



Migration Amendment (Designated Unauthorised Arrivals) Bill 2006

Sue Harris Rimmer
Law and Bills Digest Section

Contents

Purpose.....	1
Background.....	1
Basis of policy commitment	3
Position of significant interest groups/press commentary	5
International law	5
Foreign policy.....	7
Domestic concerns.....	8
Coalition backbench	9
ALP position	10
Australian Democrat position	10
Australian Greens position.....	11
Family First position.....	11
Financial implications.....	11
Standing appropriation.....	12
Main provisions	13
Schedule 1 – Amendments to the Migration Act 1958	13
Definitions	13
Exemptions	14
Entry by sea	16

Detention is discretionary	16
Visa applications	17
Offshore processing.....	18
Disclosure of refugee claims	18
Reporting requirements	18
Bar on court proceedings.....	19
Transitional cases	20
Compensation for acquisition of property	21
Regulations	21
Concluding comments	21
Politicisation of asylum	21
Unanswered questions	22
Does the Bill breach international law?.....	23
Protection from non-refoulement	24
Adequate refugee status determination	26
Durable solution	27
Human rights standards	28
Endnotes.....	29

Migration Amendment (Designated Unauthorised Arrivals) Bill 2006

Date introduced: 11 May 2006

House: House of Representatives

Portfolio: Immigration and Multicultural Affairs

Commencement: The day after Royal Assent. Note that the provisions of the Bill would take retrospective effect from 13 April 2006 (Schedule 1 Item 8).

Purpose

The amendments contained in the Bill propose to amend the *Migration Act 1958* (the Act) to expand the offshore processing regime introduced in 2001 currently applying to offshore entry persons and transitory persons.

The Bill itself does not excise territory. Specific locations are excised by way of regulations. The effect of excision does not affect Australians or Australian territory, but prevents aliens arriving in Australian waters from accessing the visa application process (including review) of the Act and they are also subject to being removed to a declared country.

This Bill mean that all persons arriving at mainland Australia unlawfully by sea (even those airlifted to Australia at the end of a sea journey) on or after 13 April 2006 will now be treated as if they had landed in an excised place.

The regime nominating places as excised offshore places is not replaced but extended by this bill by means of changing the definition of *offshore entry person* to *designated unauthorised arrivals*.

The Bill will ‘effectively eliminate the distinction between unauthorised boat arrivals at an excised offshore place and those who reach the mainland’.¹

Background

This Bill extends previous legislative amendments to the Migration Act:

- the *Migration Amendment (Excision from Migration Zone) Act 2001* (passed 26 September 2001)

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- the *Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001* (passed 26 September 2001),
- the *Migration Legislation Amendment (Transitional Movement) Act 2002* (passed 4 April 2002)

Note also the provisions of the Migration Legislation Amendment (Further Border Protection Measures) Bill 2002 which was negated by the Senate on 9 December 2002 and on 16 June 2003. The Bill would have amended the Act itself to extend the 'excision of the migration zone' to include islands across the North of Western Australia, Northern Territory and Queensland.²

Nauru and Manus Island in Papua New Guinea (PNG) were declared countries under section 198A of the Act and offshore processing facilities were established on those islands on 19 September 2001 and 21 October 2001 respectively.

People who are processed offshore are treated differently to those processed onshore in the following particulars:

- forced removal to a declared country such as Nauru or PNG (as opposed to mandatory detention on Christmas Island or a mainland detention centre) (see item 18, section 198A(1))
- detention in offshore centres is discretionary under the Act (see **item 9**) and subject to Memorandum of Understanding between Australia and host country and any visa conditions issued by the host country. Detention in Australian centres is subject to *Migration Amendment (Detention Arrangements) Act 2005* (note [Bills Digest no. 190](#) 2004-2005)
- no access to Refugee Review Tribunal or Australian courts for judicial review (see **Items 28 to 40**)³
- only certain visa categories can be applied for. Previously categories included temporary visas for three or five years, with bars on family reunion during that time (447 or 451 temporary visa categories). Regulations will have to be tabled to give effect to new offshore visa categories; and
- recognition of refugee status does not automatically qualify an applicant for Australian visa, could be 'resettled' to third country.

Less formally, people in offshore processing receive no professional application assistance, and may receive limited or no access to legal advisers, media, visitors and charitable or religious assistance. In the past, Nauru did not allow visas for lawyers or journalists to access the detainees. One journalist was allowed to visit Nauru in April 2005.

For further background, including a full chronology of migration legislation and regulations relating to excision and full definitions of terms, see Moira Coombs, '[Excising Australia: Are we really shrinking?](#)' *Research Note* no. 5, Parliamentary Library, 2005–06.

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On 11 May, the provisions of the Bill were referred by the Selection of Bills Committee to the Senate Legal and Constitutional Committee for inquiry and report by 13 June 2006.

Basis of policy commitment

After a Cabinet meeting on 13 April, Minister Vanstone announced in a press statement that new legislation would be introduced.

The new measures will mean that all unauthorised boat arrivals will be transferred to offshore centres for assessment of their claims.

This effectively eliminates the distinction between unauthorised boat arrivals at an excised offshore place and those who reach the mainland. The changes will apply to all unauthorised boat arrivals regardless of their nationality.⁴

Although the legislation will be wide-ranging and will apply to all arrivals, it was prompted by a series of events related to the arrival of asylum seekers from Papua Province set out briefly below. The Minister has commented that reform was needed to prevent Australia being used as a 'staging post' for political protests by asylum-seekers.⁵

- 43 asylum-seekers left Indonesia's Papua province by outrigger canoe and landed on Cape York on 18 January 2006. They alleged human rights abuses by Indonesian security forces in Papua Province and lodged a claim for refugee status. The group was moved from Weipa by a RAAF Hercules flight to Christmas Island on 20 January 2006.
- A Palestinian asylum-seeker was picked up near Thursday Island on 17 March and transferred to Christmas Island on 23 March 2006.
- The Indonesian government applied pressure on Canberra to send the Papuans home, guaranteeing their security. However, the Australian government did not intervene and on 23 March 2006, 42 of the 43 are granted temporary protection visas (TPVs), which allows them to stay for three years.
- On 25 March 2006, Indonesia recalled its ambassador from Canberra. President Susilo Bambang Yudhoyono called the decision 'incorrect, not realistic and unilateral'.⁶ Indonesia also declined the Australian Government's invitation to take up observer status at an international US-led military exercise in waters off Darwin. Cartoons about the rift considered offensive were run in Australian and Indonesian newspapers in early April 2006.
- An 'enemies list' of prominent Australians and organisations regarded as being supporters of Papuan independence was leaked to the ABC on 7 April 2006. Among the names on the list were Australian Green Party senators, Bob Brown and Kerry Nettle; Democrat Party senators Andrew Bartlett and Natasha Stott Despoja, and several members of the Labor Party, such as Duncan Kerr and Greg Sword.

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Organisations including the Australian Council of Trade Unions, Sydney University and the Royal Melbourne Institute of Technology (RMIT) were also listed.⁷

- On 7 April 2006, Prime Minister John Howard stated on Radio 3AW: ‘...I sent such a strong message to the people of West Papua. Do not imagine for a moment we want you to come to Australia’.⁸
- On 10 April 2006, Siti Pandera Wanggai told Indonesian media she wants the Indonesian Government to secure the return of her daughter Anike aged 4 who has been granted a TPV with her father in Australia. On 15 April 2006, the *Jakarta Post* reported the mother had disappeared. On 18 April 2006, *The Age* reported that the mother was hiding in PNG and had made a written statement that an Indonesian army intelligence officer and members of her own family forced her into falsely claiming custody.⁹ On 11 May 2006, ABC TV program *Lateline* aired an interview with the mother in PNG where she claimed that she made the initial public appeal after being threatened with death by Indonesian intelligence officers.¹⁰
- On 21 April 2006, Australia's special diplomatic envoy Michael L'Estrange was sent to Jakarta in an attempt to smooth relations between the two countries. After meeting with Indonesia's Foreign Minister Hassan Wirayuda, an Indonesian Foreign Ministry official described the meeting as ‘cool’.¹¹
- On 22 April 2006, media claims were aired that the remaining Papuan on Christmas Island is David Wainggai.¹² It was alleged he is the son of Dr Thomas Wainggai who died in prison in Jakarta in 1996, eight years after he and his Japanese-born wife were jailed over a demonstration where the Papuan independence flag was raised. He has a brother and sister living in Japan on temporary visas. The issue is raised as to whether he can gain a visa for Japan. An application was lodged with the Federal Magistrates Court on 5 May 2006 which accused the minister of failing to perform her duty under the Migration Act by refusing to make, or failing to make, a decision on Mr Wainggai's claim (unnamed in the application) for refugee status, lodged on 31 January 2006. The hearing date is set for early June 2006.
- On 29 April 2006, Minister Vanstone wrote in the *Weekend Australian* that Papuan separatism is a racist, ‘toxic’ cause.¹³
- On 5 May 2006, three Papuan men in a dugout canoe arrived on Boigu Island in the Torres Strait via PNG. They were taken by immigration officials to Horn Island and detained in a hotel. Boigu Island was excised from the Australian migration zone in July 2005. The Minister stated that as the men had arrived from PNG, which is party to the 1951 Convention, return options to PNG first needed to be explored.¹⁴
- Indonesian Foreign Minister Hassan Wirayuda stated on 11 May 2006 that Australia will repatriate to Papua New Guinea three stranded Indonesian Papuans to avoid a repeat of the row over its earlier decision to grant asylum to 42 boat people from Papua Province.

A spokesman for Immigration Minister Amanda Vanstone says Australia was still talking to Indonesia about the three men but no decision had been made.¹⁵

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- Foreign Minister Alexander Downer met with his Indonesian counterpart Hassan Wirajuda in a secret location in Singapore on 15 May 2006.

Position of significant interest groups/press commentary

The Cabinet announcement and tabling of the Bill has attracted a significant amount of criticism from some media commentators, refugee advocates, human rights groups and churches. The criticisms tend to fall into three broad categories:

- that the proposal may breach Australia's obligations under international law, particularly the 1951 Convention¹⁶
- that it represents flawed foreign policy in terms of a perceived 'appeasement' of Indonesia, and 'neo-colonial' relations with the Pacific;¹⁷ or
- that it represents deficient domestic policy particularly in the area of detention of women and children.¹⁸

Support for the Government's proposal has come mainly from commentators who believe that:

- the delicate foreign policy relationship with Indonesia trumps other obligations such as those imposed by international law¹⁹
- that the situation in Papua Province is not as dire as it has been described by Australian activists;²⁰ or
- that the offshore processing policy and onshore detention has been successful in preventing boat arrivals and should be maintained.²¹

International law

There have been several concerns made by refugee advocates about the compatibility of the new policy with the 1951 Convention relating to the Status of Refugees (1951 Convention), especially as the new policy relates to direct arrivals or asylum-seekers who have made a primary movement, from their country of origin to Australia. The Government's previous justification for the Pacific Solution was to deter 'secondary movement' - ie those refugees who had bypassed other countries where they could arguably have sought and obtained effective protection.²²

Despite initial praise for the decision to grant the 42 Papuans TPVs,²³ a primary concern is that the Bill and the circumstances surrounding it since constitute an unwelcome politicisation of the asylum issue:

What if China objected to Australia taking refugees from Tibet prior to signing off on a bilateral free trade agreement? What if Russia object to Australia taking refugees from Chechnya?²⁴

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The politicisation of the issue is seen as avoidable. Professor Don Rothwell has stated that the issue should be framed as one of mutual respect for sovereign legal systems:

During the Schapelle Corby and Bali Nine trials, the Howard Government rightly made the point that Australians needed to respect Indonesian's legal system. Likewise, Indonesia needs to understand that it must respect Australia's legal system and that determinations made by government officials acting under law are to not be interfered with by a foreign government or even the Australian government.²⁵

Another claim is that offshore processing is against the spirit if not the letter of the Convention:

It is a cornerstone of the Refugee Convention that countries of first asylum should admit refugees from neighbouring countries regardless of the political relationship between the two countries. Once political considerations intrude, the integrity of the system is compromised and the concept of refugee protection placed at risk.²⁶

Advocates have raised the argument that the policy could breach Article 31 of the Convention which prohibits State signatories from discriminating against refugees on the basis of mode of arrival. Unauthorised air arrivals continue to be permitted to apply for asylum in Australia, whilst boat arrivals are to be sent to third countries where it is alleged they will receive a lesser standard of treatment in terms of lack of access to Australian courts and the usual appeal process.²⁷

The Office of the United Nations High Commissioner for Refugees (UNHCR) is given a supervisory role over the proper interpretation of the 1951 Convention under Article 35, as well as the mission of protecting of refugees worldwide under the Statute of the Office of the United Nations High Commissioner for Refugees.

UNHCR issued a press release on 19 April which expressed 'serious concerns' about the Australian Government announcement of legislative change:

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.

This is even more worrying in the absence of any clear indications as to what might be the nature of the envisaged off-shore processing arrangement. If it is not one that meets the same high standards Australia sets for its own processes, this could be tantamount to penalising for illegal entry.²⁸

This reluctance was confirmed with an interview with top UNHCR official Erika Feller in *The Bulletin* magazine that the Australian Government did not liaise with UNHCR over the text of the Bill as required under international law:

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If there is a text on the table, UNHCR hasn't even seen it... Article 35 of the 1951 convention stipulates that state parties are supposed to cooperate with the office of the UNHCR in the performance of its duties - that is, things like pieces of legislation directly affecting how refugee situations are managed.²⁹

UNHCR Regional Representative for Australia, NZ, PNG and the Pacific, Neill Wright, stated concerns that refugees could be 'left in limbo' in offshore camps if Australia refused to accept them for resettlement,³⁰ and that the new system could be 'tantamount to a penalty', in breach of the 1951 Convention, if it failed to match the standards for processing on the mainland.³¹ It was confirmed by UNHCR Geneva that the agency would be seeking changes to the legislation by way of a submission to the Senate inquiry.³²

The UNHCR's comments in relation to this Bill reflect its earlier view on the legality of the first version of the Pacific Solution under international law in the context of a [submission](#) to the Senate Legal and Constitutional Committee [inquiry into the Migration Legislation Amendment \(Further Border Protection\) Bill 2002](#). The key points relevant to the current Bill are dealt with in the 'Concluding Comments' section under the heading 'Unanswered questions', and focus on what were considered breaches in the previous iteration of offshore processing.

Foreign policy

There has been fervent debate in the media about the human rights situation in Papua Province and whether there is a valid claim for independence or autonomy, and what this would mean for the Indonesian state.³³

The Australian foreign policy position has been to support the territorial integrity of Indonesia. For further historical context on the internal politics of Indonesia and implications for Australia, see Chris Wilson, '[Internal Conflict in Indonesia: Causes, Symptoms and Sustainable Resolution](#)' Research Paper No. 1 2001-02, Parliamentary Library, 7 August 2001. For recent analysis, see Dr Rodd McGibbon, '[The Papua Problem](#)' (MP3 file), Lunch address, Lowy Institute for International Policy, 19 April 2006.

A major foreign policy concern raised by commentators has been that by providing asylum to independence movement activists, Australia has given, or could be seen to give support or provide a base for this independence movement.³⁴ It is argued this would have disastrous consequences for Indonesia, and the region if conflict led to a 'failed state' in the Pacific; that unrest in Papua province could raise broader security issues; that it could lead to divisive domestic politics within Indonesia and so on.³⁵ Breakdown of relations with Indonesia would be disastrous for Australia.³⁶

Supporters of the Government's policy in this Bill contend that the politicisation of the issue was unavoidable. Under this view, the relationship with Indonesia justifies making

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concessions in response to the difficulties that nation faces in pursuing ongoing democratic reform. Paul Kelly states that the national interest imperatives raised must be confronted:

To uphold a literalist view of the 1951 convention weakens the moderates in Indonesia and is likely to fracture the structure of co-operation between the two nations. How far it is impossible to judge. The facts, however, are that our trade routes run through Indonesia, our border protection depends on Jakarta stopping the boats, our regional foreign policy is heavily Jakarta-dependent and our counter-terrorism has been built with Indonesia. This reflects a network of interests that underpin the welfare of the Australian people.³⁷

On the ABC TV program *Insiders*, commentator Andrew Bolt expressed astonishment that such a decision to confer refugee status on the Papuan asylum-seekers was made by 'one or two junior public servants who happened to agree' within the Immigration Department.³⁸ He suggested that these decision makers had not consulted with DFAT about the situation in West Papua. Other commentators have suggested that the Department of Immigration and Multicultural Affairs (DIMA, previously DIMIA) decision was an over-reaction to the criticism the Department received following from Rau and Solon.³⁹

Some commentators have focussed on the effect that the diversion of Papuan asylum-seekers might have on PNG and Nauru in terms of Australia's relationship with the Pacific. This view criticises the perceived use of Australia's aid programme as a 'lever' to influence poorer countries to accept offshore processing in their territory.⁴⁰

Domestic concerns

The strongest concern has been about the detention of women and children in the offshore centres, which has been the subject of a television advertisement campaign by community group GetUp.⁴¹

Human rights advocates are also more generally concerned by the shifting of responsibility for the broader human rights of asylum-seekers detained in a third country. Australia owes obligations under international law to both those present on its territory and those in third countries but under Australia's 'effective control'.⁴² As barrister Julian Burnside QC states:

They're going to legalise kidnapping and drop people in a legal black hole, removing them from the protection of the Australian legal system and taking them to a place where they will have virtually no legal rights at all.⁴³

Some community organisations and advocates argue that the new policy of offshore processing renders meaningless the reforms introduced to satisfy the Coalition backbench via the *Migration Amendment (Detention Arrangements) Act 2005* (note [Bills Digest no. 190](#) 2004-2005), and more general accountability measures introduced to DIMA after the

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Palmer Inquiry.⁴⁴ Overview by the Refugee Review Tribunal and courts is seen as crucial to promoting accountability within the Department of Immigration.⁴⁵

Concerns were also raised about the role of the Australian Navy if they are again instructed to intercept asylum seekers who arrive in our territorial waters and transfer them to Nauru:

If the Navy also assists Indonesian forces either directly or by providing intelligence, information or identifying Papuan boats for the Indonesians, then this will breach the Refugees Convention. As with 'Children Overboard' and the use of the military during the Tampa crisis, our naval personnel will again be placed in extremely difficult moral and legal situations — with the same potential for affecting morale problems as happened before.⁴⁶

Finally critics have raised the issue of the cost of the strategy compared to mainland processing, which is discussed further below under 'Financial Implications'.

Over the Easter weekend 2006, Australian church leaders raised concerns with the proposed Bill from the pulpit, which mainly focused on moral values and the dignity of the person, respect for refugees and the institution of asylum, lack of access by churches to the detainees offshore,⁴⁷ and the plight of women and children in detention.⁴⁸ In Sydney on Good Friday, the Baptist Church compared Australia's 'abandonment' of Papuan refugees to Pontius Pilate, who washed his hands of Jesus' blood.⁴⁹

The churches have also played a role in highlighting human rights issues within Papua Province, although not as proponents of the independence movement.⁵⁰ A petition lodged by Senator Calvert, the President of the Senate on 10 May states that the petitioners 'humbly pray that immigration policies be framed to expedite the entry of Christian refugees into Australia'.

Coalition backbench

There was wide media reportage that some Coalition backbenchers were unhappy with the Bill as it was perceived to breach the softening of asylum policy made via the Migration Amendment (Detention Arrangements) Bill 2005 in three areas (note [Bills Digest no. 190](#) 2004-2005). The first was the pledge that women and children would no longer be placed in detention. The second was that Bill breached the commitment to process asylum seekers within 90 days, with rights to appeal, and the third was oversight by the ombudsman.⁵¹

Nationals Senator Barnaby Joyce said Australia should allow refugees who arrived here to stay but he would not oppose the legislation.

My big issue - and unfortunately I differ with the Prime Minister on this one a little bit - is I think that if people are being persecuted and they come here, they should be

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allowed to stay...But what I'm concerned about is the result, not the processing arrangements.⁵²

ALP position

The ALP supported the 2001 excision bills as part of the Tampa package of legislation.

The ALP position outlined on 13 April 2006 was that if asylum seekers land in Australia they should be assessed under Australian law. If they are found on the high seas escaping an alleged place of persecution, they should be taken to Christmas Island for assessment under international law. However, the ALP contends that Australia must discourage boats from coming here and must have a Coastguard on patrol, policing northern waters, on the basis that 'good fences make good neighbours'.⁵³

In a Laurie Oakes interview with ALP immigration spokesperson Tony Burke for the Sunday program on 16 April, Mr Burke stated that:

The Government's proposals are simply wrong. They're wrong in principle and they're wrong to allow Indonesia to be dictating what our immigration policy ought to be. What the Government's effectively doing, instead of just excising an extra island for our immigration zone, is excising the whole of Australia from our immigration zone and Labor doesn't believe that you deal with border protection by pretending that you have no borders at all.

On 11 May, the day the Bill was introduced to the House, Mr Burke told AAP:

Never before in Australia's history has a government wanted to pretend that we have no border...This is bad legislation where the principle of it is wrong and the motivation for it is unforgivable...There is nothing you can do with this bill to save it.⁵⁴

Australian Democrat position

The Democrats oppose the Bill on the grounds of incompatibility with international law, but also argue that human rights abuses in Papua Province should be addressed at the source. Senator Andrew Bartlett stated:

Well, it's a pretty sad state of affairs really when our own government has acknowledged that there is significant human rights problems in West Papua and their response to it is not to try and reduce the human rights abuses, but to just prevent people from escaping that persecution.

I think the reason why we're having so much difficulty with our relationship with Indonesia over this issue now is because we've spent so long turning a blind eye to it and just sweeping it under the carpet, hoping it goes away. It can't go away until there

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is proper action to reduce the human rights abuses, and just preventing people from escaping that persecution, isn't going to solve the problem.⁵⁵

Senator Stott Despoja and Senator Bartlett were named 'enemies of Indonesia' (as noted above). This was addressed in remarks made by Senator Stott Despoja to the Senate on 10 May.⁵⁶

Australian Greens position

The Australian Greens oppose the Bill and openly support the Papuan independence movement on the grounds of the right to self-determination under international law.

The Australian government should be seeking constructive engagement with Indonesia to prevent human rights abuses instead of trying to prevent asylum seekers from accessing Australian protection.⁵⁷

The Greens Senators were also listed as 'enemies of Indonesia' as noted above. Senator Nettle states that her inclusion on the list makes her 'proud'.⁵⁸

Family First position

It was reported in *The Age* newspaper on 12 May that Senator Steven Fielding is yet to make up his mind on the Bill but 'warned it was ludicrous to keep people in detention for years'.⁵⁹

Financial implications

Australia has maintained two offshore processing centre (OPC) sites on Nauru and another on Manus Island since late 2001.

In a Budget 2006 fact sheet, Minister Vanstone announced that Manus will be retained as a contingency facility, but that to ensure:

efficient and cost effective operation of offshore processing the OPC's will be consolidated on Nauru, through closing one site and maintaining the other in a state of high readiness. This reflects recent changes to processing arrangements for unauthorised boat arrivals.

The initiative is a savings measure and will return some \$33.8 million over four years to Government.⁶⁰

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The Explanatory Memorandum also states:

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. This is designed to operate as a disincentive to people who arrived 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 than 200 people have arrived although they have targeted areas which were not excised. 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 boat arrivals reducing costs further.⁶¹

This interpretation of the financial implications of the Bill is likely to be controversial, given that there has been considerable debate over whether the cost of offshore processing compared to onshore processing is prohibitive⁶² or good economic policy.⁶³ The Senate Select Committee inquiry into the Certain Maritime Incident found it difficult to put an exact figure on the expenditure involved in the first version of the Pacific Solution but found the amount 'significantly more expensive than onshore processing of the same number of people'.⁶⁴

Estimations about costs and savings depend on numbers, assumptions about the savings from deterrence and the cost of onshore judicial review, plus time frames which are difficult to determine.

Standing appropriation

Item 43 of the Bill deals with compensation for acquisition of property, a standard inclusion in such Bills to ensure Constitutional consistency. However **subitem 43(3)** provides that the Consolidated Revenue Fund is appropriated for the purposes of this item. The Explanatory Memorandum elaborates:

It is important that in the event a visa application is rendered invalid by operation of these amendments, or a court proceeding is discontinued, the applicant is entitled to be repaid the visa application charge or court application fee without delay. A standing appropriation ensures this.

An annual appropriation through the annual budget bills would require that an accurate estimation be made annually regarding the likely total cost to the Commonwealth resulting from refunds of charges and fees over the forthcoming twelve months. While we do not expect the cost to be large, it is not possible to accurately estimate the likely cost to the Commonwealth as this will depend on the number of unauthorised arrivals, especially unauthorised sea arrivals to a place other than an excised offshore place after 13 April 2006 and before the commencement. It is largely only these persons who may have made visa applications that this Bill will render invalid or commenced court proceedings that may not be continued. Any

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estimates would have to be a 'worst case scenario' and may over estimate the needed appropriation.

By contrast, a standing appropriation will ensure that public money can be used for other purposes while ensuring the certainty of refund of visa application charges and court fees, and accountability to Parliament through the Portfolio Budget Statements and Annual Report.⁶⁵

This inclusion of a standing appropriation may be linked to findings in relation to onshore detention claims which may require large compensation payouts.⁶⁶ There is merit to the issue of flexibility, however it should be noted that there is an existing mechanism under annual appropriations where agencies can seek additional funds under Appropriation Bills No. 3 and 4.

Main provisions

Schedule 1 – Amendments to the Migration Act 1958

Definitions

Item 1 inserts a definition of *designated unauthorised arrival* in **subsection 5(1)** in Part 1 of the Act which refers to **new section 5F**.

Item 5 amends the definition of *transitory person* by the insertion of **subsection 5(1) new paragraphs (d) to (g)** into the definition. The new paragraphs provide events upon which a person who has been a transitory person will cease to hold that status. A person ceases to be a transitory person if they have:

- been assessed to be a refugee;
- become the holder of a substantive visa;
- left Australia other than as a result of being removed under subsection 198(1A) or taken under subsection 198A(1), from Australia to a country in respect of which a declaration is in force under subsection 198A(3); or
- left a country in respect of which a declaration is in force under subsection 198A(3), to travel to a country other than Australia.

Item 8 inserts **new section 5F**, which defines *designated unauthorised arrival*. The Explanatory Memorandum states:

The definition includes those persons who formerly came within the definition of *offshore entry person* ie a person who became an unlawful non-citizen because the person entered Australia at an *excised offshore place* after the excision time for that place (i.e. before the commencement of this Bill). Excised offshore place and excision time are defined at subsection 5(1). The definition will also cover such persons who

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enter at an excised offshore place after commencement of the Bill where the place is excised at time of commencement. In addition it will cover such persons who enter excised offshore places that may be prescribed after the commencement of the Bill pursuant to paragraph (e) of the definition of excised offshore place.⁶⁷

The definition also includes persons **who enter Australia at a place other than an excised offshore place (i.e. mainland Australia) by sea on or after 13 April 2006 and become an unlawful non-citizen because of that entry.**

New subsection 5F(8) provides for circumstances in which a person is taken to have entered Australia by sea.

Item 6 inserts **new subsections 5(4B) and 5(4C)** into existing section 5. New subsection 5(4B) provides that a person is taken not to have left Australia if they have been removed under section 198 to another country but refused entry by that country and returned to Australia as a result of that refusal.

New subsection 5(4C) provides that a person is taken not to have left a country if they have left the country to travel to one or more other countries, been refused entry by each of those other countries and returned to the first country as a result of the refusal or refusals. It also provides that a person is taken not to have left a country if they have left the country for medical treatment in another country or countries and have returned to the first country after having received medical treatment.

A *transitory person* who is taken not to have left Australia or not to have left a declared country in these circumstances will continue to come within the definition of transitory person.

Exemptions

Certain persons are excluded from the definition of designated unauthorised arrival. **Paragraph 5F(1)(a)** excludes a person who is an exempt person under **subsection 5F(2).**

New paragraph 5F(1)(c) provides that a person is not a designated unauthorised arrival if the person has, after the entry that made them a designated unauthorised arrival:

- become the holder of a substantive visa;
- left Australia other than as result of being taken under subsection 198A(1) from Australia to a country in respect of which a declaration is in force under subsection 198A(3); or
- left a country in respect of which a declaration is in force under subsection 198A(3), to travel to a country other than Australia.

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New subsections 5F(10) and (11) provide certain circumstances in which a person is taken not to have left Australia or left a country, for the purposes of the definition of designated unauthorised arrival, reflecting the terms of 5(4B) and 5(4C) above.

Subsection 5F(2) sets out certain classes of person who are exempt from inclusion in the definition of designated unauthorised arrival.

- **paragraph 5F(2)(a)** exempts New Zealand citizens who hold and produce a New Zealand passport that is in force.
- **paragraph 5F(2)(b)** exempts non-citizens who hold and produce a passport that is in force and is endorsed with an authority to reside indefinitely on Norfolk Island.
- Persons described in paragraphs 24 and 25 need to be exempted as they receive a Special Category visa after arrival and would be caught by the designated unauthorised arrival definition if not otherwise exempted.
- **paragraph 5F(2)(c)** exempts persons brought to the migration zone under subsection 185(3A) of the *Customs Act 1901* as a result of being found on a ship detained under section 185 of that Act, and no officer reasonably suspected that the person was seeking to enter the migration zone and would, if in the migration zone, become an unlawful non-citizen.
- **paragraph 5F(2)(d)** exempts classes of persons declared by the Minister, under subsection 5F(3), to be exempt.
- **paragraph 5F(2)(e)** exempts individual persons declared by the Minister, under subsection 5F(6), to be exempt.

Subsection 5F(3) allows the Minister to declare a class of persons to be exempt under paragraph 5F(2)(d). **Subsection 5F(4)** provides that a class of persons may be specified in a declaration made under subsection 5F(3) even if ascertaining the membership of the class relies on a discretion being exercised or a particular opinion being held.

For example, a declaration might describe an exempt class as ‘where an officer is satisfied the person would meet the criteria for a particular visa were they able to make a valid application’. This will assist in ensuring that persons not intended to be subject to the offshore processing regime are not caught.⁶⁸

It is not explained clearly which classes of persons the Government do not envisage being caught by the regime.

Subsection 5F(5) provides that a declaration by the Minister under subsection 5F(3), that declares a class of persons to be exempt under paragraph 5F(2)(d), is a legislative instrument.

Subsection 5F(6) provides that the Minister may, for the purposes of paragraph (2)(e), declare, in writing, a specified person to be exempt if:

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- regulations made for the purposes of the subsection specify criteria that a person must satisfy before the person may be declared to be exempt under this subsection; and
- the Minister is satisfied that the person satisfies those criteria.

The Explanatory Memorandum states that:

This will allow for the regulations to provide criteria which must be met by an individual before the Minister may declare that individual to be exempt. For example, a criterion might be that the person would likely be eligible to be granted a particular visa were they able to make such an application.⁶⁹

Subsection 5F(7) provides that a declaration by the Minister under subsection 5F(6), that declares a specified person to be exempt, is not a legislative instrument.

Entry by sea

New subsection 5F(8) sets out circumstances in which a person is taken to have entered Australia by sea, for the purposes of section 5F: '[t]he intention is to make clear that certain persons who travel by sea, but enter the migration zone other than by sea, are nonetheless taken to have entered Australia by sea.'⁷⁰

- **paragraph 5F(8)(a)** provides that a person enters Australia by sea if the person travels to Australia by sea and enters the migration zone (whether or not by sea). Migration zone is defined in subsection 5(1).
- **paragraph 5F(8)(b)** provides that a person enters Australia by sea if the person enters the migration zone by air pursuant to subsection 245F(9) as a result of being found on a ship detained under section 245F. Subsection 5F(9) provides that for the purposes of section 5F a person who enters Australia on an aircraft is taken to have entered the migration zone by air only if that aircraft lands in the migration zone.
- **paragraph 5F(8)(c)** provides that a person enters Australia by sea if the person enters the migration zone by air after being rescued at sea.
- **paragraphs 5F(8)(b) and (c)** are to ensure that persons airlifted to Australia for the last leg of their journey after having travelled by sea do not avoid becoming a designated unauthorised arrival if they would otherwise meet the definition of such a person.

Detention is discretionary

Item 9 repeals the note after subsection 42(4) and substitutes a 'more accurate' note.

Before the amendment the note stated that section 189 provides that an unlawful non-citizen in the migration zone must be detained. This did not take account of the fact that for unlawful non-citizens in the migration zone which is also an excised offshore place, detention is discretionary pursuant to subsection 189(3) of the Act.⁷¹

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Item 17 amends subsection 189(2). Subsection 189(2) applies to persons in Australia but outside the migration zone, where an officer reasonably suspects that the person is seeking to enter the migration zone (other than at an excised offshore place) and would, if in the migration zone, be an unlawful non-citizen. Currently, subsection 189(2) requires an officer to detain such a person. This item amends subsection 189(2) to provide that an officer has a discretion whether or not to detain such a person.

The Explanatory Memorandum states:

This amendment brings the detention regime for persons seeking to enter Australia (other than at an excised offshore place) in line with the regime in place for persons seeking to enter at offshore entry places. It provides officers with the opportunity to detain a person under this section or alternative provisions such as subsection 245F(9) of the Act.⁷²

Item 22 repeals and substitutes a **new subsection 198A(4)**, in relation to the immigration detention of designated unauthorised arrivals being dealt with under section 198A(1). It replaces the reference to an offshore entry person with a reference to a designated unauthorised arrival, consequential to the change made by item 18. This item also adds a provision making clear that the fact a designated unauthorised arrival is in immigration detention (whether pursuant to a mandatory or discretionary power) does not prevent an officer removing the person to a declared country under section 198A.

Visa applications

Item 10 repeals subsection 46A(1) and substitutes a new subsection which provides that an application for a visa is not valid if made by a designated unauthorised arrival who is in Australia.

The Explanatory Memorandum explains:

Section 46A forms part of the offshore processing regime for designated unauthorised arrivals. Prior to amendment, section 46A prohibited applications for visas by offshore entry persons in Australia unlawfully (unless the Minister determines that a particular person may apply for a particular class of visa). The concept of offshore entry person is removed from the Act by this Schedule (item 3) and replaced with the new concept of designated unauthorised arrival. The amendment made by this item provides that the bar on visa applications in section 46A applies to designated unauthorised arrivals. Such persons will be prohibited from applying for any visa while the person is in Australia, unless the Minister determines under subsection 46A(2) that the person may apply for a visa of a class specified in the determination. When such a determination is made, the Minister is required to table a statement in each House of the Parliament as set out in subsections 46A(4) and (5).⁷³

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Offshore processing

Item 18 amends subsection 198A(1) to replace the reference to offshore entry person with a reference to designated unauthorised arrival. This subsection is the operative provision for the policy of offshore processing. As the Explanatory Memorandum explains:

Subsection 198A(1) forms part of the offshore processing regime for designated unauthorised arrivals. It allows an officer to take such a person from Australia to a country in respect of which a declaration is in force under subsection 198A(3), for the processing of their refugee claims. In the past, persons taken to declared countries for processing of refugee claims have had these assessed either by the United Nations High Commissioner for Refugees (UNHCR) or by trained Australian officers using a process modelled closely on that used by the UNHCR. Subsection 198A(3) provides that the Minister may declare that a country:

- provides access, for persons seeking asylum, to effective procedures for assessing the person's need for protection;
- provides protection for persons seeking asylum pending determination of their refugee status;
- provides protection to persons who are given refugee status, pending their voluntary repatriation to their country of origin or resettlement in another country; and
- meets relevant human rights standards in providing that protection.

This provision ensures that asylum seekers will be dealt with under the offshore processing regime in a manner that meets Australia's international obligations.⁷⁴

Disclosure of refugee claims

Items 24 to 26 amend existing section 336F to replace references to an offshore entry person with a reference to a designated unauthorised arrival. This section allows the Secretary to authorise officers to disclose identifying information in certain circumstances. Subsection 336F(3) puts certain limitations on the Secretary's ability to give such an authorisation. Disclosure cannot be authorised in respect of persons who have made claims to protection under the 1951 Convention as amended by the Protocol, where disclosure would be to a foreign country in respect of which the claim is made, or a body of such a country.

Reporting requirements

Item 27 inserts a new **Part 8D** 'Reports relating to designated unauthorised and transitory persons' plus **new section 486R**.

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New subsection 486R(1) provides that the Secretary must, in regard to each financial year (commencing the year ending **30 June 2007**), provide to the Minister a report not later than 30 September in the next financial year.

A report under section 486R must include information about: arrangements during that financial year for designated unauthorised arrivals and transitory persons seeking asylum (**486R(2)**). This includes arrangements for:

- assessing any claims for refugee status made by such designated unauthorised arrivals and transitory persons; and
- the accommodation, health care and education of such designated unauthorised arrivals and transitory persons; and
- the number of asylum claims, by designated unauthorised arrivals and transitory persons, that are assessed during that financial year; and
- the number of designated unauthorised arrivals and transitory persons determined, during that financial year, to be refugees.

The report will not cover designated unauthorised arrivals and transitory persons who do not seek asylum.

New subsection 486R(3) provides that because of privacy considerations and provisions under the Refugees Convention concerning the identification of individual asylum seekers, a report made under section 486R must not include:

- the name of any person who is or was a designated unauthorised arrival or a transitory person; or
- any information that may identify such a person; or
- the name of any other person connected in any way with any person covered by the first point above; or
- any information that may identify that other person.

New subsection 486R(4) provides that a report made under section 486R may include any further information that the Secretary thinks is appropriate.

New subsection 486R(5) provides that the Minister must table in each House of Parliament a copy of the report provided under section 486R, within 15 sitting days of that House after the day on which the Minister receives the report from the Secretary.

Bar on court proceedings

Items 28 to 39 make amendments to sections 494AA and 494AB in respect of prohibitions on instituting, and continuing, certain legal proceedings relating to designated

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unauthorised arrivals and transitory persons. The term offshore entry persons is now replaced with the concept of designated unauthorised arrivals (see items 3 and 8).

Item 40 provides that the amendments made by items 28 to 39 apply to the institution of proceedings on or after the day on which item 40 commences. It also provides that these amendments apply to the continuation, after the day on which item 40 commences, of proceedings instituted on or after 13 April 2006 but before the commencement of item 40.

Transitional cases

Item 41 makes provision for transitional cases affected by the amendments made by this Schedule. Subitem 41(1) provides that a visa application made in certain circumstances is taken, on and after commencement of the item, not to be a valid application for a visa. The circumstances are where a person:

- entered the migration zone (other than at an excised offshore place) during the relevant period;
- made an application for a visa during the relevant period;
- was not granted the visa during the relevant period; and
- is covered by the definition of a designated unauthorised arrival on the commencement on section 5F of the Migration Act 1958 (inserted by item 8 of this Schedule) because of the entry to the migration zone.

The relevant period is defined at subitem 40(2) as the period starting on **13 April 2006** and ending immediately before the commencement of this item. The Explanatory Memorandum states that:

Persons entering unlawfully by sea at a place other than an excised offshore place on or after 13 April 2006 and before commencement will be able to make visa applications until they become subject to the new regime on commencement. Consistent with the Government's decision that such persons should be subject to the offshore processing regime, any application that has not resulted in the grant of a visa will be rendered invalid on commencement of the Bill. This will include cases where a primary decision has been made to refuse the grant of a visa, and the decision is subject to merits review. It will also include cases where a refusal decision has been upheld on merits review, and the matter is subject to judicial review. In all such cases, any visa application will be rendered invalid because no visa has been granted before commencement.⁷⁵

Item 42 is a saving provision, consequential to the amendments made by items 7 and 24 to 26. Those items repeal references to offshore entry person in paragraphs 5A(3)(j)(ii) and 336F(5)(c) and subparagraphs 336F(3)(a)(ii) and (4)(a)(ii), and substitute references to designated unauthorised arrival. Item 42 provides that any references to offshore entry person in an instrument of authorisation made under section 336D or 336F are taken to be references to designated unauthorised arrivals. It also provides that such an instrument is

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taken to authorise access to, and disclosure of, identifying information in respect of a designated unauthorised arrival to the extent that it would have authorised access to, or disclosure of, identifying information in relation to an offshore entry person. This ensures such instruments will continue to have effect as intended, on and after commencement of the Bill.

Compensation for acquisition of property

Item 43 provides for the payment by the Commonwealth of a ‘reasonable amount’ of compensation if the operation of the Bill would result in an acquisition of property otherwise than on just terms.

If the Commonwealth and the person do not agree on the amount of the compensation, the person may institute proceedings in a court of competent jurisdiction for the recovery from the Commonwealth of such reasonable amount of compensation as the court determines (**subitem 43(2)**)

Subitem 43(3) provides that the Consolidated Revenue Fund is appropriated for the purposes of this item (see ‘Financial implications’ above)

Regulations

Item 44 provides a power for the Governor-General to make regulations under the Bill, prescribing matters required or permitted to be prescribed by the Bill; or necessary or convenient for carrying out or giving effect to the Bill (**subitem 44(1)**) or regulations for matters of a consequential or transitional nature (**subitem 44(2)**).

Concluding comments

Politicisation of asylum

The granting of asylum is intended to be a humanitarian, non-political act.⁷⁶ Refugee status determination is a highly individualised process which focuses on persecution on five narrow grounds from which a State is unwilling or unable to protect that individual.⁷⁷ In other words, the grant of refugee status to an individual, even 42 individuals from a group, does not logically correlate to support in the receiving State for any political opinion they hold, or even the general human rights situation in the country of origin.⁷⁸

Nevertheless, the history of Indonesian asylum claims in Australia is a particularly fraught one.⁷⁹ It is clear that asylum issues are the subject of politic debate and influence, and that this phenomenon is on the rise globally, which has arguably detracted from a focus on prevention of refugee flows by reduction of human rights violations which could lead to persecution. This is especially the case where refugee flows take place in the context of

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debates over independence or autonomy, where groups can even be characterised as terrorists (such as the PKK in Turkey or the Tamil Tigers in Sri Lanka).

Former High Commissioner Rudd Lubbers stated in 2004:

In the past few years, the politicisation of immigration, confusion between refugees and economic migrants, and fears of criminal and terrorist networks have combined to erode asylum legislation in many States. Paradoxically, this has taken place against a backdrop of declining numbers of refugees and asylum seekers.⁸⁰

Former Immigration Minister, now Attorney-General Philip Ruddock often told international audiences that the focus of Western democratic States should be on helping to prevent refugee situations at the source and reduce the burden on countries of first asylum.⁸¹

Providing protection to refugees should not be politicised, but that does not mean that caseloads which raise particular sensitivities in a host country cannot be dealt with in a manner which manages political considerations. As UNHCR's Erika Feller puts it:

If Australia were to come up with a different version of this scheme, which addressed the protection and precedent concerns the UNHCR has but was nevertheless a particularised approach to managing boat arrivals ... I believe the UNHCR could work with it.⁸²

Unanswered questions

The Explanatory Memorandum asserts in relation to **item 18** that 'This provision ensures that asylum seekers will be dealt with under the offshore processing regime in a manner that meets Australia's international obligations'.⁸³

With respect, the text of the Bill cannot offer this reassurance because Australia's obligations under international law also rely on the detail of the policy and the manner in which it will be carried out—which is not contained in the Bill, or in public policy documents available as yet. For example, basic elements of the policy which will need to be examined for Australia's protection obligations to be fulfilled might include the following:

- How will the transfer to offshore countries take place?
- How will Australia ensure that no refoulement from PNG or Nauru will take place? What is the content of the agreement with these countries in terms of protection? What is the substance behind a section 198(3) declaration?
- Who will undertake the refugee status determination processing? If Australia, what standards will it employ? Is it in fact 'closely modelled' on UNHCR processes?

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- Will the asylum-seekers be detained? Under what authority and for what duration? Will private contractors be used? Will there be special measures for women and children?
- Who is responsible for the human rights and welfare of the asylum-seekers whilst in the third country? Will there be any oversight? Who will provide it?
- Will asylum-seekers be able to access legal advice and support services in the third country?
- What type of visa will successful applicants be allowed to apply for? Will the visa allow for family reunion?
- How will 'resettlement' work? Will refugees continue to be detained while a 'durable solution' is found? Is there a time frame within which refugees will need to be found a durable solution in Australia if other countries decline?

These questions are important to resolve as the effect of the Bill is retrospective to the date of the Cabinet announcement on 13 April 2006.

At paragraphs 6.56 to 6.57 of the report of the Senate Legal and Constitutional Committee [inquiry into the Migration Legislation Amendment \(Further Border Protection\) Bill 2002](#), the Committee expresses concerns about the retrospectivity of excision relevant to this Bill:

Retrospective application of legislation that takes rights away or imposes new obligations is a serious step which must be fully justified.

The Committee notes that...a person who lands at an excised offshore place does not actually lose the right to seek asylum. However, his or her rights are not the same as those of a person who lands in mainland Australia. The Committee notes also DIMIA's advice that no person who lands in an excised offshore place will be disadvantaged by the application of existing criminal offences in the Migration Act. However, concerns about the proposed retrospectivity remain.⁸⁴

Does the Bill breach international law?

There is no clear positive obligation under the Convention for States to admit asylum-seekers to its territorial frontiers, although whether State practice since 1951 effectively creates a presumption against transfer is the subject of debate amongst refugee law experts.⁸⁵ The primary obligation under the Convention is expressed in negative terms, in other words that a State party will not return ('refoule') a refugee to their country of origin where they would face persecution.⁸⁶ The Convention is however often characterised as an international 'burden-sharing' agreement.⁸⁷

UNHCR did not find excision an effective means to prevent Australia's international obligations in 2002:

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Australia's international protection obligations to asylum seekers and refugees are therefore engaged at the frontiers of and throughout its entire sovereign territory including in any locations excised under national law.

In UNHCR's view, as a signatory to the 1951 Convention Australia's international protection responsibilities to asylum seekers in the excised areas **continue to be engaged following their transfer to a third country for processing. Only when a durable solution is found does this cease.**⁸⁸

Transfer to an excised area or third country could therefore only be undertaken under three conditions:

Respect for the principle of non-refoulement and the right to seek and enjoy asylum,

Adequate refugee status determination procedures to identify those in need of international protection, and

Treatment in accordance with international human rights standards and international refugee standards, including those contained within the 1951 Convention.⁸⁹

Protection from non-refoulement

These protection obligations in the offshore context are contained in subsection 198A(3) of the Act which provides that the Minister may declare that a country:

- provides access, for persons seeking asylum, to effective procedures for assessing the person's need for protection
- provides protection for persons seeking asylum pending determination of their refugee status
- provides protection to persons who are given refugee status, pending their voluntary repatriation to their country of origin or resettlement in another country; and
- meets relevant human rights standards in providing that protection.

Significantly, the Minister does not have to be satisfied that certain factors are present before he or she declares a country. The declaration will simply declare that the factors exist. There is no objective proof of these requirements provided, and the countries seem to be declared safe for any caseload. For example, the Minister's declaration that Nauru and PNG are safe for Middle Eastern asylum-seekers in 2001 appears to be enough to cover asylum seekers from Papua Province in 2006. One factor that is not required is that a country is a signatory of the 1951 Convention and therefore under the obligation not to *refoule*. It is not clear that is a reviewable decision by the courts and how it could be reviewed.

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There is also large scope for use of Ministerial discretion under **item 8 subsection 5F(3)** to exempt classes of persons or individuals altogether from the offshore processing regime. Further detail on how this discretion might be exercised would be helpful.

The new iteration of government policy is that the measures are designed to relate to asylum-seekers who have reached the Australian mainland directly from the country of asylum. A caseload of Papuan asylum-seekers being sent to PNG which borders onto Papua Province raises different protection issues under international law than asylum seekers from the Middle East who have made a secondary movement and been rescued at sea.

Nauru is not a signatory to the 1951 Convention, although it is a signatory to some UN human rights treaties. PNG is a signatory (with some significant reservations on housing and other rights to be provided to refugees) but has not yet passed domestic legislation implementing a refugee status determination process.

The Human Rights and Equal Opportunity Commission stated to the 2002 Senate Inquiry:

These provisions create a system in which Australia's non-refoulement obligations are not being specifically fulfilled by Australia; instead we are ultimately relying on other sovereign countries (Nauru and PNG) behaving appropriately in complying with the non-refoulement obligation even though this obligation had its origin within Australia. In the case of Nauru which is not even a signatory to the 1951 Convention, this anomaly could, theoretically, assume even greater importance at some time in the future.⁹⁰

What may be required is further analysis of whether PNG meets the section 198(3) requirements for Papuan asylum-seekers. The Port Moresby office of the UNHCR already monitors a 'population of concern' of over 10 000 people in PNG, mainly Papuans.⁹¹

David Manne, lawyer for the 43 Papuans who arrived in January has stated in relation to the mother hiding in PNG noted above:

There's concrete evidence available that for West Papuans, the situation in Papua New Guinea is not safe, the borders are porous and that there is every possibility that West Papuans in her situation could well be returned, expelled to a situation of persecution in West Papua.⁹²

One approach is that existing or new Memorandums of Understanding between Australia and Nauru and PNG on this issue be given treaty status and scrutinised by the Joint Standing Committee on Treaties. Another option is that the section 198(3) declaration process be changed to include some sort of objective criteria and scrutiny.

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Adequate refugee status determination

It is not clear whether Australian officials will provide the refugee status determination (RSD) in offshore centres. When introducing the Bill, Andrew Robb said Australian officials are available to conduct this work 'if necessary'. The Explanatory Memorandum states:

In the past, persons taken to declared countries for processing of refugee claims have had these assessed either by the United Nations High Commissioner for Refugees (UNHCR) or by trained Australian officers using a process modelled closely on that used by the UNHCR.⁹³

In 2001, on an exceptional basis, UNHCR agreed to a request from the Nauru government to do RSD and resettlement of the Tampa caseload because of the circumstances surrounding the rescue-at-sea where burden sharing and compelling humanitarian principles applied. UNHCR additionally agreed to undertake RSD and resettlement of asylum-seekers from the Aceng shipped by Australia to Nauru alongside the people from Tampa. UNHCR declined other requests from Nauru and PNG to undertake RSD processing of further asylum-seekers intercepted by Australia and transferred to offshore processing centres.⁹⁴

In 2002, the UNHCR did not feel that a bar on merits review by an independent tribunal and access to judicial review was necessarily a penalty for unauthorised arrivals in breach of Article 31 of the Convention. However the agency stated that:

The introduction of different systems for determination of refugee status for different asylum seekers depending on their location in Australia raises concerns. Having two different determination systems is discriminatory and in UNHCR's view undesirable. If lesser standards relating to procedures or lesser status accorded under these procedures are envisaged due to the nature of arrival of asylum seekers, this would not be in accord with international protection obligations.⁹⁵

The issue of how closely the procedures DIMA officials use in offshore processing 'model' UNHCR standards is debatable. There are at least two important differences that are on the public record. The first is the recognition of derivative status, and the second is the grant of complementary protection, both of which arose in Nauru.

Mr Michel Gaubaudan, the then UNHCR Regional Representative, told the Senate inquiry in 2002 that Australia requires the spouses and minor children of recognised refugees to apply on their own merits, rather than to be given refugee status and be immediately reunited with the refugee family member. The UNHCR told the Committee that it considered the issue 'fairly substantial' and that it had addressed the Government on this matter.⁹⁶ This led to the wives and children of TPV holders in Australia being presented to New Zealand in 2003.

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Another point of difference is that UNHCR has urged Australia to allow a form of 'complementary protection' as agreed to in the *Agenda for Protection* agreement by Convention signatories in 2001.⁹⁷ This was relevant to the protracted situation faced by the residual caseload of asylum-seekers from Afghanistan and Iraq in Nauru. This was addressed by UNHCR in a submission to the [Select Committee on Ministerial Discretion in Migration Matters](#) in 2004:

Persons who may not necessarily be 1951 Convention refugees but who nevertheless need international protection are commonly referred to as refugees falling under UNHCR's wider competence. This competence is generally understood also to cover persons outside their countries who are in need of international protection because of a serious threat to life, liberty or security of person in the country of origin, as a result of armed conflict or serious public disorder. For example, persons fleeing the indiscriminate effects of violence and the accompanying disorder in a conflict situation, with no specific element of persecution, might not fall under a strict interpretation of the 1951 Convention refugee definition, but may still require international protection, and be within UNHCR's competence.⁹⁸

This was also a key recommendation (no. 33) of the Senate Legal and Constitutional Committee [inquiry into the administration and operation of the Migration Act 1958](#) tabled on 2 March 2006.

One suggestion for ensuring fair processing would be that the manual used for offshore processing by DIMA be scrutinised by a parliamentary committee and brought in line with UNHCR processes, especially on the issues of derivative status and complementary protection.

Durable solution

One of the criteria that the UNHCR applied in relation to determining whether there was effective protection in a third country was the person's access to a 'durable solution'. It argued strongly that the term 'resettlement' was inappropriate for offshore processing.⁹⁹

Academic Angus Francis has argued that the Minister's power to declare countries under section 198A of the Migration Act lacked a key component, namely local integration, and that the effect of the provisions was that:

the Commonwealth can effectively expel refugees to a country where they can be left in limbo, without any chance of local integration in that country, pending voluntary repatriation or resettlement.¹⁰⁰

Along with issues about family unity, this appears to be a key concern for UNHCR from the previous operation of the policy:

We had a bad experience with the arrangement set in place in Nauru following the Tampa incident, which left many people in detention-like conditions for a long period

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of time, with no timely solutions for the refugees, who suffered considerable mental hardship.¹⁰¹

There have been media reports that countries in the region such as New Zealand, PNG, Nauru and Fiji are not interested in ‘resettling’ refugees processed offshore under the new policy.¹⁰²

DIMA has already conceded that:

...if other countries are unable or unwilling to provide protection against non-refoulement for refugees who have entered Australian territorial waters seeking asylum, Australia is obliged to ensure that convention protection is provided.¹⁰³

Also in Answers to Questions on Notice, the Department of Foreign Affairs and Trade confirmed on 19 June 2002 that the *Memorandum of Understanding between the Republic of Nauru and the Commonwealth of Australia for Cooperation in the Administration of Asylum Seekers and Related Issues* states that ‘Australia will ensure that no persons are left behind in Nauru’.

In other words, the Government may be better placed to fulfil its protection obligations if asylum-seekers, determined to be refugees, were released from detention. A short time frame should be applied to locating a third country for repatriation. If this fails, the refugee should automatically be brought to Australia and allowed family reunion.

Human rights standards

As noted, Article 31 of the Convention states that a refugee arriving in a territory directly should not be penalised for an unlawful mode of arrival.

The UNHCR argued in 2002 that a breach of Article 31 might be committed if offshore entry persons were detained ‘as a deterrent or a punitive measure for illegal entry/presence’.¹⁰⁴ As the Pacific Solution played out, UNHCR stated clearly that they were ‘concerned about the detention of refugees on Nauru and Manus Island. We consider such detention inconsistent with the provisions of the Refugee Convention.’¹⁰⁵

However, the issue of whether detention in offshore locations constitutes punitive detention is hotly debated, and if so, whether this is within Australian control.

Item 9 of this Bill notes that existing section 198A of the Act empowers an officer to remove an offshore entry person to a declared country by placing the person on a vehicle or vessel or restraining the person in a vehicle or vessel or removing a person from a vehicle or vessel and using such force as is considered necessary and reasonable. Section 198A(4) states that a person dealt with under this section is not considered to be in ‘immigration detention’ as defined in section 5(1) of the Act. DIMA has stated that

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persons taken to **declared countries, currently Nauru and Papua New Guinea**, are not detained and points out that:

The facilities were set up with the cooperation of the Governments of Nauru and Papua New Guinea. Asylum seekers are not detained under Australian law, or the laws of Nauru or Papua New Guinea, but are instead granted Special Purpose visas by those countries to facilitate their stay while they await processing and resettlement or return.¹⁰⁶

Under sub-sections 189(3) and (4) of the Act a person who arrives in an excised offshore place or a person seeking to enter an excised offshore place **may** be detained. This differs from the situation where a person in the migration zone or seeking to enter the migration zone **must** be detained under section 189.

The High Court of Australia ruled 4-1 in September 2005 on appeal from the Supreme Court of Nauru that Nauru was legally able to detain asylum-seekers on Australia's behalf. People were detained under conditions attached to a special purpose visa issued by Nauru.¹⁰⁷ In other words, any Australian standards or requirements for detention, including an open detention centre, would have to correlate to the conditions attached to a visa issued by Nauru, which is ultimately a decision of a sovereign state.

It is not clear whether the Commonwealth Ombudsman (recently given increased powers as the Immigration Ombudsman)¹⁰⁸ will have jurisdiction over and access to designated unauthorised arrivals. The detention issues require urgent clarification by the Government.

Endnotes

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25. Don Rothwell, 'We're too desperate to please Indonesia', *The Australian*, 11 April, p. 12.
26. Asylum Seekers Resource Centre, 'ASRC Briefing on West Papuan Asylum Law Changes', 1 May 2006.
27. Mary Crock and Jane McAdam, 'Nauru is no place for asylum-seekers', *The Australian*, 15 May 2006, p. 14.
28. UNHCR, 'Australia: Proposed new border control measures raise serious concerns', *media release*, 19 April 2006. ABC Radio's *AM* program then reported on talks between a senior

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Immigration Department bureaucrat and UNHCR's Geneva-based International Protection Director, Erika Feller, in Bangkok.

'A UNHCR spokeswoman says in the informal discussion, the agency was asked if it was prepared to help.

The refugee agency reiterated its concerns and, one source says, indicated to the Government that it was in no way predisposed to play ball.

It's understood the UN refugee agency did not formally say no, but made it clear that if the Australian Government wanted to put something else forward that delivers good protection outcomes, that would be welcome.

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73. Explanatory Memorandum, pp. 13-14.
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