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Senate Legal and Constitutional Legislation
Committee
Parliament House
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By email

Dear Senate Committee

**Inquiry into the provisions of the Migration Amendment
(Designated Unauthorised Arrivals) Bill 2006**

We appreciate the opportunity to make a short submission to the Senate's Inquiry into the provisions of the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006.

Our principle concerns are detailed below.

**1. The Refugee Advice and Casework Service (Australia) incorporated
(RACS)**

RACS, the oldest Community Legal Centre specialising in providing advice to asylum seekers, was originally set up in NSW in 1987 to provide a legal service to meet the specific needs of asylum seekers.

A not-for-profit incorporated association, RACS relies primarily on income through the Immigration Advice and Application Assistance Scheme administered by the Department of Immigration and Multicultural and Indigenous Affairs, donations from the community, an extensive volunteer network and a Management Committee. RACS' principle aims may be summarised as follows:

- to provide a free, expert legal service for individuals seeking asylum in Australia;
- to provide referral for counselling and assistance on related welfare issues such as accommodation, social security, employment, psychological support, language training and education;
- to provide a high standard of community education about refugee law, policy and procedure;

- to provide training sessions, workshops and seminars on refugee law, policy and procedure to legal and welfare agencies and individuals involved in advising and assisting refugees;
- to establish a resource base of current information and documentation necessary to support claims, for use by RACS, community organisations and lawyers assisting refugee claimants;
- to participate in the development of refugee policy in Australia as it relates to the rights of those seeking asylum in this country; and
- to initiate and promote reform in the area of refugee law, policy and procedures.

At a broader level, RACS aims to promote the issues asylum seekers face by raising public awareness and to advocate for a refugee determination process which both protects and promotes the rights of asylum seekers in the context of Australia's international obligations.

2. Australia is internationally legally responsible for Designated Unauthorised Arrivals

Relocating asylum seekers to foreign jurisdictions cannot alleviate Australia of its international legal responsibility to determine applicants' claims for refugee status in accordance with the 1951 Refugee Convention. Any arrangements entered into between Australia and Nauru or Papua New Guinea must ensure that the legal responsibilities of Australia are expressly incorporated into any such agreements.

In particular, Australia is not permitted to return refugees to territories in which they face—or risk removal to—persecution on account of race, religion, nationality, political opinion or membership of a political social group; or torture; or cruel, inhuman or degrading treatment or punishment.

By designating the whole of Australia as off-limits to asylum seekers arriving by boat, even to those coming directly from countries in which they fear persecution, Australia is seeking to thwart the essence of the international protection regime. In doing so, Australia is introducing impermissible policy considerations into the international legal regime governing refugee claims – in particular, an underlying rationale of deterrence, as well as diplomatic concessions designed to placate Indonesia.

RACS emphasises that all States, including Indonesia, should be encouraged to understand that granting refugee status is a neutral, apolitical, humanitarian practice that does not affect legal title to territory.

3. Offshore processing may deny durable solutions and effective protection Unauthorised Arrivals

Transferring boat arrivals to offshore processing centres is not a durable solution. We note that under the proposed legislation a person may be recognised as a refugee but be denied resettlement in Australia or any other country, and may languish in offshore processing centres indefinitely. The proposed regime is likely to deny protection to people who would gain protection as refugees if processed within Australia.

Indeed, there is no guarantee that persons held offshore will receive effective protection, in accordance with international human rights standards. Nauru and Papua New Guinea are not party to key human rights instruments, and Nauru is not party to the Refugee Convention. The human rights situation in Papua New Guinea is particularly precarious.

4. Offshore processing amounts to an unlawful penalty

Subjecting boat arrivals to a different processing regime, which is of inferior quality to the onshore regime, constitutes a penalty in violation of article 31 of the Refugee Convention. The Refugee Convention recognises that refugees may flee without proper documentation, but that they should not be penalised for it since it may be necessary to reach safety.

5. Non-discrimination

The differential treatment of "Designated Unauthorised Arrivals" amounts to unjustifiable discrimination in violation of international human rights law, since there is no legitimate policy basis for treating similarly situated asylum seekers differently.

6. Offshore processing amounts to detention, which may be arbitrary

Asylum seekers who come to Australia by boat and are transferred into offshore processing centres are, under international law, detained within the meaning of international human rights law. The argument that such people are free to travel elsewhere is not sufficient to deprive their treatment of its character as detention. Many such people have no permission to enter any country other than their country of nationality or habitual residence – that is, the country in which they fear persecution. As recognised in European and international human rights law, and in UNHCR guidelines, in such circumstances people do not have a free or voluntary choice whether to leave the offshore detention centres. Detention does not require absolute deprivation of liberty, but the restriction of liberty where there are no real or genuine alternatives available to the person.

Since offshore processing amounts to detention, there is a real risk that such arrangements may amount to arbitrary (that is, unreasonable) detention over time. While short initial periods of detention may be permissible, any extended period of detention will become arbitrary where it is not justified by specific security concerns or other accepted, limited grounds for detention. Detention solely for the purpose of processing claims – as envisaged by the Bill – is not accepted as a lawful basis for detention under international law. This is well established in the practice of the European and Inter-American human rights organs as well as in the rulings of the United Nations Human Rights Committee.

7. Designated Unauthorised Arrivals must enjoy full legal advice and assistance

In light of our experience advising asylum seekers, we submit that Australia's refugee status determination process must include provision for full and effective access to legal advice and assistance. Further, persons in detention should continue to be provided with Commonwealth funded assistance as per the current arrangements.

Good quality, properly funded legal advice for asylum applicants is essential in ensuring that Australia does not breach its fundamental legal obligation under article 33(1) of the 1951 Refugee Convention to not remove a person to a country where he or she may be persecuted.

Without effective legal advice, applicants may have difficulty understanding and navigating the determination process, lack information about their rights and responsibilities, and fail to understand the importance of disclosing relevant information. Asylum seekers confused by an absence of legal representation may suffer from adverse assessments of their credibility.

In addition, asylum seekers have often suffered torture and trauma and are particularly vulnerable. Without access to both mental health services and legal assistance these traumatised people may not fully and comprehensively articulate their claims. Experience suggests that decision makers are not always able to identify the existence of trauma-related illnesses nor pro-actively engage traumatised persons to articulate their claims. Given that a migration interview is itself potentially traumatic, independent advice and representation is vital.

It is well recognised that suffers of torture and trauma have difficulty recalling past traumatic events with clarity and consistency, particularly in stressful circumstances such as being in detention or an excised offshore place. The danger is that a decision maker may question a person's credibility because he or she has difficulty recalling past events, when in fact, the person is having difficulty because of trauma. Medical evidence is crucial in this respect because the absence of such may lead to a person being wrongly refused refugee status. If such a person is refused refugee

status, they face the prospect of *refoulement*, which would in turn place Australia in breach of its international protection obligations.

Without independent legal advice, the refugee status determination process lacks appropriate checks and balances. In a detention environment or in excised offshore processing centre, asylum seekers are particularly vulnerable and the risk that their claims are not properly presented is compounded. For this reason, we submit access to Commonwealth funded legal and mental health services is essential.

8. Procedures

The offshore procedures do not comply with best practice international standards. 'Model' UNHCR procedures have been criticised internationally as failing to meet best practice, or even minimum practice as advocated by UNHCR itself. This has been particularly apparent in the Asia-Pacific region, in which this offshore processing scheme will operate. In a democratic society which respects the rule of law for all people on an equal basis (regardless of their immigration or citizenship status). Asylum seekers should have access to independent merits and judicial review.

In Australia it has long been acknowledged that an independent merits review process of administrative decisions is a pre-requisite for ensuring both real and perceived justice and procedural fairness. For this reason, the Refugee Review Tribunal was established in 1994 with jurisdiction to review decisions of the Department. At the very least, Designated Unauthorised Arrivals should enjoy access to the Refugee Review Tribunal.

Further recourse to judicial review is essential to ensure that decisions are made according to law. Designated Unauthorised Arrivals are entitled to expect that the decision making associated with their case is correct according to law. Their rights and Australia's obligations are the same as those for any onshore asylum seeker.

In this respect we note that the Bill is designed to exclude those arriving by sea who have come directly from a country of persecution. Measures denying persons from neighbouring countries without alternative flight options access to the protection of the Australian legal system are particularly egregious.

9. Independent scrutiny and accountability must be ensured

Considering the serious concerns about the management and accountability of the Department of Immigration in recent times, it is essential that there are open and effective measures of scrutiny any regime for depriving asylum seekers of their liberty in a foreign jurisdiction. In particular, the offshore processing centres should be open to regular visits by lawyers and migration agents, the media, and bodies such as the United Nations, the Human Rights and Equal Opportunity Commission and the Commonwealth Ombudsman.

10. Concluding Remarks

A submission such as this cannot possibly canvas all the issues which may be of interest to the Committee. Accordingly, please do not hesitate to contact Dr Ben Saul, Dr Jane McAdam or Mark Green if you require any further information or assistance with any aspect of this submission.

Yours sincerely,

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Per:

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