Refugee and Immigration Legal Service Inc

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Committee Secretary
Senate Legal and Constitutional Legislation Committee
Parliament House
Canberra ACT

Dear Mr Curtis

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

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

Please find attached submissions by the Refugee and Immigration Legal Service in this matter. We note this has been a very short time frame in which to comment on such an important piece of legislation

Robert Lachowicz
Coordinator/Principal Solicitor

Submission to Senate Legal and Constitutional Legislation Committee
Migration Amendment (Designated Unauthorised Arrivals) Bill 2006 ('the Bill').
Refugee and Immigration Legal Service

Refugee and Immigration Legal Service
The Refugee and Immigration Legal Service (formerly the South Brisbane Immigration and Community Legal Service) is an independent not-for-profit organization specializing in refugee and immigration law. It is the only agency in Queensland that provides free legal assistance in this area and has a significant volunteer base.

RAILS takes on genuine cases of people most disadvantaged and in need, and provides legal representation before the Department of Immigration, the Migration and Refugee Review Tribunals, and works with pro bono lawyers to take cases of public interest to judicial review. RAILS holds phone and drop-in advice sessions and undertakes community legal education and law reform projects where resources permit.

The proposed law
The *Migration Amendment (Designated Unauthorised Arrivals) Bill 2006* ('the Bill') seeks to expand the operation of the excision scheme (the so-called 'Pacific Solution') introduced in 2001 into the *Migration Act* 1958 (Cth). Under the Bill all unauthorised boat arrivals claiming asylum will be transferred to offshore centres to have their claims for refugee status assessed. In effect, all of Australia will now be excised from the Migration Act for the purposes of seeking asylum and asylum seekers will be sent to Nauru, or some other offshore place, for processing. Nauru is not a signatory to the Refugee Convention.

RAILS has a number of serious concerns about the Bill.

The law will not strengthen border control measures
The Explanatory Memorandum accompanying the Bill suggests the purpose of the new law is to 'further strengthen border control measure in relation to unauthorized boat arrivals' (para 1). It is possible however that the opposite may be the effect. It will require far more resources of the Australian Defence Forces and border patrols to remove people from where they have landed in Australia and transport them to a small Island in the Pacific. This will certainly be the situation in the case of a mass influx of asylum seekers to our shores.

Detaining of women and children
Under the new law women and children will be taken to detention facilities in another country and held in indefinite detention while being processed. The Australian community have in recent times indicated that such action is anathema to our values.

Long detention during assessment
There is no guarantee of timely processing as is now available in Australia under recent amendments requiring 90 day processing with Ombudsman and parliamentary scrutiny[1]. Cases may take much longer to process. Our **case studies** indicate lengthy processing has occurred in the previous "Pacific solution' cases from Nauru.

[1] *Migration and Ombudsman Legislation Amendment Act 2005*

Indeterminate Detention after assessment as a refugee

After being determined to be refugees, women, children and men will then have to wait to be resettled to another country apart from Australia. This will be lengthy and, often , futile. It is almost certain that other countries will see people determined to be refugees as Australia's responsibility and will, justifiably, insist that Australia resettles them. This happened in the previous 'Pacific solution'[2]. Australia will therefore be responsible for the indefinite detention of refugees in another country whilst awaiting resettlement.

Continued suffering in Australia

If Australia does finally take in a refugee processed at its offshore centre, the harsh treatment will continue in Australia. Our experience is that, if finally resettled to Australia, refugees will be granted temporary subclass 447 or 451 visas. These are three and five year temporary visas with no ability to gain permanent residence and a sense of stability in life unless the Minister agrees (for a subclass 447 visa) or waives the bar after a period of at least four and a half years from the date of grant (for a subclass 451 visa).

Further, our migration law refuses family reunion with spouse and dependent children until a permanent visa is obtained. It can take many years for a family of genuine refugees to be reunited. This is an unconscionable policy developed to send the message that Australia is a harsh place in which to seek asylum onshore.

Continuing uncertainty for people already suffering immense trauma from their refugee experience will lead to serious psychological problems for all except the most resilient. This also becomes an expensive problem to deal with, onshore and offshore.

Our **case studies** point out some of the difficulties. .

People refused refugee status

For people refused refugee status in Nauru but unable to be returned to their home country (because of lack of identity confirmation, passport issues, internal country strife or whatever) they will remain in detention indefinitely in Nauru. They will have little or no contact with the outside world and their detention will be the responsibility of Australia.

There is no mention in the s198A *Migration Act* declaration[3] that the country should provide fair a humane treatment to people who fail in their application for asylum.

The requirement for a 'declared country' under s 198A(3) also does not include the possibility of local integration. Nauru and PNG we understand both refuse to permit the local integration of the detainees brought from Australia. Therefore, detainees can languish on Nauru or Manus Is. indefinitely if they are not sent back to Australia or resettled elsewhere.

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[2] IOM figures state that of the 1063 refugees eventually resettled under the 'Pacific solution' only 46 (4.3%) were accepted into countries other than Australia and New Zealand.

[3] 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

meets relevant human rights standards in providing that protection.

No guarantee of fair processing

Whilst the government claims the regime under s198A[4] requires the Minister to declare that a country provides effective procedures to assess a claim and protection during processing, there is no guarantee this will occur.

Nauru is not a signatory to the Refugee Convention. Whilst a DIMA Procedures document, governs DIMA processing on Nauru,[5] there is doubt that proper processing according to UN guidelines[6] will occur. We are aware of cases through this service and from other agencies where the procedural failures have occurred in processing in Nauru. These have included inadequate opportunity to properly present a case, no legal representation, inadequate reasons given for primary and internal review decisions and inappropriate interpreters.

Given the location of Nauru and the resources available access to migration agents and lawyers will be minimal and interpreters may be difficult to access. The cost of providing these would be immense given the travel and logistics issues.

Under the proposed regime there will be no external review such as provided by the Refugee Review Tribunal. Around 90% of refugee claims from countries such as Iraq and Afghanistan were overturned by the Tribunal in 2004-05. This indicates that DIMA processing was seriously flawed and that proper external review by a body such as the RRT is needed.

There is no judicial or Ombudsman oversight of this offshore regime, which currently occurs in Australia. Access to courts is needed to ensure proper procedures apply given the life and death issues involved in refugee assessment. If there is no truly independent oversight of DIMA-controlled decision-making in Nauru, then wrong decisions could be made forcing people to return to situations of persecution or death.

Transporting asylum seekers into potential danger

Transporting asylum seekers to offshore centers takes them out of the immediate security of Australia's stable democratic security and into the uncertainty of small and potentially fragile sovereign nations. The asylum seekers remain Australia's responsibility in partnership with the other country. Australia has entered into agreements with Nauru and PNG for jointly administering processing of asylum seekers[7]. However there are no guarantees when dealing with

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[4] Ibid.

[5] 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).

[6] The UNHCR has identified core elements for fair decision-making. These include a right of appeal by an authority different from and independent of that making the initial decision, right to legal assistance and representation at all stages, special consideration given to female asylum claimants and unaccompanied children, a single procedure that takes into account refugee claims and complementary claims to protection, e.g. under the *Convention against Torture*, access to impartial and qualified interpreters, a personal interview based on a thorough assessment of the circumstances of each case, an opportunity to present evidence of his or her personal circumstances and country of origin information, and a reasoned, written decision deciding the claim.

[7] See *Memorandum of Understanding Between the Republic of Nauru and the Commonwealth of Australia for Cooperation in the Administration of Asylum Seekers and Related Issue,* 11 December 2001, and subsequent agreements

other countries. There is no guarantees in the Bill or other policy that Nauru or other offshore processing place will not return people to a situation of danger in their home country. Non-refoulement is the core obligation Australia has under Article 33 *Refugee Convention*.

There is no guarantee that in the near or distant future that Nauru will not become a failed State. There is no guarantee that Nauru will not fall to the dark forces of racism, corruption or terrorism leaving those detained on this remote island in danger, and still Australia's responsibility. In Nauru, asylum seekers and refugees are a readily identified distinct group of culturally different people.

The arrangements with Nauru could collapse leaving asylum seekers detained and in danger.

Contradictory public policy rationales

The proposed regime conflicts with the Government's previously stated rationales for the temporary protection visa scheme. Prior to 1999 all people arriving in Australia being found to be refugees would obtain permanent visas to enable resettlement and a new life of stability to begin. After this a scheme was introduced, temporary protection visas were then granted for people who did not seek asylum in their country of first asylum, but rather undertook a 'secondary movement' to seek asylum in another country. This was aimed at so-called 'forum shoppers' and the government's stated justification for this was that the preferred solution of UNHCR, apart from repatriation to home country in safety, was resettlement in first country of asylum rather than in a third country.

This proposed law aims at people who arrive in Australia as their first country of asylum. It penalizes people for fleeing their country directly to Australia, even where Australia is the nearest neighbour and refuge is most easily and effectively available in Australia for genuine refugees fleeing persecution. This breaches the Refugee Convention:

> Article 31: "States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened…"

Australia as a responsible global citizen

In making such harsh laws to send a message to potential asylum seekers we are sending a message to the global community that harsh treatment of asylum seekers is justified in the 'national interest'.

The UNHCR has expressed grave reservations about the proposed law. They stated:

> "If this were to happen, it would be an unfortunate precedent, being for the first time, to our knowledge, 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." [8]

Previously Pakistan, who has up to two million refugees, has cited Australia's response to minor numbers of asylum seekers as justification for closing its borders to Afghan refugees. Australia's introduction of the 'Pacific Solution' has encouraged several European countries to consider their own versions of the 'Pacific Solution'.

[8] UNHCR media release 18th April 2006 issued by Media Relations & Public Information, Geneva.

In signalling a further retreat from the international system of protection, the proposal sets a negative precedent that could encourage other developed countries to lessen their standards for treatment of asylum seekers and refugees.

It seems clear that this new law was prompted by the reaction of Indonesia to West Papuan asylum seekers being given refugee status. There is certainly a need to keep developing close relations with Indonesia, but sending harsh signals to potential asylum seekers not to come to our shores, particularly in the context where independent evidence has indicated human rights problems exist in that place, is shameful.

Whilst there may be a need to revisit the Refugee Convention and its processes in a modern context, it needs to be done in a unified well-planned internationally agreed approach. A reactive response to Indonesia's concerns will promote further fragmentation of the approach to refugees and weaken the international system of protection.

The government could be more creative and humane in its approach to refugees. Striking out on its own and undermining the protections already developed in for refugees over many years is unwise as it is disjointed and works against a unified global approach.

Refugee and Immigration Legal Service*
23 May 2006

Case Studies - Evidence of refugees in Nauru under the previous "Pacific Solution'

Case A

- Mr A – Middle Eastern nationality
- Picked up in Australian waters in August 2001 and taken to Nauru.
- He was in detention for 2 years and 1 month in Nauru
- He was only recognized as a refugee under the 1951 Refugees Convention in October 2002, some 14 months after first being detained.
- It was not until July 2003 that he was allowed to apply for an Australian visa Class XB Temporary (subclass 451). He was granted this visa in August 2003 and left for Australia in September 2003.
- Mr A therefore was kept in detention for a further 11 more months after he had been determined as a refugee under the 1951 Convention.
- Mr A advises that from when he was sent to Nauru, he was unable to leave the detention facilities for six months. After this, he was allowed to leave under tight security for one hour per month. These strict conditions did not change after he was determined as a refugee. He continued to be allowed to leave for one hour per month until he left to come to Australia.
- In Australia, a further application was lodged for permanent protection visa but by law, a decision cannot to be made on current application for PR until 54 months after the 451 visa was granted or until Minister waives the 54 month period.
- Mr A provided submissions to Minister seeking waiver on the basis that he has a wife and three children who had been seeking refuge in another middle East country since 2001 and whom he had not seen yet. No decision has been made. Our experience in these matters is that the Minister has not granted any such waivers.

- Mr A is suffering severe anxiety in being separated from his wife and three children for such a long period of time. He still has until March 2008 before the 54 months will expire for DIMA to make a decision. He is working hard in to support his family with the money he earns and is fearful about attempting to travel to find an employer that might want to sponsor him for a permanent on a regional scheme visa as he may lose his current employment.

Cases B & C

- Two brothers from a Middle East country were taken from Australian waters as minors and detained in Nauru for 10 months, one of them who was a minor at the time. They remained in detention for about 7 months before being granted status as refugees under the 1951 Convention
- They were allowed to apply for an Australian visa Class XB Temporary (subclass 451) which was granted and they left for Australia four months later. . Therefore, they were kept in detention for a further 3 more months after they were determined as refugees under the 1951 Convention.
- B and C advise that during their time in Nauru they were allowed to leave the detention facilities about 6 times in total, and this for nothing more than 2 hours at a time and under tight escort.
- In Australia, they have applied for permanent refugee visas but by law, decisions cannot be made until 54 months elapses or until Minister waives the 54 month period.
- B and C provided submissions to Minister seeking waiver on the basis that they were young and needed certainty for their future by way of being able to study and to work to help support their family. Further, their mother and younger brother had already been granted a permanent protection visas (subclass 866) in Australia (after having previously been on 785 temporary protection visas) and that the family was suffering as a result of their still waiting for a decision to be made on their permanent residency. The Minister has not made a decision on the waiver submission. Our experience in these matters is that the Minister has not granted any such waivers.
- If no waiver is given by the Minister B and C will have to wait until January 2007 before the 54 months will expire for DIMA to make a decision.

Case D

- Mr D and his family were detained in Nauru for 15 months.
- They remained in detention for about 5 months before being granted status as refugees under the 1951 Convention again (Mr D had been recognized previously as a refugee by UNHCR and there was an issue whether he had lost his original refugee status on the basis that he had moved from Indonesia where he was last granted his refugee status - Indonesia is not a signatory to the 1951 Convention)
- Ten months later Mr D and his family were granted an Australian visa Class XB Temporary (subclass 451). Mr D suffers severe mental health issues which were exacerbated by his prolonged detention on Nauru. He and his family will also have to wait 54 months before any permanent visa decision unless the Minister waives the bar.