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Committee Secretary

Senate Legal and Constitutional Legislation Committee

Department of the Senate

PO Box 6100

Parliament House

CANBERRA ACT 2600

AUSTRALIA

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

Dear Committee Secretary

I enclose my submission on the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006.

Yours faithfully

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Submission to the Senate Legal and Constitutional Legislation Committee Inquiry into the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006

Angus Francis[1]

I Introduction

I thank the Senate Legal and Constitutional Legislation Committee for this opportunity to provide a submission on the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006 **('the Bill')**.

The Bill extends the operation of the legislative amendments in 2001 and 2002 that introduced the so-called 'excision scheme' into the *Migration Act* 1958 (Cth).[2] In doing so, the Bill also extends the operation of the administrative component of the excision scheme: the offshore processing of asylum claims on 'declared countries'.[3] As stated in the Explanatory Memorandum to the Bill, the Bill does this by replacing the concept of 'offshore entry person', introduced in 2001, with 'designated unauthorised arrivals'.[4] As the Bill intends to expand the operation of the excision scheme, this inquiry offers an important opportunity for parliamentary scrutiny of the operation of this scheme to date.

This submission argues that the Bill and associated offshore refugee status determination processes do not contain sufficient substantive or procedural safeguards against *refoulement.*

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[2] See generally: A. Francis, Submission No 26, Senate Legal and Constitutional References Committee, *Inquiry into the Migration Legislation Amendment (Further Border Protection Measures) Bill 2002*, 26 July 2002.
[3] S 198A(3), *Migration Act*.
[4] Explanatory Memorandum, Migration Amendment (Designated Unauthorised Arrivals) Bill 2006, [2].

II Summary

This submission may be summarised as follows:

1. Australia's obligation not to *refoule* applies irrespective of the designation of persons as 'designated unauthorised arrivals' and the removal of them to offshore processing centres.

2. The legislative and administrative components of the excision scheme, expanded by the Bill, do not provide adequate substantive or procedural safeguards against *refoulement.*

3. The Senate Legislation and Constitutional Legislation Committee should therefore recommend that the Senate reject the Bill in its entirety.

III Australia's obligation not to *refoule* applies irrespective of the designation of persons as 'designated unauthorised arrivals' and the removal of them to offshore processing centres

Article 33(1) of the *Convention relating to the Status of Refugees* (***'Refugees Convention'***)[5] prohibits a contracting State from expelling or returning (*refouling*) a refugee to territories where his or her life or freedom would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political

[5] *Convention relating to the Status of Refugees*, July 28, 1951, 189 U.N.T.S. 137, read together with the *Protocol relating to the Status of Refugees*, January 31, 1967, 606 U.N.T.S. 267.

opinion. The principle of *non-refoulement* is also found in Article 3 of the 1984 *Convention against Torture*.[6]

The *Refugees Convention* imposes an obligation of *non-refoulement* on a contracting State, not a right of asylum on a refugee.[7] *Non-refoulement* is distinct from asylum, 'according to which States retain discretion with respect to the grant of permission to remain on their territory. The protection which flows from *non-refoulement* is specific and fundamental, but independent of the question of admission and residence.'[8] States retain the discretion to grant asylum, while being obliged to follow the *non-refoulement* principle.[9]

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[6] Article 3:
'1. No State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.
2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.'

[7] *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225, 272-275; *T v Secretary of State for the Home Department* [1996] AC 742, 754. See also: Asian-African Legal Consultative Committee (1967) *The Rights of Refugees Report of the Committee and Background Materials*, New Delhi, The Secretariat of the Committee, 44; F. Morgenstern, 'The Right of Asylum' (1949) 26 *The British Year Book of International Law* 327, 327; P. Weis, 'Legal Aspects of the Convention of 25 July 1951 relating to the Status of Refugees' (1953) 30 *The British Year Book of International Law* 478, 481. According to Gummow J in *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 proposition that every State has competence to regulate the admission of aliens at will was applied in Australian municipal law from the earliest days of this Court.' ([137] Footnotes omitted). Cf: M. Garcia-Mora, *International Law and Asylum as a Human Right* (Washington, Public Affairs Press, 1956) 14, 23.

[8] 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, 3.

[9] Article 14 of the Universal Declaration of Human Rights declares that every individual shall have the right to seek and enjoy asylum. However, these words are regarded as not giving the individual a right to seek and be granted asylum. In discussions concerning the proposed draft of the UDHR, the words 'to seek and to be granted' asylum were rejected in favour of 'to seek and to enjoy'. Representatives considered that this change of wording safeguarded the right of States to grant asylum in their territory. Article 3 of the Declaration on Territorial Asylum (1967) goes beyond non-return to include non-rejection at the frontier. Efforts at the 1977 UN Conference on Territorial Asylum to extend the institution of asylum found in the *1951 Refugee Convention* as a binding obligation in international law failed: A Grahl-Madsen, *Territorial asylum* (Stockholm, Almquist & Wiksell International, 1980) 10.

Thus, the expansion of the excision scheme envisaged in the Bill does not breach Australia's obligation of *non-refoulement* by denying designated unauthorised arrivals permission to remain in Australia **UNLESS** non-admission or expulsion of persons under the scheme results either directly or indirectly in *refoulement.*

Non-refoulement in Article 33(1) of the *Refugee Convention* is not subject to reservation and applies irrespective of a refugee arriving without authorisation at the frontiers of the contracting State.[10] Furthermore, the right to *non-refoulement* exists irrespective of a formal determination of refugee status.[11] Australia is therefore under an obligation not to

[10] *Minister for Immigration and Multicultural Affairs v Ibrahim* [2000] HCA 55 (16 November 2000) [136] (Gummow J): 'The provisions of the Convention "assume a situation in which refugees, possibly by irregular means, have somehow managed to arrive at or in the territory of the contracting State"'. See also: G. Goodwin-Gill, *International Law and the Movement of Persons Between States* (Clarendon Press, Oxford, 1978) 140-141.

[11] The UNHCR advises that: 'A person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognized because he is a refugee': UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status* (1979) [28]. See also: C. Amann, *Die Rechte des Fluchtlings* (Baden-Baden, Nomos, 1994) 85, 109 and 145-149; J. Hathaway and J. Dent, *Refugee Rights: Report on a Comparative Survey* (Toronto, York Lanes Press, 1995).7; G. Goodwin-Gill, *The Refugee in Interntional Law* (Oxford, Clarendon Press, 1996) 32 and 141. Cf Senate Legal and Constitutional References Committee, *A Sanctuary Under Review: An Examination of Australia's Refugee and Humanitarian Determination Processes*, June 2000, [1.11]: 'However, it is necessary to recognise, that while persons coming legally to Australia as part of a re-settlement program are accepted as 'refugees', persons who arrive illegally, and persons who arrive on some other visa and then seek refugee status, are not 'refugees' until it is decided that they meet the Convention definition *as it is understood in Australia*.' This view is incorrect if it asserts that no rights set out in Article 2 to 34 of the *Refugees Convention* attach to refugees until determined to be such by municipal law. See J. Hathaway and A. Cusick, 'Refugee Rights are Not Negotiable' (2000) 14 *Geo. Immigr. L.J.* 481, 493: 'A significant number of rights are attributed to "refugees" without qualification of any kind, and several other rights accrue to all refugees who are simply "in" or "within" a contracting state's territory. In most cases, these formulations amount to the same thing: any refugee physically present, lawfully or unlawfully, in territory under a state's jurisdiction may invoke these rights, including protection against refoulement and discrimination, access to a state's courts, religious freedom, and the right to benefit from rationing and educational systems. Identity papers are to be issued to refugees without documentation, penalties on account of illegal entry or presence are prohibited, and restrictions on internal freedom of movement must be justifiable. This conclusion follows not only from the plain meaning of the physical presence text, but also from the express intention of the drafters and the context of the Convention as a whole. These rights may not legitimately be withheld pending regularization of status, but must be granted even to "… refugees who had not yet been regularly admitted into a country."' (Footnotes omitted)

refoule a refugee who arrives unlawfully (ie without a visa) regardless of whether he or she has been determined to be a refugee for the purposes of Australian law.

A State cannot avoid its obligation not to *refoule* by deeming that designated persons have not entered its jurisdiction despite physical presence within the territory of the State. *Non-refoulement* is a principle of international law. As far as international law is concerned, '*presence within State territory* is the juridically relevant fact which will in most cases be sufficient to establish the necessary link with the authorities whose actions may be imputable to the State in circumstances giving rise to State responsibility.'[12]

Australia therefore owes an obligation of *non-refoulement* to all persons within its jurisdiction regardless of a legal designation attaching to a place (e.g. 'excised offshore place') or person (e.g. 'designated unauthorised arrival' or 'transitory person'). Provisions in the *Migration Act* that once deemed a person to be at the frontier were removed from the Act by the *Migration Reform Act 1992* (Cth).[13] In contrast, the excision scheme does not deem offshore entry persons not to have entered Australia. They are instead prohibited from making a valid application for a visa. The Bill seeks to implement this same regime for 'designated unauthorised arrivals'.

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[12] 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.

[13] *Migration Act 1958–1989*, s 88 (s 36 of the original *Migration Act 1958*). Repealed by s 19 of the *Migration Reform Act 1992*. An earlier example of this kind of deeming provision is found in *Immigration Act 1901-1949*, subsection 13C(3), inserted by Act No. 86 of 1948: '[a] stowaway shall not, for the purposes of this Act, be deemed, by reason only of his having been taken ashore in pursuance of this section to have entered the Commonwealth or to have been given permission to land'. See: N. Hancock, Migration Legislation Amendment (Further Border Protection Measures) Bill 2002 [No. 2], Bills Digest No 149, 2002-2003.

Non-refoulement does not prevent expulsion to a third country so long as there is not a threat of subsequent forcible return to the country of origin.[14] The expelling State bears the onus of establishing that the third country is 'safe', i.e. will not *refoule*. Removals to a third country require individual assessment of whether a third country is 'safe' for the individual refugee.[15] This requires more than establishing formal criteria, e.g. whether a third country is a party to the *Refugees Convention*.[16] The third country must actually implement appropriate asylum procedures fairly.[17]

While the *Refugees Convention* does not set out any procedures for determining refugee status, 'it is generally recognized that fair and efficient procedures are an essential element in the full and inclusive application' of the *Refugees Convention*.[18] While different models have been put in place by States, the UNHCR has identified certain core elements that are necessary for decision-making in keeping with standards of fairness and due process.[19] These include a right of appeal by an authority different from and independent of that making the initial decision,[20] right to legal assistance and representation at all stages,[21] special consideration given to female asylum claimants and

[14] *Re Musisi* [1987] 2 WLR 606, 620 (House of Lords). See also: 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, 13.
[15] UNHCR, *Asylum Processes (Fair and Efficient Asylum Procedures)*, EC/GC/01/12, 31 May 2001 [13].
[16] Ibid [4]–[5].
[17] Ibid [14].
[18] Ibid [4]–[5].
[19] UNHCR, *Asylum Processes (Fair and Efficient Asylum Procedures)*, EC/GC/01/12, 31 May 2001; UNHCR annotated comments on the amended proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status, COM(2002) 326, 18 June 2002. See also: M Alexander, 'Refugee Status Determination Conducted by UNHCR' (1999) 11 *International Journal of Refugee Law* 251; M Kagan, 'The Beleaguered Gatekeeper: Protection Challenges Posed by the UNHCR Refugee Status Determination (2006) 18 *International Journal of Refugee Law* 1-29.
[20] UNHCR, *Asylum Processes (Fair and Efficient Asylum Procedures)*, EC/GC/01/12, 31 May 2001 [43], [50].
[21] Ibid.

unaccompanied children,[22] a single procedure that takes into account refugee claims and complementary claims to protection, e.g. under the *Convention against Torture*,[23] access to impartial and qualified interpreters,[24] a personal interview based on a thorough assessment of the circumstances of each case,[25] an opportunity to present evidence of his or her personal circumstances and country of origin information,[26] and a reasoned, written decision deciding the claim.[27]

Currently, Australia seeks to meet its *non-refoulement* obligation to offshore entry persons through s 46A and s 198A of the *Migration Act* and its responsibility for processing of asylum claims on Nauru and PNG.[28] The Bill seeks to extend this model to 'designated unauthorised arrivals'. This submission argues, however, that in seeking to rejuvenate and expand the operation of the excision scheme, the Bill reinitiates the scheme's failure to comply with core elements necessary for fair refugee status decision-making.

IV The legislative and administrative components of the excision scheme, expanded by the Bill, do not provide adequate substantive or procedural safeguards against *refoulement*

The hallmark of the legislative and administrative components of the excision scheme, which the Bill seeks to expand, is wide executive powers that lack effective substantive

[22] Ibid [45]-[46].
[23] Ibid
[24] Ibid [50].
[25] Ibid.
[26] Ibid.
[27] Ibid.
[28] See generally: S. Taylor, 'The Pacific Solution or a Pacific Nightmare?: The difference between burden shifting and responsibility sharing' (2005) 6 *Asian-Pacific Law and Policy Journal* 1.

or procedural safeguards against *refoulement*. The Bill extends the operation of those powers to include all non-citizens without a valid visa entering Australia by sea after 13 April 2006, without instigating any substantive or procedural safeguards against *refoulement.*

The legislative component of the excision scheme

The following amending legislation introduced the excision scheme into the *Migration Act*:

- the *Border Protection (Validation and Enforcement Powers) Act* 2001 (Cth) (**'the Powers Act'**);
- the *Migration Amendment (Excision from Migration Zone) Act* 2001 (Cth) (**'the Excision Act'**);
- the *Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act* 2001 (Cth) (**'the Consequential Provisions Act'**); and
- the *Migration Legislation Amendment (Transitional Movement) Act* 2002 (Cth) (**'the Transitional Movement Act'**).

The Powers Act

The *Powers Act* validated *retrospectively* the actions of Commonwealth officers undertaken during the validation period (27 August 2001 to 27 September 2001) as well

as conferred other powers *prospectively*.[29] The latter provisions include s 245F(9), (9A), (9B) and s 7A of the *Migration Act.* Section 245F(9) gives officers the power to 'take' 'persons' detained under that section to 'a place outside Australia'. Section 245F(9A) and (9B) provide wide powers of detention and coercion for that purpose that are not subject to civil or criminal proceedings. Section 7A, on the other hand, is designed to support the Commonwealth's reliance in Federal Court proceedings on the executive authority to exclude and expel aliens in order to exclude the *MV Tampa* asylum seekers outside statutory authority.[30] The section therefore states that the 'the existence of statutory powers under this Act does not prevent the exercise of any executive power of the Commonwealth to protect Australia's borders, including, where necessary, by ejecting persons who have crossed those borders'.

Neither s 245F(9) and s 7A contain any substantive or procedural restrictions or restraints. There is no substantive requirement that officers take into account Australia's *non-refoulement* obligations or that the decisions of officers are subject to procedural restraints stipulated in statutory conditions on the exercise of power or external or

[29] Part 2 of the Powers Act operates retrospectively, while Section 3 and Schedules 1 and 2 of the Powers Act confer power prospectively.

[30] *Victorian Council for Civil Liberties Inc v Minister for Immigration and Multicultural Affairs* (2001) 110 FCR 452; *Ruddock v Vadarlis* (2001) 110 FCR 491. For further litigation spawned by the government's subsequent actions in regard to the asylum seekers on board the *MV Tampa* see: *Ali v The Commonwealth* [2004] VSC 6 (Unreported, Bongiorno J, 23 January 2004); *Applicants WAIV v Minister for Immigration & Multicultural & Indigenous Affairs* [2002] FCA 1186 (Unreported, French J, 20 September 2002); *WAJC v Minister for Immigration & Multicultural & Indigenous Affairs* [2002] FCA 1631 (Unreported, French J, 23 December 2002); *P1/2003 v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCA 1029 (Unreported, French J, 26 September 2003); *P1/2003 v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCA 1370 (Unreported, RD Nicholson J, 26 November 2003); *VUAQ v The Hon. Amanda Vanstone, Minister for Immigration* V1011/03 (pending); *Vadarlis v Minister for Immigration and Multicultural Affairs* M93/2001 (Unreported, Gaudron, Gummow and Hayne JJ, 27 November 2001); *Applicant P137/2002, Ex parte – Re MIMIA P137/2002* (Unreported, Gaudron J, 24 December 2002); *Plaintiff P1/2003 v MIMIA P1/2003* (Unreported, Gaudron J, 13 January 2003); *Plaintiff P1/2003 v MIMIA P1/2003* (Unreported, Gaudron J, 18 June 2003); *Abbas Al Sayed Mahdl and others v Director of Police, Steve Hamilton, Australian Protective Services* Supreme Court of Nauru Civil Action

internal review and scrutiny mechanisms. Unlike s 198A, discussed below, there is no obligation under s 245F(9) or s 7A that the officer take a person or eject a person to a 'declared country'. A person 'dealt with' under s 245F(9)(b) is also deemed by s 5(1) not to be in 'immigration detention' and is therefore unable to access the limited procedural protections offered under s 256 of the *Migration Act* (the right to request visa application forms and legal assistance). The Bill seeks to ensure that officers may at their discretion choose whether to detain a person under s 245F(9), which triggers the unfettered power to 'take' a person to 'a place outside Australia', through amendments to s 189(2).[31]

The Excision Act

The *Excision Act* inserted definitions for *offshore entry person*, *excised offshore place* and *excision time* into the *Migration Act*. Offshore entry person means a person who entered Australia at an excised offshore place after the excision time for that offshore place and became an unlawful non-citizen because of that entry.[32] (Unlawful non-citizen means a non-citizen in the migration zone who is not a lawful non-citizen.[33] A lawful non-citizen is a non-citizen in the migration zone who holds a visa.)[34]

Excised offshore place includes Christmas Island, Ashmore and Cartier Islands, Cocos (Keeling) Islands, and any other external Territory prescribed by the regulations for the purposes of the definition or any island forming part of a State or Territory prescribed for

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No. 10/2003 (Unreported, Connell CJ, 27 May 2003); *Ruhani v Director of Police* [2005] HCA 42 (31 August 2005); *Ruhani v Director of Police [No 2]* [2005] HCA 43 (31 August 2005).

[31] Item 17 of the Bill, Explanatory Memorandum, Migration Amendment (Designated Unauthorised Arrivals) Bill 2006, [57].

[32] *Migration Act* s 5(1).

[33] *Migration Act* s 14.

[34] *Migration Act* s 13.

the purposes of the definition.[35] Since the *Migration Amendment Regulations 2005 (No. 6)* SLI 171 an excised offshore place includes all islands north of Carnarvon, Mackay and Darwin. Excision time means, for Christmas, Ashmore and Cartier Islands – 2pm on 8 September 2001; for Cocos (Keeling) Islands – 12 pm on 17 September 2001, and for places prescribed in 2005 – the date of commencement of the 2005 regulations.[36]

The *Excision Act* also inserted s 46A into the *Migration Act*, which excludes offshore entry persons arriving at an excised offshore place after the excision time from making a valid application for a visa unless the Minister determines under s 46A(2) that it is in the public interest that such a person should be able to make a valid visa application.[37] Section 46A(7) states that the Minister does not have a duty to consider whether to exercise the power under s 46A(2) in respect of an offshore entry person. Based on current authority the Minister is under no legally enforceable duty to consider whether to exercise the power found in s 46A(2).[38]

Section 46A assumes that offshore entry persons will be removed to a 'declared country' under s 198A (see below). However, there is no guarantee that this will be the case, leaving it open that offshore entry persons will be kept in indefinite detention without being able to make a valid application for a visa. Furthermore, if permitted to apply for a visa it is unclear what procedural protections are available to applicants.

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[35] *Migration Act* s 5(1).
[36] Ibid.
[37] The Explanatory Memorandum to the *Excision Act* states:
> The purpose of excising the places and installations from the migration zone in relation to unlawful non-citizens is to prevent such persons from making a valid visa application simply on the basis of entering Australia at such a place or installation.
> (Migration (Excision from Migration Zone) Bill 2001, *Explanatory Memorandum*, 2).

[38] *Minister for Immigration & Multicultural & Indigenous Affairs, Re; Ex parte Applicants S134/2002* (2003) 211 CLR 441, [48] (Gleeson CJ, McHugh, Gummow, Hayne and Callinan JJ).

The Bill replaces s 46A(1) with a new subsection that applies the bar on making a valid visa application to 'designated unauthorised arrivals'.[39] 'Designated unauthorised arrivals' is defined in the Bill to mean offshore entry persons under the existing scheme and any non-citizen without a valid visa who enters Australia by sea (including where the final leg of the journey is by air) on or after 13 April 2006.[40] The Bill amends s 46A(2)-(7) to ensure that the regime currently in place for dealing with offshore entry persons now covers designated unauthorised arrivals.[41] Consequently, designated unauthorised arrivals could also be detained at an excised offshore place indefinitely subject to the Minister's non-compellable discretion to permit them to apply for a visa or to remove them to a 'declared country'.

Thus, whether the proposed new s 46A satisfies Australia's obligations not to *refoule* 'designated unauthorised arrivals' depends on whether the Minister exercises her non-compellable discretion to lift the bar on making a valid visa application in Australia (and the adequacy of the procedural safeguards in place to assess the claims). Alternatively, Australia's compliance with its *non-refoulement* obligations depends on whether the removal of 'designated unauthorised arrivals' under s 198A (see below) and the processing of their claims offshore satisfies the *non-refoulement* obligation.

See also: Ibid [100] (Gaudron and Kirby JJ); *Bedlington v Chong* (1998) 87 FCR 75 (s 48B); *Morato v Minister for Immigration, Local Government & Ethnic Affairs* (No 2) (1992) 39 FCR 401 (s 115).

[39] Item 10 of the Bill, Explanatory Memorandum, Migration Amendment (Designated Unauthorised Arrivals) Bill 2006, [46]-[48].

[40] Item 8 of the Bill.

[41] Item 11-15 of the Bill, Explanatory Memorandum, Migration Amendment (Designated Unauthorised Arrivals) Bill 2006, [50]-[54].

The Explanatory Memorandum to the Bill envisages that the government will pursue offshore processing of all asylum claims by unauthorised boat arrivals.[42] Therefore, whether the Bill complies with Australia's *non-refoulement* obligation depends largely on s 198A of the *Migration Act*, which the *Consequential Provisions Act* introduced in 2001, and the adequacy of the offshore processing regime on Nauru and PNG.

The Consequential Provisions Act

The *Consequential Provisions Act* amended the *Migration Act* and *Migration Regulations* 1994 to provide powers to detain a person believed to be an unlawful non-citizen who is: (a) in an excised offshore place;[43] or (b) in Australia but outside the migration zone and believed to be seeking to enter an excised offshore place.[44]

The *Consequential Provisions Act* also inserted section 198A into the *Migration Act*. Section 198A allows an officer to take an offshore entry person from Australia to a declared country under that section.[45] Section 198A(3) provides that the Minister may declare in writing that a specified country:

(i) provides access to effective procedures for assessing their need for protection;

(ii) provides protection pending determination of refugee status;

(iii) provides protection pending voluntary repatriation to their country of origin or resettlement in another country; and

[42] Explanatory Memorandum, Migration Amendment (Designated Unauthorised Arrivals) Bill 2006, [1]-[2].
[43] S 189 (3).
[44] S 189 (4).
[45] S 198A(1), (2), (3).

(iv) meets relevant human rights standards in providing that protection.

On current authority the Minister's declaration under s 198A(3) is not amenable to judicial review.[46] In *P1/2003 v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCA 1029 (26 September 2003), French J stated:

> So far as the ministerial declaration under s 198A(3) is concerned, the form of that subsection does not in terms condition the power to make a declaration upon satisfaction of the standards which are its subject matter. The form of the section suggests a legislative intention that the subject matter of the declaration is for ministerial judgment. It does not appear to provide a basis upon which a court could determine whether the standards to which it refers are met.[47]

The amending legislation also introduced s 494AA which prohibits the bringing of certain legal proceedings in relation to an offshore entry person whilst recognizing the original jurisdiction of the High Court under s 75 of the *Australian Constitution.* However, as noted above, the key Ministerial powers under the excision scheme found in s 46A and s 198A are not amenable to judicial review on current authority in any event.

In relation to offshore entry persons (and now under the Bill, 'designated unauthorised arrivals'), s 198A replaces the provisions of the *Migration Act* that implement Australia's *non-refoulement* obligation under Article 33(1) of the *Refugees Convention* through a formal refugee determination process (s 36). Section 198A, although a provision dealing with removal, may be distinguished from s 198(6) which does not require an officer to

[46] *Applicants WAIV v Minister for Immigration & Multicultural & Indigenous Affairs* [2002] FCA 1186 (Unreported, French J, 20 September 2002); *P1/2003 v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCA 1029 (26 September 2003).
[47] Ibid [49].

consider Article 33(1) before removal because, in the case of s 198(6), it is presumed that a formal refugee determination process has been undertaken.[48]

In contrast to removals under s 198, s 198A applies to persons who have not applied for a visa and who are not entitled to a visa application form or legal advice upon request under s 256 because they are not in immigration detention (s 5(1) and 198A(4)). (As noted above, the scope of s 256 is limited to those in immigration detention under the *Migration Act*).[49] Contrary to the UNHCR standards noted in section III above, no individual assessment takes place under s 198A as to whether an individual is in danger of *refoulement* if removed to a 'declared' third country.

Transitional Movement Act

The Bill also seeks to extend the operation of the amendments introduced by the *Transitional Movement Act*.

In March 2002, the government introduced the *Transitional Movement Act* in order to authorize the removal of a transitory person to Australia in 'exceptional circumstances'

[48] *M38/2002 v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCAFC 131 (13 June 2003).

[49] Section 196(1) provides that an unlawful non-citizen detained under s 189 must be kept in immigration detention until he or she is: (a) removed from Australia under s 198 or 199; or (b) deported under s 200; or (c) granted a visa. Section 198A(1), however, provides that an officer may take an offshore entry person from Australia to a country in respect of which a declaration is made under s 198A(3). Section 198A (4) provides that an offshore entry person who is being dealt with under that section is taken not to be in immigration detention (as defined in s 5(1)). Presumably once an offshore entry person is being 'dealt with' under s 198A they are no longer detained for the purposes of s 196(1) and so may be removed from Australia other than under s 196(1)(a)-(c).

(e.g. bringing such a person to Australia for the purposes of providing evidence against persons charged with people smuggling).[50]

The *Transitional Movement Act* inserted s 198B and s 198(1A) into the *Migration Act* to authorize a Commonwealth officer to bring a transitory person to Australia (s 198B) and then to remove that person (s 198(1A)). The definition of transitory person introduced into s 5(1) of the *Migration Act* includes either an offshore entry person taken to another country under s 198A or a person taken to a place outside Australia under s 245F(9)(b). The Bill proposes to expand the definition of transitory person to include 'designated unauthorized arrivals'.[51]

As a result, 'designated unauthorized arrivals' will be subject to s 46B inserted by the *Transitional Movement Act* which is in similar terms to s 46A (above). Section 46B prohibits a transitory person from making a valid visa application unless the Minister considers it in the public interest to allow the person to do so. As with s 46A, on current authority the Minister's power under s 46B is not amenable to judicial review.[52] At the same time, s 198C was inserted to provide that after six months continuous residence in Australia transitory persons may make a request to the Refugee Review Tribunal for an assessment of whether they are covered by the definition of refugee in Article 1A of the *Refugees Convention.*

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[50] Hon Mr Philip Ruddock, Minister for Immigration and Multicultural and Indigenous Affairs, Second Reading Speech, Migration Legislation Amendment (Transitional Movement) Bill 2002 (Cth), 13 March 2002.

[51] Item 4, Explanatory Memorandum, Migration Amendment (Designated Unauthorised Arrivals) Bill 2006, [6]-[7].

[52] *Minister for Immigration & Multicultural & Indigenous Affairs, Re; Ex parte Applicants S134/2002* (2003) 211 CLR 441 [48] (Gleeson CJ, McHugh, Gummow, Hayne and Callinan JJ).
See also: Ibid [100] (Gaudron and Kirby JJ); *Bedlington v Chong* (1998) 87 FCR 75 (s 48B); *Morato v Minister for Immigration, Local Government & Ethnic Affairs* (No 2) (1992) 39 FCR 401 (s 115).

Although the Bill recognizes that 'designated unauthorized arrivals' will have access to s 198C, this is a limited right. The Refugee Review Tribunal cannot commence, or continue, the assessment if a certificate by the Secretary of the Department of Immigration and Multicultural Affairs (**'DIMA'**)[53] is in force with respect to the applicant under s 198D. The Secretary may issue a certificate of non-cooperation under s 198D to the Tribunal if the applicant has refused or failed to cooperate with the relevant authorities in connection with attempts to remove the person to his or her country of former residence or some other country, or has refused or failed to cooperate in relation to the his or her detention in a declared country under s 198A(3). Furthermore, there is no statutory guarantee that an officer must screen a 'transitory person' for *refoulement* risk in the exercise of the officer's statutory obligation to remove the person as soon as possible.[54]

The *Transitional Movement Act* also introduced s 494AB which imposes a bar on the bringing of certain legal proceedings in relation to a transitory person, including the exercise of powers under s 198B and the detention and removal of transitory persons, whilst preserving the original jurisdiction of the High Court. The Bill ensures that the bar in s 494AB continues to apply and extends that bar.[55]

The *Transitional Movement Act* appeared to mark the high tide mark for the excision scheme. In December 2002, the Senate rejected the Migration Legislation Amendment

[53] Note: references in this submission to DIMA include references to the previously named Department of Immigration and Multicultural and Indigenous Affairs.
[54] S 198(1A) In the case of an unlawful non-citizen who has been brought to Australia under section 198B for a temporary purpose, an officer must remove the person as soon as reasonably practicable after the person no longer needs to be in Australia for that purpose (whether or not the purpose has been achieved).
[55] Items 35-39, Explanatory Memorandum, Migration Amendment (Designated Unauthorised Arrivals) Bill 2006, [98]-[102].

(Further Border Protection Measures) Bill 2002 (Cth).[56] The Bill proposed to expand the definition of excised offshore place to include the Coral Sea Islands Territory, and certain islands that form part of Western Australia, Queensland and the Northern Territory.[57] The Bill further proposed to amend the definition of excision time[58] and expand the scope of s 46A to include visa applications made by an offshore entry person after the excision time for the excised offshore place concerned.[59] The Bill was rejected on 9 December 2002 after a recommendation to this effect from the majority of members of the Senate Legal and Constitutional References Committee, *Inquiry into the Migration Legislation Amendment (Further Border Protection Measures) Bill 2002*.[60]

The excision scheme, however, was given further scope by the successful introduction of the *Migration Amendment Regulations 2005 (No. 6)* SLI 171, which extended excise offshore places to include all islands north of Carnarvon, Mackay and Darwin.

Purpose of the excision scheme

[56] The Migration Amendment Regulations 2002 (No. 4) (7 June 2002) extended the definition of excised offshore place. On 19 June 2002 the Regulations were disallowed in the Senate (as disallowable instruments under Part XII of the *Acts Interpretation Act 1901* (Cth)). The effect of disallowance was that the Government could not make a new regulation in the same form as the disallowed regulation for up to 6 months. Consequently, the Migration Legislation Amendment (Further Border Protection Measures) Bill 2002 was introduced and passed in the House of Representatives. When introduced in the Senate the bill was referred to the Senate Legal and Constitutional References Committee.

[57] Migration Legislation Amendment (Further Border Protection Measures) Bill 2002 (Cth), Item 1 of Schedule 1.

[58] By virtue of Item 2 of Schedule 1 of the Bill the definition of excision time for the excised offshore places added by Item 1 is 2pm on 19 June 2002 by legal time in the Australian Capital Territory.

[59] Migration Legislation Amendment (Further Border Protection Measures) Bill 2002 (Cth), Clause 4.

[60] Regulations to the same effect as the rejected Bill - Migration Amendment Regs 2003 (No 8) - were tabled and disallowed in the Senate. In the interim, a boat of asylum seekers arriving at Melville Island were returned to Indonesia. See generally: Commonwealth, Mr Ed Killesteyn, Deputy Secretary and Chair of the People Smuggling Task Force, Senate Legal and Constitutional Legislation Committee, Budget Estimates Supplementary Hearings, *Official Committee Hansard* (25 November 2003), 5. However, given that Indonesia is not a declared country for the purposes of s 198A(3), it must be assumed that the Commonwealth was acting on the authority of s 245F(9)(b).

The purpose of the current excision scheme is obviously to prohibit offshore entry persons or transitory persons from making a valid visa application (other than at the discretion of the Minister) within Australia. The 2001 and 2002 amendments also confer and confirm wide statutory and non-statutory powers on Commonwealth officers to detain and expel offshore entry persons, transitory persons, and unauthorized arrivals generally to 'a place outside Australia' or a 'declared country'.

The Bill aims to extend these powers to all unauthorized boat arrivals, whilst at the same time confirming an officer's discretion to choose between the various methods of expulsion from the country.

There are no substantive or procedural protections offered to persons 'taken' or 'removed' under s 245F(9) and s 198A that provide an individual assessment of Australia's protection obligations. Nauru is also not a party to the *Refugees Convention*. The use of s 198A to satisfy Australia's *non-refoulement* obligations depends wholly on the existence in the declared country of effective procedures for assessing claims for protection. Hence, the Bill's extension of the scope of s 198A is contingent on the processing arrangements on Nauru and PNG offering adequate protection against *refoulement.*

Administrative processing arrangements on Nauru and PNG

It is submitted that the processing arrangements on Nauru and PNG do not offer adequate protection against *refoulement.*

The processing of asylum claims on Nauru and PNG is governed by bilateral agreements and policy. Australia and Nauru entered into a Statement of Principles governing the determination of status of those asylum seekers taken to Nauru.[61] In accordance with the Statement of Principles, Nauru agreed to 'accept persons for determination of their status, as jointly administered under administrative arrangements, from time to time …'[62] Australia and PNG entered into a similar agreement.[63]

On 11 December 2001 the Commonwealth and Nauru entered into the *Memorandum of Understanding Between the Republic of Nauru and the Commonwealth of Australia for Cooperation in the Administration of Asylum Seekers and Related Issues*.[64] The Memorandum replaced and terminated the Statement of Principles and First Administrative Arrangement.[65] In accordance with the Memorandum, Australia agreed to 'arrange for the day-to-day management of the Asylum Seeker's [sic] Temporary Residential Facilities'.[66] Australia also agreed to ensure that security personnel were provided at its expense.[67] Further agreements between Australia and Nauru were entered into on 9 December 2002 and 25 February 2004.

Pursuant to the MoU, Australia undertook to process all claims to asylum and to manage the detention of the asylum seekers on Nauru. Nauru is not a party to the *Refugees Convention* or to the *Protocol*. Paragraph 24 of the MoU provides:

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[61] The *First Administrative Arrangement between Nauru and Australia* dated 10 September 2001 stated that Nauru might accept additional persons under the *Statement of Principles*.
[62] *Statement of Principles between Nauru and Australia* dated 10 September 2001 [3].
[63] *Memorandum of Understanding between Australia and Papua New Guinea concerning asylum seekers* dated 11 October 2001.
[64] *Memorandum of Understanding between the Republic of Nauru and the Commonwealth of Australia for Cooperation in the Administration of Asylum Seekers and Related Issues* dated 11 December 2001.
[65] Ibid [43].
[66] Ibid [14]. See also: Ibid [38].
[67] Ibid [22].

> Consistent with paragraph 4 of this MoU, any asylum seekers awaiting determination of their status or those recognised as refugees, will not be returned by Nauru to a country in which they fear persecution nor before a place of resettlement is identified.

Paragraph 4 obliges Australia to 'ensure that each person will be processed and have departed Nauru within as short a time as is reasonably possible, and that no persons will be left behind in Nauru'.

The Commonwealth established a 'Nauru Taskforce' composed of five officers of DIMA (then DIMIA) to oversee the arrangements made for processing of asylum claims on Nauru.[68] DIMA officers were largely responsible for processing on Nauru, although the United Nations High Commissioner for Refugees ('UNHCR') did process some claims.[69] DIMA processed all claims on Manus Island, PNG.

A policy document, the *Onshore Protection Interim Procedures Advice, Refugee Status Assessment Procedures for Unauthorised Arrivals Seeking Asylum on Excised Offshore Places and Persons taken to Declared Countries,* governed DIMA processing on Nauru and Manus Island.[70] This policy document governed the processing of unauthorized arrivals sent to a 'declared country'.[71] It recognizes that persons in declared countries, including persons who were offshore entry persons whilst in Australia, are not subject to

[68] *Affidavit of Lysbeth Mary Haigh* dated 26 October 2001, [3], *Vadarlis v Minister for Immigration and Multicultural Affairs* M93/2001 (Unreported, Gaudron, Gummow and Hayne JJ, 27 November 2001).
[69] Commonwealth, Senate Legal and Constitutional References Committee, *Migration Zone Excision: An examination of the Migration Legislation Amendment (Further Border Protection Measures) Bill 2002 and related matters* (October 2002) [5.34] – [5.40].
[70] Ibid. Commonwealth, DIMIA, *Onshore Protection Interim Procedures Advice, Refugee Status Assessment Procedures for Unauthorised Arrivals Seeking Asylum on Excised Offshore Places and Persons taken to Declared Countries*, No 16 (September 2002).
[71] Commonwealth, Senate Legal and Constitutional References Committee, *Migration Zone Excision: An examination of the Migration Legislation Amendment (Further Border Protection Measures) Bill 2002 and related matters* (October 2002) [5.34] – [5.40].

the s 46A bar.[72] This is unless brought to Australia as a so-called 'transitory person' under the amendments introduced in 2002, in which case they are subject to the equivalent bar in s 46B as discussed above.[73]

The protection offered by the involvement of international organisations is minimal. The UNHCR quickly pulled out of any role in the offshore processing. The UNHCR has maintained a consistent opposition to the policy since, including to the proposal to rejuvenate the excision scheme and offshore processing of claims by introduction of the Bill.[74]

Furthermore, the role of the International Organisation for Migration (**'IOM'**), which was founded outside the UN in 1951 as the Intergovernmental Committee for European Migration, is limited to supervising detention and facilitating the 'organized transfer of refugees'.[75] This is evident in the fact that on 15 October 2001 the IOM, the Nauru Police Force and the Australian Protective Service entered into a protocol governing their roles and responsibilities in respect of the presence of the asylum seekers on Nauru.[76] IOM contracted Chubb Protective Services, Australia, to provide security services at the detention camps.[77]

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[72] Commonwealth, DIMIA, *Onshore Protection Interim Procedures Advice, Refugee Status Assessment Procedures for Unauthorised Arrivals Seeking Asylum on Excised Offshore Places and Persons taken to Declared Countries*, No 16 (September 2002) [46]. Paragraph 46 goes on to say that Refugee Status Assessment officers 'should not invite visa applications from persons in declared countries unless such an invitation is specifically approved by Humanitarian Branch DIMIA.'

[73] *Migration Legislation Amendment (Transitional Movement) Act 2002* (Cth).

[74] UNHCR Briefing Note, 'Australian legislation' (http://www.unhcr.org/cgi-bin/texis/vtx/news/opendoc.htm?tbl=NEWS&page=home&id=446476372, last visited 18 May 2006).

75 G. Goodwin-Gill, *The Refugee in International Law* (Clarendon Press, Oxford, 1996) 225, 419–28.

[76] *Protocol Between the Nauru Police Force, the International Organisation for Migration and the Australian Protective Service* dated 15 October 2001.

[77] Ibid. See also: *ALHMWU v Chubb Protective Services* [2002] QIRComm 1 (8 January 2002); 169 QGIG 103; *ALHMWU v Chubb Protective Services (No. 2)* [2002] QIRComm 42 (20 March 2002); 169 QGIG 258; *Efu v Chubb Protective Services* [2003] QIRComm 291 (1 May 2003); 173 QGIG 146.

At the end of the day, whether Australia complies with its *non-refoulement* obligations to persons removed to declared countries comes down to the fairness of the offshore refugee status determination procedures devised as instruments of policy by the government.

The DIMA processing on Nauru and PNG fails to comply with core standards required to safeguard against refoulement

From my discussions with NGOs and other migration advisers, serious doubts exist as to whether the procedural protections offered under the Interim Procedures administered to date by officers of DIMA determining claims on Nauru and PNG meet the UNHCR guidelines for fair refugee status determination procedures.

The refugee status determination process on Nauru and PNG undertaken by DIMA fails to satisfy a number of the core requirements of a fair refugee status determination process identified in section III above, including: a right of appeal to an independent body,[78] the right to legal assistance and representation at all stages,[79] special consideration given to unaccompanied children,[80] access to impartial and qualified interpreters,[81] an opportunity to present evidence of his or her personal circumstances and country of origin information,[82] and a reasoned, written decision deciding the claim.[83]

Procedural inadequacies in the administering of the Interim Procedures on Nauru and PNG that are said to fall short of these requirements include:

[78] UNHCR, *Asylum Processes (Fair and Efficient Asylum Procedures)*, EC/GC/01/12, 31 May 2001 [43], [50].
[79] Ibid.
[80] Ibid [45]-[46].
[81] Ibid [50].
[82] Ibid.
[83] Ibid.

- Applicants not being told during the primary interview or at any other time what information the officers were to rely upon in making a decision on the individual asylum claim.

- Use of interpreters from rival ethnic groups.

- A lack of special care in assessing the claims of unaccompanied minors.

- Applicants not being given an opportunity to make a written submission on their claims to asylum.

- Applicants not being given an opportunity to make any oral or written submission at the primary interview on the effect of any change of circumstances in the country of origin on their claims to asylum.

- Applicants not being given access to legal representation in order to assist in the presentation of their claims to asylum either at first instance or on review.

- Applicants not being provided with a transcript or copy of the taped primary interview.

- Applicants not being given reasons for the rejection of claims other than an inadequate pro forma letter found in the Interim Procedures Advice.

- Review by another DIMA officer, not an independent tribunal.

- The failure of reviewing officers to explain the primary decision-makers reasons for the rejection of an applicant's claim.

- The failure of reviewing officers to tell applicants what information the primary decision-maker had relied upon in making the decision set forth in the letter of rejection.

- The failure to provide applicants with a transcript of the review interview.

- Insufficient reasons given to applicants when informed in writing that his or her review was unsuccessful.

VI Conclusion

In conclusion, the Bill rejuvenates and expands a scheme that does not provide adequate substantive or procedural safeguards against *refoulement*. It is submitted that the Bill should be rejected in its entirety.

Recapping the principal concerns:

1. Officers can select methods of expulsion under s 245F(9) and s 7A that have no substantive or procedural limitations that protect against *refoulement*.

2. Removal of designated unauthorised arrivals under s 198A to a declared country does not require individual assessment of whether the declared country is 'safe' for the individual refugee.

3. The Minister's declaration under s 198A(3) is an empty one due to the fact that the offshore refugee status determination processes adopted by DIMA fall well short of the core requirements for a fair refugee status determination process.