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Submission by the Human Rights Council of Australia and Australians for Just Refugee Programs Inc. (*A Just Australia*) to the

Senate Legal and Constitutional References Committee Inquiry into the Administration and Operation of the Migration Act 1958

The Human Rights Council of Australia Inc is a private non-government organization which promotes understanding of and respect for human rights for all persons without discrimination through adherence to the International Bill of Rights, and other human rights instruments, internationally and within Australia.

The Council was established in 1978 and for many years, under the leadership of James Dunn, has been an important link between the Australian human rights movement and human rights activists in other parts of the world. The Council is affiliated with the International League of Human Rights and has Special Consultative Status with ECOSOC.

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Australians for Just Refugee Programs under its campaign for *A Just Australia* welcomes the opportunity to present this submission to the Senate Legal and Constitutional References Committee Inquiry into the administration and operation of the Migration Act 1958.

A Just Australia would be pleased to attend Senate hearings on this inquiry to provide additional information to this submission. Case studies in this submission have been de-identified. Names can be supplied upon request.

A Just Australia believes that Australia's policies toward refugees and asylum seekers should at all times reflect respect, decency and traditional Australian generosity to those in need, while advancing Australia's international standing and national interests. *A Just Australia* aims to achieve just and compassionate treatment of refugees, consistent with the human rights standards that Australia has developed and endorsed.

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It's Broke and It Needs Fixing: the case for reforming administration of refugee and asylum seeker programs

The fall in numbers of unauthorised arrivals seeking protection in Australia provides an opportunity to improve the refugee determination process. With this in mind, AUSTRALIANS FOR JUST REFUGEE PROGRAMS commissioned the HUMAN RIGHTS COUNCIL OF AUSTRALIA to examine the case for reforming the administration of refugee and asylum seeker programs. This article is based on this work to date. It argues that the Department of Immigration and Multicultural and Indigenous Affairs (DIMIA) is now inextricably associated with refugee policies that have polarised the Australian community, and generated substantial community, judicial and international concern. Furthermore, DIMIA's multiple functions have conflated the issues of population, migration, resettlement, citizenship, multiculturalism, border protection, mandatory detention, refugees and asylum seekers. While general immigration is a discretionary issue, refugee determination is a legal obligation and should be entrusted to an independent agency, not public servants. The proposal for re-organising the various functions of DIMIA is set out here for broader public discussion in an effort to promote accountable and just administration of refugee programs.

Introduction

Over recent years the Department of Immigration, Multicultural and Indigenous Affairs (DIMIA) has developed an ever-growing range of portfolios and programs. Its website www.dimia.gov.au lists 'Population Change', 'Border Protection', 'Migration Program', 'Humanitarian Program', 'Multicultural Affairs' and 'Indigenous Affairs' as principal areas of responsibility.

The multiple responsibilities of DIMIA have helped to conflate the issues of population, migration, resettlement, border protection, mandatory detention, refugees and asylum seekers. At the same time Indigenous Affairs and Reconciliation have been sidelined and marginalised.

DIMIA is now inextricably associated with refugee policies and practices that have divided the Australian people and attracted unparalleled community and judicial criticism as well as negative international publicity and comment. The adoption and implementation of alternative policies for processing asylum seekers and protecting refugees will require a reorganisation of DIMIA and a re-allocation of its functions. Addressing these functional issues offers an opportunity to promote alternative policy within the broader context of promoting a vision for good, accountable and efficient government.

Such proposals may also help shift the grounds of public debate away from the polarising language of mandatory detention to mandatory processing of asylum seekers. Proposing an extensive—and overdue—overhaul of current departmental responsibilities offers an opportunity to move the debate to issues of government administration, accountability and efficiency.

By focusing on government administration of different functions it will be easier to clarify public debate on the different issues of border protection, processing of asylum claims, re-settlement of refugees, migration policy, multiculturalism and national and regional population policy.

Unravelling the mess: areas of concern

DIMIA has grown in an ad-hoc way over the years. The Human Rights Council's focus is on the need to reform administration of the processing of asylum seekers and the care and resettlement of refugees. However, any review and reallocation of DIMIA's current responsibilities should build on existing proposals for change in other areas of DIMIA's

responsibilities.

- Resettlement: the immigration gate-keeping function of DIMIA is at odds with the function of providing care and resettlement services. Today it makes more sense to integrate care and resettlement services into other departments (in association with state government departments) to aid swifter integration of people into the regular support services within the community, such as the Department of Family and Community Services and the Department of Education, Science and Training. While refugees and asylum seekers often have particular and distinct resettlement needs, such as trauma counseling, many of the services they require in order to adapt to their new circumstances will be the same as migrants from the same region. Those refugees currently on temporary protection visas (TPVs) are effectively denied most resettlement services and are treated as second-class refugees. Many of those on bridging visas are in an even worse situation.
- Multicultural Affairs: Immigration programs and multicultural policy were more clearly linked in the past, when migration policy and the immigration program rapidly transformed Australia into a multicultural society. Today, however, Australia's immigration program is more focused on selective skills transfer than explicit community building. Increasingly, the gatekeeper (or border protection) function of DIMIA is in tension with its other imperatives to promote multiculturalism, to emphasise the value of diversity and to build better community relations.
- Indigenous issues: Indigenous Affairs and Reconciliation merit a separate Ministry, rather than being an add-on to immigration or multicultural affairs.
- Population policy: the Government, Opposition and the business community have acknowledged the need for policies to manage Australia's overall population. Population policy is complex and covers numerous departmental areas, including family policy and the environment. Refugee flows have to be considered when population policy is developed, but governments also have legal obligations to refugees. Dealing with refugees in the context of population policy risks ignoring or subordinating these legal obligations in discretionary decisions about immigration

An agenda for the Australian Government

It may be useful to clearly differentiate the border protection functions of DIMIA from the community building functions, and to free the Navy from its current deployment intercepting unarmed, overloaded and often unseaworthy fishing vessels carrying asylum seekers.

Bringing customs and immigration functions under a single Ministerial portfolio would enable a clearer departmental focus on managing border protection and processing arrangements at points of entry. The immigration function in this arrangement would involve processing of non-refugee visas and policing points of entry, rather than migration policy as a whole. Such an arrangement could enable more cohesive responses to people trafficking, the smuggling of goods and people, and to other border integrity issues.

In such an arrangement, a new Department of Community and Multicultural Affairs (CAMA) could become more clearly focused on the needs of all Australians. Its responsibilities would include developing population and migration policy as well as administering and promoting multiculturalism and the humanitarian resettlement program (community services and relations).

The case for separating immigration and refugee determination processes

There are legal, political and policy reasons for separating Australia's handling of refugees and asylum seekers from its handling of migrants and discretionary decisions on immigration.

> *Refugee policy...derives from obligations under international law, which have been incorporated into Australian domestic law… Accommodating the refugee determination process within the immigration portfolio blurs this distinction. Refugee policy comes to be perceived as a sub-set of immigration policy. The two have distinct legal bases, however, with divergent consequences.*

(HREOC 1998, 233)

Politically, there is a need to separate the issue of border protection from the harsh treatment of individuals in Australia. The detention of asylum seekers in remote camps in often harsh conditions reinforces popular perceptions that asylum seekers arriving by boat are simply immigration cheats. There is no evidence to support the claim that the detention camp regime has acted as a deterrent to asylum seekers. Rather, the intervention of the Australian Navy, the deaths of many at sea, the fall of the Taliban and more effective interdiction in third countries all appear to have succeeded for now in halting the arrival of asylum seekers. Remote detention camps cannot be justified on grounds of deterrence, despite their expense and the suffering they have caused. The Naval blockade was introduced because of the failure of the camps to deter.

> *The convergence of border control on the one hand and protection obligations on the other gives rise to policies… disproportionately felt by asylum seekers who arrive by boat and claim refugee status on-shore…*
>
> *(HREOC 1998, 233)*

The previous Minister for Immigration, Philip Ruddock, consistently used phrases such as ‘queue jumpers’ and ‘seeking migration outcomes’. Such phrases can reinforce public hostility to the minority of asylum seekers who arrive in Australia by boat. Good refugee policy should not be determined by focusing on the small minority who might abuse the system at the expense of the vast majority who require protection and assistance.

Refugees need protection

In its 1998 report, Those who’ve come across the seas: detention of unauthorised arrivals, the Human Rights and Equal Opportunity Commission (HREOC) recommended that processing of asylum seekers and refugee claims be via the Attorney-General’s Department, as these claims flow from Australia’s obligations under domestic and international law rather than discretionary decisions about the size and composition of the migration program.

> *There is a fundamental difference between immigration decisions and determination of refugee status. Immigration is properly a matter of government policy. Subject to human rights considerations, including the principle of non-discrimination, each state is entitled to decide its own approach to immigration…*
>
> *Determination of refugee status is however a matter of law, not policy. Whether or not someone is a refugee depends on whether the person meets the definition of refugee set out in the Refugees Convention, which is incorporated in Australian law. This is not a matter on which the Minister should be able to issue policy directions…*
>
> *Deciding a refugee application is not properly an immigration matter at all. Refugee determinations should therefore be transferred to the Attorney-General’s Department, which is better placed to manage a legal process, which should not be constrained by immigration policy.*
>
> *(HREOC 1998, 234)*

While international comparisons can be misleading because of Australia’s unique island situation and its commitment to a significant migrant intake program, a Canadian report may nonetheless be helpful in considering how best to separate refugee protection functions from immigration programs and processing. The report—Not Just Numbers: a Canadian Framework for Future Immigration—prepared by the Legislative Review Advisory Committee for the Canadian Minister for Citizenship and Immigration, recommends a radical revision of Canada’s legislative framework, the creation of a separate Protection Act that would cover both resettlement and onshore determination and the creation of a specialist protection agency.

Deterrence distorting DIMIA

It has become evident to those regularly dealing with DIMIA that the department’s active promotion of the current punitive approach to asylum seekers has made DIMIA part of the problem in the quest to find a better way of handling refugees. The culture within DIMIA may also contribute to the approach taken by successive Minister’s who seek to take a ‘hardline’ approach to asylum seekers.

Processing of asylum seekers and of refugee issues is currently the preserve of DIMIA from beginning to end unless the Courts intervene, as they increasingly do. While memorandums of understanding have been signed with some state governments over access and provision of services, these have been limited. The lack of interaction with other departments

in the refugee determination and processing system has increased DIMIA's isolation and reduced scrutiny and input from other portfolio areas.

The political emphasis and priority given to the divisive issues of the mandatory detention regime and border protection may have distorted DIMIA's organisational culture and sense of mission. DIMIA's website is notable for the space it currently devotes to efforts to rebut community and international criticism of its treatment of refugees.

The current emphasis seems to be on DIMIA official's role in protecting and policing Australia's borders and national security, with asylum seekers arriving by boat depicted as a threat to both. Passion and polarisation in the community over the treatment of asylum seekers and refugees have tended to make DIMIA officials more defensive. According to anecdotal evidence, public servants uncomfortable with implementing the policy have tended to move away from the departmental areas responsible for detention, leaving those who are ideologically committed and personally invested in the policy approach.

DIMIA's conduct in relation to those in its care, or to whom it has a duty, has also come in for increasingly strong criticism from various judicial quarters, including from the growing number of Coronial Inquiries into the deaths of asylum seekers in detention centers or ensnared in DIMIA's refugee determination processes, and more recently the Palmer Report into the detention of an Australian citizen.

The 1998 HREOC Report recommended moving responsibility for administration of immigration detention facilities to the federal justice portfolio within the Attorney General's Department.

Abusing discretion and lacking accountability

The wide powers of discretion open to the Minister and lack of public accountability are open to abuse and perceptions of rorting and favouritism. At the very least, the extent of the discretionary powers over vulnerable individuals is inimical to informed and healthy dissent.

Refugee advocates are conscious that they may need to call privately for the Minister's personal intervention in individual cases. They are aware that public criticism from them may have adverse impacts on individuals they are seeking to assist: there is an understandable reluctance to bite the hand that holds the keys to freedom and safety for their clients.

This problem of accountability is exacerbated by the shortcomings and inadequacies of the current Refugee Review Tribunal (RRT). Apart from the Minister's existing and wide powers of discretion as a last avenue of appeal, and her role as the guardian of the children she detains, the Minister, it is suggested, also exerts an unhealthy influence over what was meant to be an independent review mechanism. This influence rests partly in the combination of her powers of appointment to the RRT, the short tenure of these appointments, and the fact that single-member panels mean it is possible for the Minister to more easily identify or pressure individuals whose decisions go consistently against the department.

The Refugee Council of Australia (RCOA) has pointed out that the Administrative Review Council has addressed these issues specifically in relation to Commonwealth merits review tribunals and noted:

> *Independence from the agency whose decisions are being reviewed is necessary to ensure credibility in the eyes of people who seek to have agency decisions reviewed. Independence basically means that decision makers involved in external review are not subjected to undue influence (and that there is no perception of such influence) in reaching their decisions or in making management choices.*
>
> *(RCOA 1999, 61)*

In addition, the failure of key selection criteria for members to include legal or human rights expertise raises doubts about the emphasis these issues are given in the making of life and death decisions for asylum seekers. It is true to say that an appeal to the RRT will not automatically guarantee an applicant a fair, thorough and independent examination of the claims presented. This lack of confidence in the RRT is clearly one of the reasons behind the sizeable increase in rate of appeal from the RRT to the Federal Court in recent years.

Detaining children or guarding their interests?

Currently the Minister for Immigration is the official guardian of all unaccompanied minors awaiting visa decisions or in detention. The guardianship responsibility is often delegated—sometimes down to the level of those administering the detention camps. This situation has been roundly condemned by a number of organisations including RCOA and Children out of Detention (Chilout).

> *There is no way that the Minister can give due regard to what are inherently contradictory functions. Nor is it possible that a Minister of the Crown can take an active role in monitoring the welfare of every child under his guardianship…*
>
> *This system leads to many legally questionable practices, such as a DIMIA officer signing the minor's application for refugee status, or worse still, the minor signing him/herself (the statement of claims that accompanies the application for refugee status is a Statutory Declaration and, as such, requires the person signing it to be over the age of majority). It also leaves minors exposed to neglect and abuse in the detention centres as regular staff rotation means that there* cannot be continuity of care.
>
> *As things stand at present, there is no delegation of guardianship to a person who has the best interests of the child as his/her sole and unambiguous responsibility and who will have responsibility for the child for as long as he/she remains in Australia or until the child reaches majority.*
>
> *(RCOA 2002, 6)*

It would be more appropriate if the guardianship function resided elsewhere and not with the Minister or department that is responsible for determining status of the asylum claim (or any other visa matter). If the Attorney-General's Department is to administer refugee applications, it is suggested that the guardianship function should lie with the Department of Family and Community Services. This responsibility should in no way override any of the existing state government child protection regimes, but should include a provision to act as legal guardian to assist in the refugee application process.

Tough but fair: principled and pragmatic

Table 1 provides a notional breakdown of how DIMIA's current responsibilities and functions might be redistributed.

Department	Functions
Indigenous Affairs and Reconciliation (new)	Aboriginal and Torres Strait Islander issues and the Reconciliation process
Attorney General	Processing refugee and asylum seeker applications
Border Control, Immigration and Customs (new)	Passport control, ports, processing and issuing of non-refugee visas (border control)
Community and Multicultural Affairs (new)	Population and migration policy, multicultural affairs and humanitarian resettlement services
Family and Community Services	Some refugee and migrant resettlement services
Education, Training and Science	Some refugee and migrant resettlement services

A better way to administer a better refugee policy

Table 2 briefly outlines how administrative functions of refugee and asylum seeker programs could be overhauled. It builds on the principles for an alternative refugee policy prepared by the Human Rights Council of Australia, available from the Human Rights Council's website www.hrca.org.au/refugees.htm.

References

Human Rights and Equal Opportunity Commission (HREOC) 1998, Those who've come across the seas: detention of unauthorised arrivals, Report, 12 May, available from the HREOC website at www.hreoc.gov.au/human_rights/asylum_seekers/index.html#seas.

Refugee Council of Australia (RCOA) 1999, Better Decisions: Review of Commonwealth Merits Review Tribunals, 14 September, available from the RCOA website at www.refugeecouncil.org.au/html/resources/publications.html.

Refugee Council of Australia (RCOA) 2002, Submission to the Human Rights and Equal Opportunity Commission's Inquiry into Children in Immigration Detention, April, available from the RCOA website at www.refugeecouncil.org.au/html/resources/HREOC02.html.

The Human Rights Council of Australia is a private non-government organisation which promotes understanding of and respect for human rights for all persons without discrimination through adherence to the International Bill of Rights, and other human rights instruments, internationally and within Australia. This article is based on work commissioned by Australians for Just Refugee Programs (AFJRP):www.ajustaustralia.com. Comments are welcome: mail@justrefugeeprograms.com.au.