23 May 2006

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

Clyde Cosentino
Director
Centre for Multicultural Pastoral Care
PO Box 112
Paddington QLD 4064

Telephone: 07 38763295

Dear Committee Secretary,

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

I am enclosing submissions in response to the Inquiry into the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006.

The Centre for Multicultural Pastoral Care (CMPC) is an agency of the Catholic Archdiocese of Brisbane, which facilitates in the pastoral care and advocacy for migrants, people on the move, refugee claimants and refugees.

CMPC has been involved in the pastoral care of this group of persons for several decades though it has come under different names in the past (for example, the Catholic Immigration Office). CMPC was very closely associated with the pastoral care and assistance of hundreds of temporary protection visa holders in 2000 onwards when they were released from the various immigration processing centres around Australia.

The proposed law

One of the aims of the *Migration Amendment (Designated Unauthorised Arrivals) Bill 2006* ('the Bill') is 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 be excised from the *Migration Act* for the purposes of seeking asylum for those who come by boat, and all such asylum seekers will be sent to Nauru, or some other offshore place, for processing. It should be noted that Nauru is not a signatory to the Refugee Convention.

This submission raises a number of serious concerns about the Bill.

Women and children in detention

Women and children will be taken to immigration facilities in Nauru, which is <u>not</u> a signatory to the 1951 Refugees Convention. These women and children will, therefore, remain in indefinite detention while they are being processed. Resorting to this type of detention again will run counter to the Prime Minister's announcement made in June 2005 in protecting women, children and families, where he said:

> "The Act would be amended to state that 'the Parliament affirms as a principle that a minor child shall only be detained as a measure of last resort'.
> … … …
> The objective of these amendments is to ensure that families with children in detention will be placed in the community, under community detention arrangements, with conditions set to meet their individual circumstances."

When these women and children are finally processed, and if determined as refugees, they will have to wait to be resettled to a safe third country as refugees while remaining in indefinite detention. If these women and children are refused protection then they will have to remain in indefinite detention until they are removed from Nauru or other offshore processing place. The Prime Minister's announcement of June 2005 was clearly aimed at the protection, human dignity and wellbeing of women and children even in these situations where they faced removal, when he stated:

> "The Second Reading Speech to the Bill will make it clear that the overall intention of the package of amendments will be to ensure that the best interests of minor children are taken into account and that any alternatives to detention of children are considered in administering the relevant provisions.
>
> The new arrangements will allow all families with children who are currently in detention centres and Residential Housing Projects to be placed in the community under community detention arrangements. Where their primary processing has been completed and removal arrangements are not underway, community detention arrangements will be made for these families as soon as possible, following decision by the Minister. It may take 4-6 weeks to make suitable arrangements for the families currently in detention."

Such protective measures will not be possible in the case of women and children detained on Nauru.

Lengthy periods of detention for all persons, even those recognized as refugees

The history of Refugee Status Determination (RSD) by the Department of Immigration (DIMA) or the United Nations High Commissioner for Refugees (UNHCR) for persons detained in Nauru, and whom have made a claim for refugee status, is that most of those persons who were eventually determined as refugees after a long time period were <u>not</u> resettled <u>outside</u> Australia. Only New Zealand accepted a few refugees on the basis of resettlement but its intake of humanitarian refugees was not high.

The Australian Government has advised that it will seek to resettle any persons determined as refugees to other safe third countries, thus not breaching its obligations of *non-refoulement*. It has, however, tried this approach before under its Pacific solution with very little success. It reached a point where persons who were eventually determined as refugees, and who languished in detention in Nauru for further lengthy periods of time, were resettled to Australia, after having been granted a subclass 447 visa or subclass 451 visa for lawful entry into Australia.

The subclass 447 and 451 visas respectively are temporary protection visas allowing for lawful entry into Australia. These visas, however, keep the visa holders separated from immediate family members and relatives for lengthy periods of time and are limited visas as compared with the permanent protection visa (subclass 866 visa). Thus, if a refugee is granted a subclass 451 visa, the recipient of this temporary protection visa cannot have his or her application for permanent protection decided by DIMA for at least four and a half years unless the Minister waives this requirement. It is rare that the Minister makes a positive decision on the waiver submission to shorten this time. If a refugee is granted a subclass 447 visa, then he or she cannot apply for a permanent protection visa unless the Minister waives this statutory bar on public interests grounds. Some of these persons who have been granted these visas after lengthy detention on Nauru have acquired mental health problems such as severe depression and paranoia.

Fleeing to a country of first asylum is not secondary movement

Fleeing from a country of persecution to a second country in order to seek asylum in a safe third country was one of the reasons that the "Pacific Island solution" was incorporated. It was to penalise persons who did not apply for refugee status in a country of first asylum (even though that country might not even be a signatory to the 1951 Refugees Convention) and who instead traveled to a safe third country to do this. However, legislation is soon to be passed penalising persons who apply in a country of first asylum for refugee status by removing them to another country to be processed, a country that is not a signatory to the 1951 Refugees Convention. Such an approach is unprecedented under international law.

No monitor on site or accountability process in DIMA processing and determination of refugee status

Refugee claimants cannot take benefit of humane laws in Australia because they have been excluded from the "migration zone". The laws are designed for these persons to not take benefit of Australian laws. If that is the case, then how is it allowed that the Australian government can set up a detention centre in another country, Nauru, and have DIMA, an Australian government body, make its own RSD assessment, with no accountability processes under Australian law put in place? DIMA is a department body accountable under Australian law. If DIMA, in another country, makes RSD determinations of persons claiming persecution then it needs to be accountable under Australian law in its decision-making.

If UNHCR is to undertake the RSD assessment, then DIMA should not be involved and the Australian community should be informed of the fact that UNHCR has full responsibility for RSD assessment. If DIMA is to undertake in the RSD process then as an Australian government department it should be accountable under Australian law, where due process can deal with this. DIMA cannot have it both ways where it is undertaking RSD assessment as an Australian government department but is not accountable under Australian law because it is doing this in another country.

Excision of Australian mainland

The progression of prescribing excised offshore places to now incorporate mainland Australia is a major concern. It is worrying that even now, those rescued by plane after traveling by sea who have been brought to Australian mainland, will then be taken to Nauru, a sovereign country in its own right, to be processed by DIMA with no accountability processes or scrutiny. The concern is that the legislation has been narrowed over the last few years. There is a fear that, in the future, the government will attempt to force *all* persons entering by plane, who apply for asylum, to be detained outside of Australia. This is how serious it has become and is not an unreal proposition. It should be remembered that on 28 August 2003, the Australian government amended the *Migration Regulations* 1994 in the following way:

"From 28 August 2003, immigration law has been amended to broaden the coverage of Temporary Protection Visa (TPV) arrangements to include all asylum seekers arriving in Australia, not just those arriving unlawfully. Authorised arrivals seeking protection will, in the first instance, be eligible for a Temporary Protection Visa (TPV). Access to permanent residence will be subject to a continuing need for protection, and, in accordance with existing legislation, on whether or not the person abandoned or bypassed effective protection en route to Australia (Taken from DIMA's Fact Sheet – 28.08.2003).

Thus the Australian Government inserted regulations that were to ensure that all asylum seekers in Australia, whether they arrived lawfully or unlawfully by plane or boat, were only to be granted temporary protection visas at first instance and had to wait 30 months before DIMA would make a decision on their claims for permanent protection. The Senate subsequently disallowed these regulations on the 9 October 2003. However, these regulations remained in force from 28 August 2003 until 9 October 2003.

Nauru is not a signatory to the 1951 Refugees Convention
Nauru is not a signatory to the 1951 Refugees Convention. Therefore, the responsibility of non-refoulement falls on a country that has no RSD processes in place and is not a signatory to the 1951 Refugees Convention. Thus, it is a sovereign country, which is under no obligation to not remove persons from its territory to a person's country of persecution.

If you have any queries in this matter please do not hesitate to contact me on 07 38763295.

I thank you in anticipation.

Yours faithfully,

Clyde Cosentino
Director
Centre for Multicultural Pastoral Care