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Committee Secretary
Senate Legal and Constitutional Committee
Department of the Senate
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Sir / Madam,

Re: Inquiry into the *Migration Amendment (Designated Unauthorised Arrivals) Bill 2006*

Thank you for the opportunity to comment on the *Migration Amendment (Designated Unauthorised Arrivals) Bill 2006*.

The Legal Services Commission of South Australia has been providing migration services to disadvantaged members of the public, particularly to refugees and asylum seekers, since 1993. It is the largest publicly-funded provider of legal advice and assistance for migration matters in South Australia.

The Commission notes that the Bill was introduced into Parliament on 11 May 2006 and referred to the Senate Legal and Constitutional Committee on the same day, with submissions from the public due by 22 May 2006. It has not been possible to prepare a thorough submission to the Committee given these time constraints. The Commission is disappointed that the Bill is being dealt with in haste and believes that such important legislation should be subject to greater public debate and scrutiny by the Australian Parliament.

The Bill purports to be retrospective in its application and almost all of the people who will be directly affected by this Bill will never have the opportunity to comment on it. It is therefore of paramount importance that relevant legal and community groups be given adequate time to raise all relevant issues so that they can be properly debated in a public forum.

Given the time available for the provision of this submission, the Commission cannot comment on all of the relevant issues. Some of the matters raised by this Bill were considered when the "Pacific Solution" was introduced in 2001. This submission concentrates only on the issues that the Commission views as the most serious consequences of this Bill.

Please find attached comments on the Bill prepared by senior solicitors of the Commission which do not necessarily reflect the views of the Commission itself.

Thank you for the opportunity to comment on the Bill.

Yours faithfully

HAMISH GILMORE
DIRECTOR

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Inquiry into the *Migration Amendment (Designated Unauthorised Arrivals) Bill 2006*

1. Erosion of legal rights and due process

The Bill proposes to strip asylum seekers who reach Australia's mainland of significant rights to have their claims of persecution assessed in a transparent and accountable manner by properly qualified Australians.

Shifting the refugee processing regime offshore will prevent any public scrutiny and will shroud the process in secrecy. Even if the process is fair in substance, it will never be able to be perceived as fair by Australians or the international community.

It appears that Australian law will not apply to most "designated unauthorised arrivals" once they are removed from mainland Australia pursuant to section 198A. The law applicable to such persons would vary depending upon which detention facility they are removed to. The countries to which such persons would be removed (currently Nauru and Papua New Guinea) will not offer the same entitlements and protections that would have been legally available to asylum seekers if they had been processed in Australia. The people removed to offshore centres will be left in a precarious legal limbo and shielded from view of the Australian community.

Another very significant effect of this Bill will be the wholesale removal of merits review for decisions made upon applications for refugee status determination. While the Explanatory Memorandum refers to "provisions for a merits review of refugee decisions", there is no provision whatsoever in the legislation to afford this right to asylum seekers in offshore centres. The recent experience of the Afghani and Iraqi caseloads in Australia demonstrates the importance of merits review in correcting the errors of primary decision makers. The Refugee Review Tribunal's statistics confirm the overwhelmingly meritorious nature of the appeals made to the RRT by these caseloads (http://www.rrt.gov.au/statistics.htm):

- For the RRT cases finalised in the 2004 – 2005 financial year, 89.2 per cent of the decisions of Afghani applicants and 91.5 per cent of Iraqi applicants were set aside;
- For the present financial year (to 28 February 2006), 95 per cent of the decisions of Afghani applicants and 97 per cent of Iraqi applicants were set aside.

Review of primary decision making is of cardinal importance in ensuring that decisions are made in a legally justifiable and procedurally fair manner. Judicial review is already extremely curtailed under the *Migration Act* and will not be available to persons processed in other countries. The denial of judicial review runs contrary to Article 16 of the *Convention Relating to the Status of Refugees 1951*. Without merits or judicial review, decisions on refugee status will be immune from scrutiny and will lead to, at the very least, the appearance of arbitrariness. The RRT's statistics indicate that genuine refugees would have been deported to their countries of persecution if merits review had not been available to them.

2. Denial of legal assistance

The second major effect of the Bill will be to deny any legal assistance to 'designated unauthorised arrivals'. Lawyers will not be able to access asylum seekers in Nauru, for example, if the experiences of the 'Pacific Solution' to date provide any illustration. Lawyers who attempted to travel to Nauru at their own cost to provide *pro bono* assistance to asylum seekers were denied visas to the country.

It seems clear that IAAAS-funded assistance will not be available to persons removed under section 198A, as this has not been provided to asylum seekers who have been processed through Nauru to date. Legal aid funding for migration work is extremely limited and will not be available to persons detained offshore.

The Commission is disappointed that some recent migration legislation amendments have been specifically designed to prevent or discourage lawyers from assisting asylum seekers. Legal assistance is fundamental to the proper functioning of Australia's justice system and the system will not be perceived as fair by community standards if legal assistance is withheld from applicants. The Commission further considers that lawyers can provide assistance which can make the process of refugee applications run more smoothly for both applicants and decision makers. It has been the experience of the Commission that DIMA case officers processing the onshore caseload have often specifically requested the Commission to assist particular applicants for the benefit of both the applicant and DIMA.

The denial of legal assistance to designated unauthorised arrivals is compounded by the proposal to exclude the rights under section 256 of the *Migration Act 1958* from applying to such persons. Section 198A(4) provides that designated unauthorised arrivals are deemed not to be in "immigration detention" for the purposes of the Act. Section 256 provides for persons in immigration detention to be supplied with:

- application forms for a visa
- reasonable facilities for making a statutory declaration for the purposes of the Act
- reasonable facilities for obtaining legal advice
- reasonable facilities for taking legal proceedings in relation to his or her immigration detention.

Section 256 has been criticised because the availability of such rights is contingent upon the person knowing to *request* such facilities. However, they provide some form of basic access to justice for persons in immigration detention and these small legislative entitlements are specifically withheld from designated unauthorised arrivals.

3. Convention Relating to the Status of Refugees

Article 31 of the Refugees Convention prevents State parties from imposing penalties on refugees because of their "illegal entry". The proposed changes aim to establish a system which involves Australia treating refugees differently depending on their method of arrival and ensures that those who arrive by sea have fewer rights. The specific goal of the Bill therefore appears to be in breach of the Refugees Convention. The Commission notes that while the Government justified the introduction of the 'Pacific Solution' on the basis of the need to prevent 'secondary movement', the measures proposed in the Bill would have a direct impact on refugees who flee to Australia as a country of first asylum.

Article 33 of the Refugees Convention prevents signatories from removing (*refouling*) refugees to a country where their life or freedom would be threatened for reasons of their race, religion, nationality, membership of a particular social group or political opinion. Although the letter of the Refugees Convention does not prohibit refugees being transferred to third countries for processing, the Bill contravenes the spirit of the Convention, which envisages each signatory country providing asylum to genuine refugees within its borders. If all countries were to adopt regimes similar to the 'Pacific Solution', no country would ever take responsibility for the obligations it willingly accepted under the Convention. Refugees would be in a perpetual state of limbo and could have no expectation of ever gaining the residence of a safe country.

The experience of the 'Pacific Solution' suggests that it is highly unlikely that other countries will agree to accept many of the refugees whom Australia has diverted from its territory. Australia will almost certainly be the ultimate country of resettlement for most refugees processed offshore. Genuine refugees are likely to spend prolonged periods in detention while Australia tries to negotiate internationally the issue of burden sharing. The mental health problems suffered by detainees have been well documented and the human cost is likely to be enormous.

4. Reversal of recent positive amendments

The Commission welcomed the recent *Migration and Ombudsman Legislation Amendment Act 2005* and the *Migration Amendment (Detention Arrangements) Act 2005* which brought about 90 day processing periods for protection visa applications, the guarantee of regular scrutiny by the Commonwealth Ombudsman and the assurance that children would only be kept in detention as a last resort. These changes occurred in the context of considerable public disquiet about the culture and actions of the Department of Immigration and Multicultural Affairs.

The Bill renders those positive amendments meaningless for designated unauthorised arrivals. There is no protection whatsoever to ensure that children will not be kept in detention on Nauru or Papua New Guinea, or any other country designated by the Minister. There is further no guarantee of reasonable processing times or of the right to scrutiny by an independent public authority.

The Commission has grave concerns about the reversal of these recent assurances. It strongly opposes the Bill and opposes any changes designed to prevent asylum seekers who arrive in Australia from having their claims processed in Australia and under Australian law.