NEW SOUTH WALES COUNCIL FOR CIVIL LIBERTIES INC

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Mr. Owen Walsh,
Committee Secretary,
Senate Legal and Constitutional Committee,
Department of the Senate
Parliament House
Canberra
ACT 2600

Dear Mr. Walsh,

Here is the submission of the New South Wales Council for Civil Liberties to the Senate Legal and Constitutional Committee Inquiry into the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006.

The CCL would be happy to elaborate further on any matters in this submission, should the Senate Committee wish it to do so.

Yours sincerely,

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For the Committee of the CCL.

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Submission of the New South Wales Council for Civil Liberties

to the Senate Legal and Constitutional Committee

concerning

the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006

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A. The purposes of the Bill.

The central questions at issue in this matter are:
1. What is a refugee supposed to do?
2. Why is Australia supposed to be different from other countries?
3. What are the international implications?

1. What is a refugee supposed to do?

The assumption in this Bill appears to be that there is something wrong with a refugee arriving in Australia. The assumption is found in the Explanatory Memorandum, in the Second Reading Speech of the Parliamentary Secretary, and in the provisions of the Bill.

It is found most clearly in the Explanatory Memorandum.

> [The Bill] simply provides the flexibility to the Government to move a wider group of people to offshore processing centres. It is designed to operate as a disincentive to people who arrived (sic) on the mainland unauthorised by boat to defeat the existing excision provisions. It should be noted that nearly 9,000 people arrived unauthorised by boat in the two years to June 2001 but, following the legislative changes made in 2001, less (sic) than 200 people arrived although they have targeted areas which not excised (sic). As a rule of thumb, there was a saving of around $50,000 for each person whose unauthorised arrival was avoided. *The Government believes that these changes will further reduce the incentive for unauthorised arrivals reducing costs further.*
> Emphasis added.

The assumptions made here are surprising. First, refugees who reached the mainland of Australia were apparently evading the existing excision provisions. What were they supposed to do? To seek an excised island?

Second, there is the view that reducing the number of people who arrive by boat is a matter for congratulation. This is absurd. The overwhelming majority of those people have been declared to be refugees. Are we to be congratulated for discouraging people who are in fear for their lives from seeking a safe refuge here?

It was argued repeatedly by the former Minister for Immigration that the asylum seekers who arrived here were queue jumpers—a notion which assumed that refugees should remain in their country of first refuge. That position was cruel. Refugee camps in Pakistan, where Afghans fled from the Taliban, were endangered by Taliban supporters, overcrowded and disease-ridden. The refuges lacked sufficient food and warmth, and in some cases the women and children were subject to sex abuse. The position also held that Pakistan, where poverty remains a problem, ought to look after refugees while they were processed, while we, with

our comparative wealth, ought not to have to. And it ignored the fact that Pakistan is not a signatory to the United Nations Convention on Refugees.

But what is supposed here is quite different. The Explanatory Memorandum takes it that the purpose of the previous policy was just to deter refugees from our shores. Success in doing that is not a ground for congratulation. What are refugees supposed to do? Where are they to go?

Our policies have caused serious mental illness. It was not known at first that this would be the case. Growing concern by psychiatrists who visited refugees in prison and those who dealt with refugees after they were released, were ignored. Even when children were involved, DIMIA resisted their release. Did the public servants in DIMIA (now DIMA) assume that the psychiatrists were so forgetful of their professional ethics that they would lie, in order to secure the refugees' release? Or was the harsh treatment, meted out to children as well as adults, also meant to deter, as some have argued?

The last suggestion is revolting. Australians do not torture children in order to deter others from anything. There are limits to what deterrence can justify.

However in the last sentence quoted above, the Explanatory Memorandum assumes that sending people to Nauru will be a disincentive to refugees from arriving at all. So we must ask, what are they supposed to do? Stay and die? Go to Papua New Guinea instead?

We have a clear obligation to accept refugees, both as a moral matter and in international law. We do not have the excuse, bad as it was, that we used with earlier arrivals: that they had already found refuge. We are not entitled to deter them from coming here.

2. Why is Australia special?

Small children are asked, as part of their moral training, 'Why do you think that you are so special? Why do you think that you are more important than everyone else?

The Bill is premised on the notion that refugees have no entitlement to determine which safe country will be their home. What entitlement has Australia got to ask other countries to take them? Why are we so special, that they should not come here?

Supposition a. Australia is special because it is in a difficult relationship with Indonesia.

The rhetoric which accompanied the introduction of harsher treatment of asylum seekers was all about illegal entry and not being pushed around. (In the off-quoted phrase, 'we will determine who will come to this country and the manner of their arrival'). There is a widely held view that this Bill has been introduced to appease Indonesia. There is a certain tension between these two positions.

Let us suppose that the widely held view is true. Are we entitled to take it?

If it is combined with the deterrence view, we appease Indonesia by discouraging refugees from arriving here at all. So should they go to Papua New Guinea? Is Papua New Guinea in a better position than Australia to offend Indonesia? What entitles Australia to say to PNG 'you take the risks, we don't want to'?

A different way to make the same point is to ask how the maxim on which we act could be universalised. Could we plausibly hold that no country that risks the displeasure of its neighbour should accept refugees from it? No, for that would mean that no refuge would be given anywhere. Turkey could not accept Iraqis. Pakistan should not have accepted Afghans.

Adopting deterrence for this reason would in any case be intolerable. We would not physically torture children to appease Indonesia. What are we doing subjecting them to conditions known to be likely to cause mental illness?

And it is not just for children. The same arguments apply to adults.

Without the deterrence idea, the rationalisation becomes implausible. How is the relationship to be helped merely by changing the way we process refugees? Is it suggested that people who would have been found to be refugees if treated by the full Australian process will not be when assessed offshore? That would imply that the offshore process is inherently flawed, and genuine refugees will be refouled.

Supposition b. Australia has the opportunity to encourage change in the ways of the TNI. Soon, soon, persecution and murder will be at an end. Accepting refugees from West Papua will prejudice this opportunity.

If this is the reason, the Government should say so. There is no sign at present of improvement. Two supporters of West Papuan independence were killed only a few weeks ago.

So we will ask other countries to take them, and then accept them anyway when those countries reasonably say that we have the resources to take them, that we have room for them (we are encouraging women to have more babies for economic reasons) and that we are shirking our responsibilities. There is simply no case here, so no reason to expect other countries to take them.

3. What are the international implications?

In South East Asia. Since it is widely believed that Australia is enacting this law to appease Indonesia, we can expect trouble from other countries. They will believe: that Australia is a pushover; that our support for human rights is spurious, and probably self-interested; that our participation in the Iraq war is because we were pressured by the Americans. Can we expect the Indonesians to adopt a more kindly view? If we think it appropriate to prejudice the rights and risk the sanity of refugees when we think it is in Australia's interests, how can we expect our objections to be heard when other countries detain people incommunicado and subject them to torture?

In countries with a strong civil rights tradition. Australia is on the nose enough already, thanks to our treatment of asylum seekers and our treatment of whistle blowers. We can do without making things worse.

B. The practice proposed

Faults in the reasoning.

In his second reading speech, the Parliamentary Secretary to the Minister for Immigration declares that it is incongruous that a person arriving at an excised offshore place (in a boat) is 'unable to access the opportunities for protracted merits review and litigation processes', while a person who travels a few kilometres further to the mainland can. Indeed it is. One would expect therefore some argument at to which process is the better. None is given. There is at most the assertion that the processes used offshore will be reliable, in that they will follow the processes undertaken by the United Nations High Commissioner for Refugees.

Since the UNHCR has expressed concern about the present proposal, this is disingenuous.

Problems with the proposed process.
Here are some reasons for favouring on-shore procedures, with important improvements.

Findings by the Department have been highly unreliable. They have used methods of detecting deception without doing the research necessary to check the reliability of those methods, or the truth of their assumptions.

The result has been that it has made many mistakes. In consequence, the Refugees Review Tribunal has overridden many of the Department's decisions. The courts in their turn have corrected mistakes made by the RRT—in hundreds of cases. (And this is in spite of the fact that the courts are limited to examining errors in law—they cannot correct the judgements of fact.)

The faults in these processes have resulted in people being sent back to danger. In some cases, the victims have fled again, and been found by other Western countries to indeed be refugees. In at least one case, the asylum seeker was killed by those whom he had asserted would do so.

The processes intended to be used overseas, far from improving these dismal outcomes, can be expected to make things much worse. We have every reason to be sceptical of the readiness of 'trained officers' to reject the culture of the Department and to assess asylum seekers accurately. At the same time, the lawyers who have been able to assist refugees to obtain recognition of their status are to be excluded. The refugee, frightened, unfamiliar with Australian bureaucracy will be faced with an inquisitor who starts from the supposition that the person he or she confronts is lying, and is slow to be convinced. While groups of refugees have access to each other's accounts by way of verification, an individual will be left with nothing but his or her word. There will be no knowledge of how to challenge bad decisions. There will be no experience in challenging bad arguments based on unresearched or poorly researched assumptions. To call this a satisfactory process is absurd.

Whatever process is adopted for assessing refugees, it is essential that it include proper representation of the interests of the asylum seeker. And above all it must be open to public scrutiny.

Creating and ignoring mental illness.
As noted above, the Department has shown a grave lack of concern for the mental health of those in its care. It has opposed access by specialists, even when it has been demonstrated that the advice it has obtained is deeply flawed or without proper foundation. It has fought through the courts to avoid its plain responsibilities. It has not changed its procedures when the faults have been uncovered.

The problems occurred in Nauru also. Psychiatrists' reports have led to many of those detained there being brought to Australia because they had developed serious illnesses.

To counter these deficiencies, regular visits of psychiatrists should be arranged to examine and report on the mental health of all detainees in all centres. They should also report on the impact of the conditions and the rules at the centres on the mental health of the detainees.

Better arrangements—though far from ideal.
To deal with the weaknesses repeatedly shown by the Department and by those, like Global Solutions Limited which have been trusted to act as its agents, the procedures, policy and practice at all immigration detention centres should be open to public scrutiny. The CCL has argued before that, until the detention policy is abolished:

- all immigration detention centres should be located in or near major cities;
- • a system of regular visits to immigration detention centres by magistrates should be instituted,
- • all centres should be open to inspection from time to time by relevant experts;
- • an inspector-general of immigration detention centres, with powers akin to those of the Inspector-General of Security and Intelligence, should be appointed.

None of these important changes are likely to be achieved if asylum seekers are processed off shore. Rather, the immoral practices which occurred at Baxter immigration detention centre are likely to be reproduced.

No children should be in asylum
Under the proposed law, children will be sent to Nauru (or other third countries), where they will be in detention. This contrary to the Convention on the Rights of the Child, specifically Article 37 (b). The Minister of Immigration has been reported as saying that in Nauru people will not be in detention by day, and so they are not really in detention at all. This is like a child arguing that since they have not strictly said anything that is false, they are not guilty of lying. To argue that the Government will meet its obligations (and its promises to its own members) because the term 'detention' can be held not to be strictly accurate is playing fast and loose with language.

All the problems of detention centres will be there: desperate adults, in terror of being refouled; indefinite periods in capture, with slowly fading hopes; the assumption by guards that the detainees are at moral fault, and in consequence, probably attempts at self harm. Children will go through the torments that at present they go through in immigration detention centres on the mainland. They will be kept for long periods, at first while their cases and those of their parents (if they are there) are processed, and then while they wait for a country to accept them. To make this proposal after what has been seen to happen is outrageous.

Conclusion

The Bill proposes a set of arrangements that will cause mental illness in adults and in children. Those arrangements would place people already traumatised by the deaths of relatives and friends, and who have fled for their own lives, through further torment, for long periods.

The arguments which are used to support the Bill are outrageous.

The Bill should be rejected. Improvements should be made to our internal arrangements to turn them from a deterrence system to one which is morally tolerable.

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