



14 January 2014

Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

By email: legcon.sen@aph.gov.au

Due date for submissions: 14 January 2014

To the Committee

Public interest Immunity

Submission by the Refugee Advice & Casework Service (Aust) Inc.

The Refugee Advice & Casework Service (**RACS**) is a community legal centre that provides free legal advice and assistance to people seeking refugee status in Australia. It is a specialised refugee legal centre and has been assisting asylum-seekers on a not-for-profit basis since 1988.

RACS refers to the claim of public interest immunity over documents tabled by the Assistant Minister for Immigration and Border Protection on 4 December 2013 (the Documents). These Documents relate to asylum seeker boat arrivals, and the role played by government in the detection and interception of boats and transfer of those on board seeking protection in Australia. Importantly, the information over which public interest immunity is claimed includes information on the number of boats intercepted since the change of government on 7 September 2013, the nationality of boat passengers, the number of children on board, and the number of asylum seekers subject to “on-water transfers” to Indonesian authorities.

Specifically, the Documents subject to the order to produce include:

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(a) all communications relating to any 'on water operations' that occurred between 7 September 2013 and 14 November 2013 be laid on the table by the Minister representing the Minister for Immigration and Border Protection, by noon on 18 November 2013, including but not limited to:

Any report or briefing to, or email or other correspondence between the Minister or the Minister's office and the Department of Immigration and Border Protection or the Detection, Interception and Transfer Task Group and related agencies which includes information related to any or all of the following:

- (i) the chronology of events,
- (ii) 'illegal maritime arrivals' (unauthorised arrivals),
- (iii) Suspected Irregular Entry Vessels (SIEVs) intercepted at sea,
- (iv) distress calls to and response time by the Australian Maritime Safety Authority,
- (v) where the SIEV was detected,
- (vi) nationality of passengers,
- (vii) safety-of-life-at-sea incidents,
- (viii) SIEV turn backs,
- (ix) SIEV tow backs,
- (x) number of people suspected to be on board the SIEVs,
- (xi) the number of children suspected to be on board the SIEVs, and
- (xii) how many people, if any, were subject to 'on water transfers';

(b) no later than 24 hours after an event relating to 'on water operations' all communications be laid on the table by the Minister representing the Minister for Immigration and Border Protection, including but not limited to:

Any report or briefing to, or email or other correspondence between the Minister or the Minister's office and the Department of Immigration and Border Protection or the Detection, Interception and Transfer Task Group and related agencies which includes information related to any or all of the following information:

- (i) the chronology of events,
- (ii) 'illegal maritime arrivals' (unauthorised arrivals),
- (iii) Suspected Irregular Entry Vessels (SIEVs) intercepted at sea,
- (iv) distress calls to and response time by the Australian Maritime Safety Authority,
- (v) where the SIEV was detected,
- (vi) nationality of passengers,
- (vii) safety-of-life-at-sea incidents,
- (viii) SIEV turn backs,

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- (ix) SIEV tow backs,
 - (x) number of people suspected to be on board the SIEVs,
 - (xi) the number of children suspected to be on board the SIEVs, and
 - (xii) how many people, if any, were subject to 'on water transfers'; and
- (c) if the Senate is not sitting within the 24 hours after the event relating to 'on water operations' then the documents are to be presented to the President under standing order 166 on the next working day.

RACS acknowledges that there are public interest concerns raised by the information in the Documents but submits these are outweighed by other overriding public interest considerations supporting the release of this information.

RACS is particularly concerned by the Minister's claim of public interest immunity over the information directly relevant to Australia's compliance with its international obligations and the protection of human rights in the region. The information that is the subject of the claimed public interest immunity also relates to a key aspect of the Coalition Government's election platform, which makes it appropriate that its conduct be transparent and capable of being held to account.

RACS notes the Government's stated concern that access to the requested Documents could "cause damage to the national security, defence, or international relations" and "the provision of information such as that contained in the documents requested will further enhance the knowledge of people smugglers."¹ RACS is concerned that these apprehensions may be overstated and should also be properly justified through the provision of information which can be held to account. In any case, such concerns must be balanced against the important democratic principles enshrined in Australia's adherence to Responsible Government, Ministerial Responsibility and the Separation of Powers. These doctrines aim to ensure the Executive is made accountable to the Parliament, the Parliament to the people and that there are checks and balances on the exercise of powers by each branch of power. Central to the achievement of these aims is a fair and transparent process for the access of information regarding the Executive's use of its power. It has long been recognised that there is a real and well-founded risk that if left unchecked, Executive bodies will use the claim of public interest and national security to 'cloak' other less legitimate purposes.² It is important that the Legislative and Judicial arms of Government exercise a level of oversight to ensure exercises of Executive power are properly-directed and

¹ <http://www.smh.com.au/federal-politics/political-news/immigration-minister-scott-morrison-responds-to-senate-order-with-press-releases-20131119-2xs7a.html>

² *Church of Scientology v Woodward* (1982) 154 CLR 25, 68 per Brennan J.

proportionate in this respect. The balancing of the public interest concerns raised in this case is critical.

RACS submits that it is in the interests of the Australian community that the Documents tabled be made publicly available. In the following comments, we draw on our experience as asylum seeker advocates, noting the relevance of the information in the Documents to our service and the interests of asylum seekers in Australia more generally.

RACS supports the release of the Documents (on whole or part) on the following public interest grounds, which we submit outweigh the public interest concerns raised by the Minister.

The public significance of the information contained in the Documents – Government accountability and possible breaches of international law

On 10 January 2014 claims were made by the Minister that not a single asylum seeker had been taken by the Australian immigration authorities for more than three s, perhaps three, boats were “pushed back” before being abandoned in Indonesian waters. Our Centre was contacted within this period on behalf of asylum seekers who also reported being towed back.

Twenty-eight year old Sudanese asylum seeker Yousif Ibrahim Maser has spoken publicly³ about his boat, which carrying more than 40 people, landed on an Island near Darwin on New Year’s Day. He said the Australian navy towed the boat for several days before dumping the asylum seekers in the middle of the night outside Indonesian waters.

Turning, pushing or towing back boats, or returning asylum seeker boats raises significant human rights issues and potentially places Australia in breach of its obligations under the Refugee Convention and other instruments of international law. Non-refoulement obligations arise under the *Convention against Torture*⁴, the *International Covenant on Civil and Political Rights*⁵, and in Article 33(1) of the Refugees Convention⁶. Article 33 of the 1951 Convention contains a prohibition on the expulsion or return of a refugee:

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

³ Sydney Morning Herald 10 January 2014, accessible at: <http://www.smh.com.au/national/abbotts-secretive-ways-have-gone-too-far-says-john-hewson-20140110-30mpq.html>

⁴ *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* 1465 UNTS 85 (entered into force 26 June 1987)

⁵ *International Covenant on Civil and Political Rights* 999 UNTS 171 (entered into force 23 March 1976)

⁶ *Convention Relating to the Status of Refugees* 189 UNTS 137 (entered into force 22 April 1954) and *Protocol Relating to the Status of Refugees* 606 UNTS 267 (entered into force 4 October 1967) (“the Refugees Convention”)

account of his race, religion, nationality, membership of a particular social group or political opinion.

RACS is very concerned about the possible breaches by Australia of its *non-refoulement* obligations. Not only do these breaches expose Australia to international criticism, but also represent a betrayal of Australia's own humanitarian standards. To return asylum seekers to situations of persecution and to condone *refoulement* diminishes our own humanity and will come at significant human cost⁷. If Australia is responsible for exposing a person to return to persecution contrary to international law, this information is relevant to whether government is acting lawfully and therefore ought properly to be publicly accessible.

The threat to our diplomatic and co-operative relationship with neighbouring source, transit or resettlement states

Experts have recommended that real solutions to the problems of deaths at sea lie in better co-operative relations with our neighbouring source, transit and resettlement countries. Information as to what Australia's policy in relation to maritime arrivals is, what if any are its limits and how it works on a day to day basis is information which would need to be provided to these very countries in order to foster an atmosphere of trust and co-operation. As it stands, relations with many of these countries, and particularly Indonesia, are currently being threatened by the withholding of that information. Withholding the information allow for doubts over the accuracy of information which has been released to those countries, particularly when the information which is released conflicts with what is reported by local or international news agencies.

The deterrent aims of withholding the Documents may not be realised – information continues to be available to people smugglers through alternative means

It is a misconception that the Government can create an information vacuum regarding asylum seeker boat movements and operations. The free flow of information through mobile communication and the reporting of Australia's actions by our neighbouring and affected countries' news agencies means that information released or presented by the government is not the only information currently available to those considering making a journey by boat to Australia, to those assisting them with that trip, or to our neighbouring countries' governments.

⁷ See David Marr "Turn the boats back and people will die" accessible at:<http://www.smh.com.au/federal-politics/political-opinion/turn-the-boats-back-and-people-will-die--abbott-knows-this-20120123-1qe3o.html>.

This point is acknowledged by Crock and Ghezelbash in their comprehensive paper on this subject “Do Loose Lips Bring Ships? The Role of Policy, Politics and Human Rights in Managing Unauthorised Boat Arrivals:

“We live at a time when the transfer of information and communication between people and between countries has never been easier. The prevalence of internet and mobile technology has given asylum seekers and their facilitators unprecedented access to news casts and other information sources. Asylum seekers often have mobile phones. Refugees in Australia report that they know when friends and relatives are making an “undocumented” trip to Australia because the practice is to call a contact in Australia at point of departure.”⁸

Restricting access to the information over which public interest immunity is claimed would still allow that information to be freely available to those people the Minister wishes to prevent from accessing it.

The ineffectiveness of deterrence measures generally

Deterrence measures designed to discourage would-be asylum seekers from coming to Australia, including the use of language or attempts to control or restrict information, have been recognised as far less effective than co-operative arrangements with source or transit governments, coupled with targeted resettlement programs which would provide refugees with alternative viable protection options.

The best strategies prevent rather than deter, and stop the flow of asylum seekers at the source or divert desperate people away from dangerous and irregular modes of transport.

The Report of the Expert Panel on Asylum Seekers makes this clear. Rather than deterrence measures, the Expert Panel’s recommendations prioritise a whole-of-government strategy for engaging with source countries, and cooperation on asylum seeker issues with Indonesia, Malaysia, PNG and emerging resettlement countries.

The ineffectiveness of measures designed to deter asylum seekers from reaching Australia by boat must also be placed in a broader context which recognises the impact that war and conflict has on the movement of people globally. Since 2001, the number of refugees, asylum seekers and people displaced by conflict has risen globally from 19.8 million to 45.2 million.⁹ In RACS’ experience, withholding information will have no impact on the decisions

⁸ Mary Crock and Daniel Ghezelbash, “Do Loose Lips Bring Ships? The Role of Policy, Politics and Human Rights in Managing Unauthorised Boat Arrivals” (2010) 19 Griffith Law Review 238 at 246-7, accessible at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1653086

⁹ Amnesty International - Asylum seekers in the Asia Pacific: a solution – 14 October 2013, accessed at <http://www.amnesty.org.au/refugees/comments/32990/>

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asylum seekers make to arrange travel to Australia by boat. the urgent and life-threatening factors which lead individuals and families to travel to Australia by boat often outweigh all other considerations in our client's minds. Addressing the issues raised by the global movement of people displaced by conflict is not unique to Australia and punitive deterrence strategies are unlikely to be effective for this reason.

Moreover, preventing or controlling the information released about asylum seeker boats is of very limited value when compared with real strategies to address asylum seeker arrivals like co-operative arrangements with source or transit governments and the development of resettlement programs which would provide refugees with viable protection options.

RACS' experience with enhanced screening

Since around October 2012, many asylum seekers who arrive by boat have been subject to a "screening" process which involves a person arriving by boat being initially interviewed by one or two officers of the Department to assess whether that person should be "screened-in" and given an opportunity to make an application for a protection visa. If a person is "screened-out" they are not given that opportunity and are returned to their country of origin.

The enhanced screening process raises serious concerns, as it appears to be being used to determine substantive claims for protection in the absence of the provision of legal advice and ultimately without any formal application subject to natural justice and various review procedures. It has been criticised by the President of the Australian Human Rights Commission, Gillian Triggs, as well as other human rights organisations.

RACS has many clients affected by this policy. We generally attempt to obtain the person's entry interview record, screening interview record, and then speak with them by phone about their claims. Significant barriers exist to due process currently in this area of our work. Much of the documentation ordinarily released under FOI is being refused for operational reasons.

The restricted release of documents under FOI poses significant barriers to being able to assess the Department's decision making process, reasons for decisions and their modus operandi generally in relation to screening.

RACS is concerned about the lack of transparency of the screening process, its lack of procedural safeguards and the absence of any kind of review system. It is our observation that boat arrivals subject to screening do not have an adequate opportunity to fully consider a person's claims for protection and are not afforded procedural fairness.

RACS supports transparency generally in relation to Departmental decision making, and particularly as it affects those subject to screening. All asylum seekers arriving in Australia

ought to have their claims for protection considered lawfully, and ought to be accorded procedural fairness in that decision making process.

The public benefits of transparency on asylum seeker issues and Australia's migration programs

It is important that Members of Parliament and the public generally be able to access information relating to the Executive branch of Government's exercise of power. This ensures decision-making is subject to a level of public scrutiny conducive to government accountability and Responsible Government more generally. As solicitors who regularly hear asylum seekers' histories, RACS is acutely aware of the large number of misconceptions that exist in relation to refugees and asylum seekers in Australia. RACS supports allowing public access to information which would facilitate better understanding of the real scope of asylum seeker arrivals by boat, as measured against our migration intake program.

There are many reasons why the lived experiences of asylum seekers are often not made public. The main reason for RACS clients' reluctance to speak publicly about their experience is usually a validly held concern about the consequences of doing so for the person's own safety or the safety of their family. Further, as we advise our clients, any publicity or public statement an asylum seeker makes in Australia is likely to be scrutinised by decision-makers considering their case as to whether it constitutes a deliberate attempt to create *sur place* claims. In addition there are significant practical reasons why the Australian public are unlikely to hear the voices or experiences of asylum seekers. Asylum seekers ordinarily lack family or other social support structures in Australia, most come from non-English speaking backgrounds and therefore face cultural and linguistic challenges. Many have suffered trauma and are fearful of authorities due to experiences in their countries of origin. As a result, asylum seekers may find it difficult to share information or personal details with either Australian citizens or with the Australian media.

RACS regularly delivers community legal education to members of the Australian community wanting more information about refugee law. In our experience, there is almost no public understanding currently of the difference between our planned intake of refugees from overseas (our offshore humanitarian program) and our receiving and processing requests for asylum (our onshore humanitarian program). In our experience there is very little understanding that these two humanitarian programs are ideally intended to work in complement with one another.

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Access to information about Australia's migration programs and policies allows Australians to take an honest look at the facts, issues and statistics. RACS supports allowing people to make informed judgements about the issues surrounding asylum seekers arriving onshore to Australia.

To discuss the contents of this submission, please contact us on (02) 9114 1600.

Yours sincerely,

REFUGEE ADVICE AND CASEWORK SERVICE (AUST) INC

Per:

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SUMMARY OF RACS'S COMMENTS:

1. The information which it is proposed to protect is of significant public interest considering Australia's possible breaches of international law.
2. The withholding of the Documents tabled does not guarantee that information would not be available through alternative means to people considering making a journey by boat to Australia, those assisting them with that trip and our neighbouring and affected countries. This may occur through a variety of means including mobile phone communications and local and international news agencies.
3. Deterrence measures designed to discourage asylum seekers from coming to Australia, including the use or control of propaganda, language and information, will always remain far less effective than co-operative arrangements with source or transit governments, coupled with targeted resettlement programs which would provide refugees with viable protection options. The best strategies prevent rather than deter, and stop the flow of asylum seekers at the source or divert desperate people away from dangerous and irregular modes of transport.
4. Transparency in Executive decision-making is important, and particularly as it affects those subject to screening. All asylum seekers arriving in Australia ought to be able to access information relevant to having their claims for protection considered lawfully, and accorded procedural fairness.
5. There is enormous public benefit in allowing transparency on asylum seeker issues and Australia's migration programs.