processing of the unauthorised boat arrival caseload. Australia's offshore assessment process has provided generous results in comparison to a number of European countries operating advanced refugee assessment processes (see below under Offshore Processing and Resettlement Outcomes and Comparisons section for further detail on comparative outcomes).

The assessment of refugee claims in the offshore processing facilities has previously been undertaken both by representatives of the UNHCR and officers from the (now) Department of Immigration and Multicultural Affairs (DIMA). The involvement by UNHCR was in response to a request by the Government of Nauru. Australia is in discussions with UNHCR on a range of matters. However there is no particular arrangement in place for UNHCR to conduct further refugee assessments in the OPCs. DIMA has sufficient resources and trained officers to continue conducting assessments in a timely and robust manner using its offshore processing arrangements.

The guidance in the UNHCR handbook and reflected in Australia's offshore assessment process encourages face to face discussions with the asylum seeker to identify and explore claims for protection. Australia's offshore assessment procedures emphasise such face to face contact and discussion with clients - including to provide counselling and advice on

decision outcomes and reasons, and on opportunities for review of decisions. Interpreters are used for these discussions.

By way of comparison, the *onshore* protection visa decision-making process is more heavily reliant than the *offshore* process on the written documentation and testing of claims, and the written documentation and notification of decision outcomes and reasons. In line with the UNHCR arrangements for its refugee processing, the Australian offshore assessment process does not require the involvement of legal professional advisers, but does not prevent asylum seekers from making their own arrangements to obtain whatever legal advice or assistance they wish. Publicly funded migration agents assistance is not required under the Refugees Convention and has not been provided under the offshore processing arrangements.

Australia's offshore assessment process allows a person found not to be a refugee to obtain a fresh merits review of their case by another, more senior, departmental officer. This arrangement is consistent with the general view held by UNHCR that refugee status assessment processes should provide a review opportunity, either administrative or judicial. The Australian offshore processing arrangements also provide for regular, pro-active review of cases in the OPCs, explicitly to acknowledge that even after the final resolution of claims it is possible that an asylum seeker's case needs to be reopened in order to consider changes to country circumstances or new claims or information about the case.

Refugees being processed offshore excluded from returning to Australia under transitory persons arrangements

The new arrangements do not prevent persons determined to be refugees from being brought to Australia temporarily, but they will need to be brought to Australia as holders of a visa.

The transitory person arrangements enable a person to be brought to Australia without a visa. As a result, transitory persons are liable for detention upon arrival.

People who have already been found to be refugees are excluded from the transitory person arrangements because it may be inappropriate to bring them to Australia and place them in detention for the duration of their stay.

OFFSHORE PROCESSING AND RESETTLEMENT OUTCOMES AND COMPARISONS

UNHCR and Australian processing on Nauru

1550 people have been accommodated in the OPCs, and of these, 1509 people had their refugee claims assessed. As has been flagged above, processing of the caseload on Nauru was split between UNHCR and Australia.

It is important to bear in mind that each case is considered on its own individual merits and any comparison of refugee approval rate information needs to be approached with caution. Claims may vary from person to person and also over time, according to the particular home-country circumstances at the point of decision.

That having been said, the overall refugee approval rate for the UNHCR caseload was 64% and for Australia it was 66%.

Comparisons with outcomes in Australia's onshore assessment process and in comparable countries operating advanced refugee assessment processes

The offshore processing arrangements incorporate some features which differ from those found in processing in Australia, including a continuing high-profile IOM presence for people in the OPCs. People in the OPCs had easy access to IOM as a third-party to provide counselling, support and practical arrangements for individuals considering voluntary return to their homeland. These IOM services for people in the OPCs assisted over 480 people accommodated in the centres to return voluntarily to their homelands.

To make any useful comparison in approval rates between processing in the OPCs and in Australia, the outcomes for the OPC must be adjusted to account for the impact of the significant number of IOM-assisted voluntary returns under the offshore arrangements and the comparison must then be with a similar onshore caseload, such as unauthorised arrivals. For people in the OPCs who chose not to voluntarily return to their homeland, the overall refugee approval rate for the OPC caseload was 94%. In comparison, there was an 89% approval rate under Australia's onshore protection visa process for unauthorised arrivals who applied for protection visas between mid-1999 and mid-2005.

Reliability of Australia's onshore process

Australia operates an advanced onshore refugee assessment process. Australia's onshore approval rates are comparable to, and frequently more generous than, the refugee approval rates in several other countries, such as in Europe, which operate advanced refugee assessment processes of their own.

- Australia's primary protection visa approval rate in 2004 was 13.7% and in the current financial year is almost 18%. In 2004, the UK primary approval rate was 4.4%, the primary approval rate in Denmark was 4.9% and the approval rate in Sweden was less than 2%.

Australia's Refugee Review Tribunal set aside rates are also comparable with refugee review set aside rates in several comparable European countries.

- Since 1993, the RRT has made some 58,000 decisions and has set aside the primary decision in some 7880 cases – a set aside rate of 13.6% over the life of the tribunal.

- Refugee review set aside rates are available for other countries for the year 2003. These show the Australian Refugee Review Tribunal remit rate for that year as 7%. By comparison the refugee review remit rates for some comparable countries were Ireland 18%, the UK 20%, New Zealand 12%, the Netherlands 8% and Sweden 1%.

Considerable caution is needed in drawing any conclusions about the reliability of refugee assessment processes from a superficial consideration of review set aside rates. The Refugee Review Tribunal does not consider whether the original decision was right or wrong. Rather it conducts a fresh merits assessment of the need for protection. This merits review provides an opportunity for the applicant to provide any further claims, information

or argument that they wish to present. The decision is also made on the basis of the country situation in the homeland at the time of tribunal decision. In the Australian context, many of the Refugee Review Tribunal decisions have been made many months and in some instances years after a primary decision was made by the Department.

Resettlement outcomes from Offshore Processing Centres

Of the 1509 persons processed at the OPCs, 985 refugees were resettled in six countries (New Zealand (360), Sweden (19), Australia (586), Canada (10), Denmark (6) and Norway (4)). A further 77 persons found not to be refugees were resettled in four countries (New Zealand (41), Australia (29), Sweden (1) and Canada (6)).

Processing refugee assessment and resettlement arrangement times at OPCs compare very favourably with assessment and refugee resettlement times in other locations. For example:

- of all people in the OPCs, 41% of persons spent less than 12 months and 81% of persons spent less than 24 months;
- of Humanitarian entrants under Australia's offshore Humanitarian Programme, 38% had spent two years or more in a refugee camp, 24% had spent more than six years in a refugee camp, and 15% had spent ten years or more in a refugee camp.

ACCOMMODATION ARRANGEMENTS AT OFFSHORE PROCESSING CENTRES

Arrangements for families, women and children

It is proposed that all families residing in the OPC would be accommodated in separate, air-conditioned rooms. Individual families are to be housed together and not split up inside the centre.

Family accommodation would, in most cases, be in air-conditioned transportable style buildings, with a maximum of four persons to a room.

Australia will work with the Government of Nauru on possible arrangements for women, children and families to live in residential-style housing in the community.

Treatment of single men

Single males will be accommodated within the OPC in air-conditioned rooms, with a maximum occupancy of four to a room.

Arrangements for single males are yet to be established but it is envisaged that the Nauru Government will seek to implement some form of movement restriction while more detailed health clearances are obtained. If any restrictions are to apply, they will be applied lawfully by means of visa conditions.

OFFSHORE PROCESSING CENTRES ARE NOT DETENTION

OPCs are not detention centres and conditions of movement in Nauru and Papua New Guinea were determined by the respective governments. OPC residents in Nauru are not held in detention but reside legally in Nauru holding a visa granted by the Nauru Government.

The particular visa held by the OPC residents is a Special Purpose visa. The legality of the Nauru Special Purpose visa granted to residents of OPCs has been tested in the Nauru Supreme Court and on appeal to Australia's High Court. Both Courts have upheld the legality of these particular visas, and as such, any holder is not considered to be in detention under either Nauru or Australian Law.

The OPC at Nauru is managed by IOM and is a processing centre, not a detention centre. Security services provided through IOM at the OPC are largely for safety reasons and are present to prevent inappropriate or unnecessary access to the centre by residents of Nauru.

DETENTION

Currently, detention for persons who seek to enter Australia illegally at an excised offshore place is discretionary. To be consistent, and allow for operational flexibility in our ability to appropriately process people seeking to enter illegally by sea, detention has been made discretionary for persons seeking to enter the mainland who would, on entry, become unlawful non-citizens. This change was made to maintain consistency in the treatment of persons who seek to enter Australia unlawfully by sea. There have been no amendments made in relation to the policy of mandatory detention on the mainland or to provisions introduced last year regarding the detention of women and children.

Further, these proposed changes do not seek to undermine the Government's strong commitment to only placing children in immigration detention facilities as a last resort and moving them into alternative arrangements if their status cannot be quickly resolved.

PERSONS EXEMPT FROM THE NEW REGIME

Certain persons not intended to be caught by the offshore processing arrangements will be exempted from the definition of designated unauthorised arrivals. These include New Zealand citizens, permanent residents of Norfolk Island and persons brought to Australia purely for Customs Act purposes. The Bill also allows the Minister to declare that specified persons or classes of persons are exempt. This will provide flexibility to avoid the arrangements being extended to those not intended to be covered by the changes.

Sound border management requires such flexibility, recognising the range of complex circumstances that can apply to a person's arrival in Australia without a visa. For example, a person who has been medically evacuated from a commercial vessel at sea, and who has inadvertently engaged these provisions by arriving in Australia without a visa, could be such a case. The person may have had no intention to come to Australia, and their circumstances may warrant a more flexible approach. At this point in time, while we can identify certain groups of people who may currently be eligible for the grant of a visa if

they arrived on the mainland, for example, New Zealanders and Norfolk Islanders, there may also be other persons whose particular circumstances require some flexibility to assess and determine their status. The power to declare exempt classes recognises the breadth and complexity of situations in which people arrive in Australia, particularly by sea.

To meet potential operational demand the discretion to exempt individuals (as opposed to classes of persons) is to be constrained by regulations prescribing certain criteria that a person must meet to be eligible to be declared exempt. To meet potential operational demand, it is necessary that this exemption power be delegable. At this stage however it is the intention that the power not be delegated.

REPORTING OBLIGATIONS

This Bill proposes to establish a reporting mechanism to ensure transparency and accountability with regard to persons being processed in OPCs. More specifically, the Bill establishes an obligation on the Secretary to report to the Minister, every twelve months, on matters relating to offshore processing arrangements and refugee assessment outcomes, and a requirement for the Minister to table these reports in both Houses of Parliament. More specifically, this report is to contain details of:

- arrangements during that financial year for designated unauthorised arrivals, and transitory persons, seeking asylum, including arrangements for:
    - assessing any claims for refugee status made by such designated unauthorised arrivals and transitory persons; and
    - the accommodation, health care and education of such designated unauthorised arrivals and transitory persons; and
- the number of asylum claims, by designated unauthorised arrivals and transitory persons, that are assessed during that financial year; and
- the number of designated unauthorised arrivals and transitory persons determined, during that financial year, to be refugees.

This report may also include any other information that the Secretary thinks appropriate.

MIGRATION REGULATIONS 1994

Some changes are also to be made to the Migration Regulations 1994 in relation to humanitarian visas as a consequence of the changes proposed in the Bill.

The Subclass 447 visa will change its name from "Secondary Movement Offshore Entry (Temporary)" to "Designated Unauthorised Arrival (Temporary)", to align with the new terminology. However, no significant changes will be made to the eligibility criteria for the Subclass 447 visa. Straight forward amendments will be made to include references to designated unauthorised arrivals to align with terminology in the Bill.

The regulations will make some amendments to other permanent offshore humanitarian visa subclasses to include the criterion that the applicant must not be a designated

unauthorised arrival or a transitory person. It is not appropriate that persons assessed to be refugees and awaiting resettlement under the offshore processing regime should be able to undermine that process by being granted a permanent offshore humanitarian visa.

APPLICATION OF THE AMENDMENTS

The changes reflected in the Bill were announced by the Minister on 13 April 2006 and were to cover all persons arriving unlawfully by sea on or after that date.

This does not mean that the legislation is retrospective. The proposed changes do not preclude arrivals by sea after 13 April pursuing visa applications or commencing litigation under the current legislative provisions before the changes come into effect. However, when the new legislation is enacted, the changes to the *Migration Act 1958* will apply, from that commencement date, to any people who arrived by sea without authority from 13 April. More specifically, if any such people:

- have already had visas granted, these visas will remain in force; and
- still have visa applications or court action under way, these processes will be terminated and any asylum claims will be assessed under the revised offshore processing arrangements.

The compensation provisions allow any such person to seek redress for the costs incurred in relation to such matters, should the new legislation subsequently prevent the visa application being decided, or their litigation from proceeding.

ATTACHMENT A

An extract from the judgment of Gummow J in the matter of *Minister for Immigration and Multicultural Affairs v Ibrahim* [2000] HCA 55 (16 November 2000)

"First, it has long been recognised that, according to customary international law, the right of asylum is a right of States, not of the individual; no individual, including those seeking asylum, may assert a right to enter the territory of a State of which that individual is not a national…."

…." the Universal Declaration of Human Rights adopted in 1948, that is to say, shortly before the formation of the Convention, was accompanied by a general repudiation by member States of the idea that the Declaration imposed upon them a legal obligation to respect the human rights and fundamental freedoms which it proclaimed. Article 14 declared that "[e]veryone has the right to seek and to enjoy in other countries asylum from persecution". But this right "to seek" asylum was not accompanied by any assurance that the quest would be successful. A deliberate choice was made not to make a significant innovation in international law which would have amounted to a limitation upon the absolute right of member States to regulate immigration by conferring privileges upon individuals."

"Over the last 50 years, other provisions of the Declaration have, as Professor Brownlie puts it, come to "constitute general principles of law or [to] represent elementary considerations of humanity" and have been invoked by the European Court of Human Rights and the International Court of Justice. But it is not suggested that Art 14 goes beyond its calculated limitation."

"Nor was the matter taken any further by the International Covenant on Civil and Political Rights ("the ICCPR"). This entered into force for Australia on 13 November 1980. Article 12 of the ICCPR stipulates freedom to leave any country and forbids arbitrary deprivation of the right to enter one's own country; but the ICCPR does not provide for any right of entry to seek asylum and the omission was deliberate".