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24 May 2006

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

By Email (legcon.sen@aph.gov.au)

Dear Committee Secretary

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

The Law Institute of Victoria (LIV) welcomes the opportunity to provide a written submission to the Senate Legal and Constitutional Committee on its inquiry into the provisions of the *Migration Amendment (Designated Unauthorised Arrivals) Bill* 2006 (Bill). The Bill, which proposes to amend the *Migration Act* 1958 (Cth), will give effect to the Australian Government's announcement that all asylum seekers who arrive by boat, either on the Australian mainland or at an excised location, will be transferred to offshore processing centres for assessment of their refugee claims.

The LIV's submission is attached for your review and consideration.

The LIV understands that a public hearing on the Bill will be held in Canberra on Friday 26 May 2006. However, the LIV urges the Committee to also hold a public hearing in Melbourne to provide an opportunity for a number of Melbourne-based organisations with significant knowledge of refugee law, such as the LIV, the Victorian Bar, Public Interest Law Clearing House and the Human Rights Law Resource Centre to make oral submissions in person before the Committee.

If you would like to discuss any of the matters raised in the submission, please contact me on 03 9607 9367 or Jo Kummrow, Solicitor, Administrative Law & Human Rights Section on 03 9607 9385.

Yours sincerely

Catherine Gale
President
Law Institute of Victoria

Attach.

Law Institute Victoria

Submission

Administrative Law & Human Rights Section

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

To: Senate Legal and Constitutional Committee

A submission from the Administrative Law & Human Rights Section of the Law Institute of Victoria

Date 24 May 2006

Queries regarding this submission should be directed to:
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1 Introduction

On 13 April 2006, the Minister for Immigration and Multicultural Affairs announced that the Australian Government would introduce legislation to provide that asylum seekers who arrive in Australia (including mainland Australia) by boat would be transferred to offshore processing centres for assessment of their refugee claims.

The *Migration Amendment (Designated Unauthorised Arrivals) Bill* 2006 (Bill) is intended to give effect to the Government's announcement.

The Explanatory Memorandum to the Bill states:

> *The amendments contained in the Bill propose to amend the Migration Act 1958 (the Act) to expand the offshore processing regime currently applying to offshore entry persons and transitory persons to include, in addition, all persons arriving at mainland Australia (meaning other than at an excised offshore place) unlawfully by sea on or after 13 April 2006. The concept of offshore entry person will be replaced by the concept of designated unauthorised arrivals.*
>
> *The Bill will also deem certain air arrivals to be entry by sea so the persons will be subject to the new regime. Persons who travel most of the way to Australia by sea but travel the last leg by air, before entering (on or after 13 April 2006) and who become unlawful on entry, will be taken to have entered Australia by sea. These are basically situations where persons are airlifted into Australia at the end of their sea journey.*
>
> *Certain persons not intended to be caught by the regime 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 1901 purposes. It is also proposed that the Minister have an additional power to declare that specified persons or classes of persons are exempt. This will provide flexibility to avoid the regime being extended to those not intended to be covered by the changes.*

On 11 May 2006, the Senate referred the Bill to the Senate Legal and Constitutional Legislation Committee (Committee) for inquiry. The Committee must report to the Parliament by 13 June 2006.

The LIV understands that a public hearing on the Bill will be held in Canberra on Friday 26 May 2006. However, the LIV urges the Committee also to hold a public hearing in Melbourne to provide an opportunity for a number of Melbourne-based organisations with significant knowledge of refugee law, such as the LIV, the Victorian Bar, Public Interest Law Clearing House and the Human Rights Law Resource Centre, to make oral submissions in person before the Committee.

2 Executive summary

Currently, only those persons who arrive at an "excised offshore place" seeking protection are transferred to offshore processing centres for assessment of their refugee claims. The proposed legislative changes will expand that provision to include all asylum seekers who arrive on the Australian mainland by boat on or after 13 April 2006.

While the LIV understands the importance of protecting Australia's borders, we submit that such measures should not override Australia's international treaty obligations in

relation to refugees and asylum seekers. The LIV urges the Australian Government to reconsider the proposed legislative amendments and its decision to resettle refugees in third countries rather than in Australia.

The LIV is concerned that the legislative amendments will effectively reverse these key reforms made in 2005 to the treatment and processing of asylum seeker protection visa applications. In particular, the proposed amendments are likely to:

(a) not specify a reasonable time period (i.e. 90 days) in which the Minister must determine protection visa applications for asylum seekers detained in offshore processing centres;

(b) not apply the principle that children should only be detained as a measure of last resort;

(c) not provide for asylum seekers to access independent legal advice and legal representatives to assist them in making their protection visa applications;

(d) not provide for the Minister to grant a visa to an asylum seekers detained in offshore processing centres regardless of whether they have applied or are eligible for a visa;

(e) not provide for the Minister to determine that an asylum seeker detained in offshore processing centres may reside in a place other than a detention centre (e.g. community housing);

(f) not provide for reports by DIMA to the Commonwealth Ombudsman or Australian Parliament on asylum seekers detained in offshore processing centres; and

(g) not provide asylum seekers with a right to have a negative decision on their protection visa application reviewed by an independent tribunal, such as the Refugee Review Tribunal or court.

In summary, the LIV considers that the proposed legislative amendments will effectively "shut the door" on asylum seekers arriving by boat and prevent them from accessing the refugee determination system in Australia, including access to independent lawyers and review, and from being resettled in Australia as bona fide refugees.

The LIV also submits that the proposed legislative amendments potentially represent a breach of Australia's obligations under the 1951 UN Refugee Convention (Refugee Convention) with respect to Articles 31(1) and 33(1).

The LIV calls upon the Australian Government to reconsider the proposed legislation in the interests of ensuring that it continues to reform its treatment and processing of asylum seekers, improve its international standing on human rights issues and meets its international treaty obligations with respect to providing a fair refugee status determination process.

3 Deadline for comments

Following the Senate's referral of the Bill to the Committee for inquiry on 11 May 2006, the LIV received an invitation to provide comments to the Senate inquiry on 12 May 2006. The deadline for all submissions is 22 May 2006.

The LIV suggests that the ten day period within which comments must be made is inadequate to provide sufficient consultation amongst its members and necessary

research. It questions the genuine desire by the Australian Government to receive considered comments on the Bill. A more suitable review period would allow at least one month for comments to be received. Regardless of the tight deadline for comments, the LIV is committed to providing feedback on the Bill in this submission.

The LIV would welcome the opportunity to make an oral submission to the Committee at a public hearing or provide further written comments as required.

4 Recent reforms to the treatment of asylum seekers

The LIV has previously raised concerns with the Australian Government about the treatment and detention of asylum seekers in Australia. The LIV acknowledges the strong efforts made by the Department of Immigration and Multicultural Affairs (DIMA) to improve its processes, operations and image in the wake of the wrongful deportation of Australian citizen, Ms Vivien Alvarez Solon and the wrongful detention of Australian permanent resident, Ms Cornelia Rau.

An important aspect of the reforms included amending the *Migration Act* 1958 (Cth) (Migration Act) under the *Migration and Ombudsman Legislation Amendment Act* 2005 (Cth) and the *Migration Amendment (Detention Arrangements) Act* 2005 (Cth) to ensure certain protections for asylum seekers being held in immigration detention, including providing for:

(a) the principle that children should only be detained as a measure of last resort;

(b) determination of protection visa applications for detained asylum seekers within 90 days;

(c) the Minister to grant a visa to a detainee regardless of whether they have applied or are eligible for a visa;

(d) the Minister to determine that a person may reside in a place other than a detention centre (e.g. community housing); and

(e) reports by DIMA to the Commonwealth Ombudsman on persons being held in detention for more than two years.

The LIV submits that the proposed legislative amendments will unravel these key reforms made to the treatment and processing of asylum seeker protection visa applications.

4.1 Children and families in detention

The LIV notes the significant debate in Australia in 2005 about the detention of women and children, including in offshore processing centres. Unlike provisions under the Migration Act that apply to asylum seekers held in Australia, this Bill does not provide children and their parents with any assistance in relation to their need to be housed in the community with adequate social assistance, housing, and healthcare (including counselling).

Australia is a signatory to the Convention on the Rights of the Child (CRoC). Article 37(b) of the CRoC provides that:

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

The LIV refers the Committee to the findings and recommendations in the Human Rights and Equal Opportunity Commission 2004 report, *National Inquiry into Children in Immigration Detention: A last resort?* (HREOC Report).[1] Of particular concern is Major Finding 2 in the HREOC Report:

> *Children in immigration detention for long periods of time are at high risk of serious mental harm. The Commonwealth's failure to implement the repeated recommendations by mental health professionals that certain children be removed from the detention environment with their parents amounted to cruel, inhumane and degrading treatment of those children in detention (CRC, Article 37(a) - see Chapter 9).*

Furthermore, Recommendation 5 in the Report provides that "Australia should review the impact of the 'Pacific Solution' and 'excision' measures on children". It raises a concern with the application of the "Pacific Solution" to child asylum seekers that may result in serious breaches of the CRoC. Concerns are also raised about the increased risk of indeterminate detention and *refoulement* for children detained in "excised offshore places" and "for children transferred by Australian authorities to Nauru and Papua New Guinea".

If enacted, the LIV recommends that the proposed legislation provide safeguards to protect the best interests of children and families.

The LIV also has concerns about whether the transfer and detention of children in offshore processing centres complies with its obligations under the Convention on the Rights of the Child.

4.2 Mental health of detainees

There has been significant and ongoing debate within the medical profession and discussion in the media about the prevalence of mental illness in long term immigration detainees. In particular, the outsourcing of health services, including mental health services to those in detention centres, has proved to be an issue of substantial concern.

In May 2005, the Federal Court in the case of *S v Secretary, Department of Immigration & Multicultural & Indigenous Affairs*[2] held that:

> *258 Given the known prevalence of mental illness amongst the over 100 long-term detainees at Baxter, ... the level of psychiatric service made available to S and M was, and remained, clearly inadequate.*
>
> *259 The Commonwealth entered into a complex outsourcing arrangement for the provision of mental health services which left it to contractors and subcontractors to determine the level of services to be supplied. The hallmarks of these arrangements were devolution and fragmentation of actual service provision. The service provision was so structured that there was a clear and obvious need for regular and systematic auditing of the psychological and psychiatric services provided if the Commonwealth was to inform itself appropriately as to the adequacy and effectiveness of these services for which it bore responsibility. There has to date been no such audit. The Commonwealth has put into place monitoring and working procedures to deal essentially with the immediate and the ad hoc, though these did not avail S and M up to these hearings. The Commonwealth now foreshadows more by way of auditing and monitoring. Nonetheless, it is difficult to avoid the conclusion that the Commonwealth's own arrangement for outsourcing health care services itself requires review. Its aptness is open to real question.*

The LIV notes that following the above judgment, the Australian Government announced in October 2005 that all remaining detainees held in offshore processing centres on Manus Island and Nauru (with the exception of two detainees) would be transferred to mainland Australia following a review by independent experts into the deteriorating mental health of detainees on Nauru.

As reported in *The Age* on 14 October 2005:

> *The breakthrough follows a visit to the island last month by former immigration minister John Hodges and mental health experts Paris Aristotle and Ida Kaplan, who said the situation required urgent attention.*
>
> *"It had reached a point where none of those interventions were going to prevent a rapid decline in their mental health," Mr Aristotle said last night.*
>
> *It was clear Senator Vanstone was concerned about the welfare of the asylum seekers and had taken the group's advice seriously, he said.*
>
> *It is believed the condition of several of the internees had deteriorated to the point that they were being constantly monitored because of the risk of suicide or self-harm.*

The LIV has concerns about the provision of mental health services to those detained in offshore processing centres and the ability of the Australian Government to monitor such services.

The mental health of offshore detainees will be at greater risk if they are able to be detained for long periods of time without time limits on the determination of their refugee applications. The LIV recommends that, if enacted, an independent review of asylum seeker mental health be conducted on a quarterly basis.

4.3 Indefinite detention

A key legislative reform and policy development announced by the Prime Minister on 17 June 2005 was the new position under the Migration Act that detainees are not held in immigration detention indefinitely.

This provision came about due to mental health issues surrounding the long term and indefinite detention of detainees.

The LIV suggests that this is a particular concern in circumstances where an asylum seeker is not granted a visa and cannot be returned to their country of origin. Alternatively, even if an asylum seeker is granted a visa, there is no guarantee that they will be successfully resettled in a third country as indicated under the proposed legislation.

In the case of possible West Papuan asylum seekers, the LIV suggests that third countries in the region may not accept such persons due to pressure exerted by the Indonesian government as demonstrated in the case of Australia. In such circumstances, the long-term detention of asylum seekers may arise. The LIV is concerned that no safeguards appear to have been put in place in the proposed legislation to ensure they are not detained indefinitely.

5 Australia's international treaty obligations

As a signatory to the Refugee Convention, Australia has certain obligations to refugees. The LIV submits that Australia is in possible breach of its international treaty obligations with respect to its treatment of asylum seekers. The removal of asylum seekers who arrive by boat, either on the Australian mainland or at an excised location, to an offshore processing centre (possibly Nauru or Manus Island) for assessment of their protection claims would appear to constitute an abandonment of Australia's obligations under the Refugee Convention, in particular Article 31. It should also be noted that Nauru is not itself a signatory to the Refugee Convention.

5.1 Refugee Convention

5.1.1 Article 31(1): Penalising of asylum seekers

Article 31 of the Refugee Convention prohibits states from imposing penalties upon refugees who come directly from a territory where their life or freedom was under threat simply because they enter the state unlawfully.

Refugees arriving lawfully by air will continue to be entitled to apply for protection visas on the mainland. While their applications are being processed they will generally be entitled to work to support themselves, have access to Medicare, public education for their children, and in some cases, financial support. They will have access to full independent merits review, as well as judicial review.

Refugees arriving unlawfully by sea will be transferred to an offshore detention centre, where they will have none of these rights.

Consequently, the LIV suggests that the proposed legislative amendments will effectively penalise asylum seekers who arrive in Australia by boat without a valid visa and consequently represents a breach of Australia's obligations under Article 31 of the Refugee Convention. This is particularly of concern in relation to potential West Papuan asylum seekers coming "directly" to Australia from West Papua.

The LIV suggests that placing refugees who arrive unlawfully in offshore processing centres clearly involves penalising them, both in absolute terms and, even more starkly, when their situation is compared with that of refugees arriving lawfully in Australia. For example, they will be incarcerated in conditions which have, in other cases, had an adverse impact on detainees' mental health. Of the caseload which was previously sent to Nauru, all but two detainees were transferred back to Australia in October 2005 after being visited by an expert panel (refer para 4.2 above).

The LIV suggests that this is perhaps the clearest breach of Australia's obligations under the Refugee Convention. There are arguably a number of others. The proposed legislation should be rejected on this basis alone.

5.1.2 Article 33(1): Breach of non-*refoulement*: extra territorial *refoulement*

The LIV submits that the Australian Government, in seeking to avoid its international obligations, is acting in a way which is inconsistent with the spirit and purpose of the Refugee Convention.

As a party to the Refugee Convention and the subsequent Protocol, Australia has a duty to respect certain rights, most importantly the duty of non-*refoulement* under Article 32. The LIV submits that regardless of whether Australia processes asylum seekers offshore it still has an obligation to make available all rights under the Refugee Convention to those seeking asylum.

The most pressing need for asylum seekers is the ability to enter a territory in which they are protected from the risk of being persecuted.[3] Otherwise, they are likely to be returned to their country of origin where the risk is imminent or "thrown into perpetual orbit"[4] in their search for a state which is prepared to allow them entry.

Article 33(1) of the Refugee Convention dictates that "no contracting state shall expel or return (*refouler*) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." The benefit of this provision may not be claimed by a refugee where, according to Article 33(2):

> *there are reasonable grounds for regarding [a refugee] as a danger to security . . . or having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.*

The duty of non-*refoulement* arises automatically by virtue of those being physically present and seeking refuge within Australia's territory. This is because refugee status pursuant to the Refugee Convention "arises from the nature of one's predicament rather than from a formal determination status".[5] This notion is affirmed in the UNHCR Handbook which declares that a refugee "does not become a refugee because of recognition, but is recognised because he is a refugee".[6] Since refugee rights are inherently defined as a result of refugee status alone, they must be respected by State parties until and unless a negative determination of a refugee claim is made. Refugee rights remain "inchoate until and unless the refugee comes under the *de jure* or *de facto* jurisdiction of a State party to the Refugee Convention".[7] Therefore, persons who seek refugee protection are entitled to enter and remain in the asylum state until they are determined not to be entitled to refugee status.

Australia has a responsibility for its own conduct and those acting under its authority. This responsibility is not limited to within its territory.[8] Hathaway suggests that the "operation of interception and related strategies may in fact result in refugees being denied protection. These deterrent measures are premised on denial to the refugee of any direct contact with the receiving State".[9] This is equivalent to "arms length actions"[10] that produces an outcome in which refugees are forced back to their country of origin which is a violation of Article 33(1) of the Refugee Convention.

The fact that there is no explicit mention of extraterritorial *refoulement* in the Refugee Convention, Hathaway reconciles by noting that this reflects the "empirical reality"[11] of the period of time in which the Refugee Convention was drafted. No State had prevented access to refugees other than from within its territory or at its borders.[12] This concept is further advanced by the American representative to the ad hoc committee that created the Refugee Convention:

> *…[i]t is incredible that states that had agreed not to force any human being back into the hands of his oppressors intended to leave themselves – and each*

other – free to reach out beyond their territory to seize a refugee and to return him/her to the country from which he sought escape.[13]

The fact that Article 33(1) of the Refugee Convention prohibits return to the risk of being persecuted "in any manner whatsoever" implies that there are numerous ways in which a refugee could be refused entry or forcibly removed.[14]

This view is in line with the underlying humanitarian objective of Article 33(1) which is to grant rights to "seriously at-risk persons"[15] who are able to flee from their countries of origin. It is also consistent with a State's obligations under international human rights law. The UN Human Rights Committee has declared that a State party may be liable under Article 2(1) of the International Covenant on Civil and Political Rights (ICCPR) for "violation of protected rights committed by its agents in the territory of another State, whether or not that State acquiesced".[16] Thus, the Committee views the phrase "within its territory and subject to its jurisdiction" as encompassing not just the location where the breach transpired, but also the relationship between the State and the individual.[17] Similarly, the European Court of Human Rights declared that "the responsibility of Contracting States can be involved because of acts of their authorities, whether performed within or outside national boundaries, which produce effects outside their own territory".[18] The International Court of Justice (ICJ) in its recent advisory opinion on the *Israeli Wall case*[19] that even where a treaty's provisions may point to a purely territorial obligation "it is not to be excluded that it applies both to territories over which a State party has sovereignty and to those over which that State exercises territorial jurisdiction".[20]

The ICJ opinion also seemed to endorse the jurisprudence in *Bankovic* which focuses on the notion of "cause-and-effect jurisdiction".[21] Thus in accordance with refugee law, States must honour their obligations under Article 33(1) and the subsequent rights that ensue "not only in a territory over which they have formal, de jure jurisdiction, but equally in places where they exercise effective or de facto jurisdiction outside their own territory".[22] Hence, Article 33(1) is understood to apply to the conduct of State officials or those acting on behalf of the State "whether beyond the national territory of the State in question, at border posts, or other points of entry, international zones and at transit points".[23]

6 Penalising asylum seekers for political purposes

The LIV suggests that the proposed legislation involves an act of political appeasement which sets a dangerous precedent. It has been hurriedly drafted and constitutes "bad law" in breach of Australia's international obligations and is a reversal of significant reforms introduced to reform and "humanise" Australia's treatment of asylum seekers. There has been dissatisfaction expressed by the Indonesian government towards the Australian Government following the grant of 42 protection visas to West Papuan asylum seekers fleeing persecution from Indonesian authorities in West Papua. It should be noted that Indonesia is not itself a signatory to the Refugees Convention. This has resulted in the Indonesian ambassador being recalled from Australia.

The legislative amendments made to the Migration Act in 2001 were sought, among other reasons "…in response to the increasing threats to Australia's sovereign right to determine who will enter and remain in Australia".[24] It is therefore somewhat ironic that

the proposed legislation seems designed primarily to address Indonesian political disquiet rather than Australia's national interest.

Despite the fact that asylum seekers arriving by boat have been criticised as "queue jumpers" and "forum shoppers", DIMA's own statistics tend to show that these asylum seekers are far more likely to be found to be refugees than those who lawfully enter Australia and then apply for protection visas. This is exemplified by the West Papuan claimants, 42 of whom have already been granted protection visas.

The proposed legislation not only discriminates unlawfully between refugees who arrive by air and those who arrive by boat, but this has the perhaps unintended effect of penalising the most meritorious refugee claimants.

The LIV also notes that the proposed legislation provides the Minister "an additional power to declare that specified persons or classes of persons are exempt". The stated purpose of this power is to provide "flexibility to avoid the regime being extended to those not intended to be covered by the changes". This power also suggests that the Minister will have discretion as to whether the new measures should be imposed on certain groups of asylum seekers. This discretionary power indicates that the proposed legislation will be used to penalise some asylum seekers and not others – possibly based on their nationality and the nature of their refugee claims.

The LIV suggests that if applied in this manner, the proposed legislation would give rise to discrimination of a kind that is entirely inappropriate to the legal framework for Australia's immigration and border control.

7 Economic concerns

The Explanatory Memorandum to the Bill states that there are "no direct financial implications from the Bill as it simply provides the flexibility to the Government to move a wider group of people to offshore processing centres".

The LIV suggests that the Pacific Solution has already cost hundreds of millions of dollars. The Australian Government has provided no evidence to show that processing of refugee claims outside of Australia has any influence on the number of asylum seekers arriving by boat. The LIV suggests that a key factor in the reduced number of asylum seekers relates to international political developments in countries from which asylum seekers have previously fled. The significant disruption of people smuggling rings has also contributed to reduced numbers of asylum seekers.

The LIV also notes that the Australian Government is currently building a large immigration detention facility on Christmas Island and questions the cost of building this new centre in light of its proposal to transfer asylum seekers who arrive by boat to offshore processing centres in foreign jurisdictions.

The LIV recommends that the Australian Government carry out a full cost analysis of transferring asylum seekers to offshore processing centres, payment to foreign governments such as Nauru and centre operating costs (including staff, health service providers, food, equipment, etc).

8 UNHCR response

The United Nations High Commissioner for Refugees (UNHCR), which has oversight on the workings of the Refugee Convention, has also expressed strong concerns about the proposed new measures. In particular, the removal of asylum seekers to offshore processing centres, rather than have their refugee claims assessed in Australia under the Migration Act has been viewed as Australia deflecting its responsibilities to bona fide refugees elsewhere.[25] The UNHCR also states that this would be the first time that "a country with a fully functioning and credible asylum system, in the absence of anything approximating a mass influx, decides to transfer elsewhere the responsibility to handle claims made actually on the territory of the state". The UNHCR also suggests that "this could be tantamount to penalising for illegal entry".

Based on the UNHCR's response to the proposed new measures, it is unlikely that it would assist the Australian Government in the administration of offshore processing centres including assessment of refugee claims.

Most recently, on 21 May 2006, Ms Sandra Pratt, a European Commission official in charge of drafting common European Union immigration and asylum policy, criticised the "tough" new measures and stated that the proposal "sails close to the wind" on human rights and its international obligations.[26] Ms Pratt also stated that asylum seekers arriving in Western countries now were "more likely to be genuine refugees than the masses who landed in the 1980s and 1990s" when "many people were using the asylum route as a way to get into the West because there weren't very clear, open legal channels to come in to work".

9 Annual report

The Bill provides that the Secretary of DIMA must report annually on offshore processing centre arrangements. The LIV suggests that annual reporting provides an inadequate safeguard given that the health and general well-being of asylum seekers at offshore processing centres is at serious risk.

There has been a great deal of controversy in this area and many parliamentarians are concerned about the efficacy of offshore processing centres and the effect on children and their families. The LIV suggests that, if the legislation is enacted, a Parliamentary Committee be appointed to oversee its operation and effect with quarterly reports to Parliament. The LIV also recommends that the Commonwealth Ombudsman be given powers to receive complaints and investigate such complaints.

[1] Human Rights and Equal Opportunity Commission, *A last resort? - The Report of the National Inquiry into Children in Immigration Detention* (Tabled in Parliament, 13 May 2004) http://www.hreoc.gov.au/human_rights/children_detention_report/index.html (accessed 22 May 2006).

[2] *S v Secretary, Department of Immigration & Multicultural & Indigenous Affairs* [2005] FCA 549 (5 May 2005.

[3] James Hathaway, "The scope and content of the principle of non-refoulement: Opinion", *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Edited by Erika Feller, Volker Türk, et al) (Cambridge University Press, New York, 2005), p 279.

[4] Ibid.

[5] Ibid, p 278.

[6] Ibid.

[7] Ibid.

[8] Ibid, p 110.

[9] Ibid, p 335.

[10] Ibid.

[11] Ibid, p 337.

[12] Ibid.

[13] Ibid.

[14] Ibid, p 338.

[15] Ibid.

[16] Guy Goodwin Gill, *The Refugee in International Law,* (Clarendon, Oxford, 1990), p 142.

[17] Ibid, p 142 (para 12). See *De Lopez v Uruguay* (52/1979), HRC, Selected Decisions under the Optional Protocol: UN doc. CCPR/C/OT/1 (1985), 88-92.

[18] Above n 3, p 111 (paras 62-3). See *Loizidou v Turkey* (Preliminary Objections), European Court of Human Rights (23 February 1995) Series A, No. 310, 103 ILR 622.

[19] Refer, Advisory Opinion on the Legal consequences of the construction of a wall in the occupied Palestinian Territory (9 July 2004) http://www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm (accessed 22 May 2006).

[20] Above n 3, p 168. Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory, (2004) ICJ Generally. List No. 131, (9 July 2004).

[21] Ibid.

[22] Ibid, p 169.

[23] Above n 3, p 111.

[24] See *Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Bill* 2001 (18 September 2001) and Migration *Amendment (Excision from Migration Zone) (Consequential Provisions) Bill* 2001 (18 September 2001).

[25] "Australia: Proposed new border control measures raise serious concerns", UNHCR Briefing Note (18 April 2006) http://www.unhcr.org/cgi-bin/texis/vtx/news/opendoc.htm?tbl=NEWS&id=4444cb662&page=news (accessed 22 May 2006).

[26] Natasha Bita, 'EC official slams refugee policy", *The Australian* (22 May 2006), p 6.