



**SUBMISSION OF**

**THE HUMAN RIGHTS AND EQUAL OPPORTUNITY**

**COMMISSION**

**TO**

**THE SENATE LEGAL AND CONSTITUTIONAL**

**LEGISLATION COMMITTEE**

**ON THE**

**MIGRATION AMENDMENT (DESIGNATED**

**UNAUTHORISED ARRIVALS) BILL 2006**

**Human Rights and Equal Opportunity Commission**

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# 1 INTRODUCTION

- 1.1 The Human Rights and Equal Opportunity Commission ('The Commission') has been invited by the Senate Legal and Constitutional Legislation Committee ('the Committee') to make submissions on the *Migration Amendment (Designated Unauthorised Arrivals) Bill 2006* ('the Bill').
- 1.2 The Commission welcomes the opportunity to make this submission and thanks the Committee for its invitation.

# 2 THE HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION

- 2.1 The Commission is established by the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) ('HREOC Act'). It is Australia's national human rights institution.
- 2.2 Its functions are set out in section 11(1) of the HREOC Act and include the power to promote an understanding and acceptance, and the public discussion, of human rights in Australia.<sup>1</sup>

# 3 SUMMARY OF COMMISSION'S SUBMISSION

## Summary

- 3.1 The Commission recognises the importance of border control in protecting border security. The Commission recognises it is necessary, proper and desirable to facilitate the detection of unauthorised boat arrivals in Australian territorial waters. However, the Commission is of the view that once detection of unauthorised boats has occurred, any unauthorised arrivals should be processed onshore in a manner which is consistent with Australia's human rights obligations.
- 3.2 The Commission believes that the proposal to process all unauthorised boat arrivals in Offshore Processing Centres ('OPCs') is inconsistent with Australia's international obligations. In particular, the Commission is concerned that the Bill will:
  - (a) Breach Australia's obligations under the *Convention on the Rights of the Child* ('CRC') including the obligation to act in the best interests of the child (Article 3(1)) and the principle that children should only be detained as a measure of last resort (Article 37(b));
  - (b) Undermine Australia's obligations under the *International Covenant on Civil and Political Rights* ('ICCPR') by failing to act in accordance with the principle of non-discrimination (Article 26), failing to provide effective remedies for potential breaches of ICCPR rights (Article 2(3)) and exposing asylum seekers in OPCs to the risk of arbitrary detention (Article 9).
  - (c) Undermine the fundamental human rights principle of non-refoulement by failing to provide adequate procedural safeguards to ensure that cases in which a person has a fear of persecution are justly decided. The Commission is particularly concerned that the Bill does not provide for any form of independent merits review.

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<sup>1</sup> For further information about the Commission's functions and powers please see [http://www.hreoc.gov.au/about\\_the\\_commission/functions/index.html](http://www.hreoc.gov.au/about_the_commission/functions/index.html)

(d) Undermine Australia's commitment to the *Convention Relating to the Status of Refugees* ('the Refugee Convention'). The Commission is concerned that a number of features of the Bill may place Australia in breach of Article 31 of the Refugee Convention which provides asylum seekers should not be penalised for arriving illegally.

3.3 If the unauthorised boat arrivals are processed offshore the Commission believes that, in light of the serious human rights concerns about OPCs, it is imperative that OPCs are subject to the same level of independent scrutiny that applies to immigration detention centres in Australia. In particular, the Commission and the Commonwealth Ombudsman should have the same role in relation to OPCs as they do in relation to Immigration detention centres in Australia.

## **Recommendations**

**Recommendation 1: The Commission recommends that the Bill is not passed.**

**Recommendation 2: The Commission recommends that the policy of processing unauthorised arrivals in offshore processing centres be abandoned.**

**Recommendation 3: In the event that the policy of offshore processing is not abandoned, the Commission recommends that there should be an independent review of the impact of offshore processing on the rights of children.**

**Recommendation 4: In the event that the Bill is passed, the Commission recommends that asylum seekers processed in OPCs have, at a minimum, access to independent merits review.**

**Recommendation 5: In the event that the Bill is passed, the Commission recommends that provision be made for independent scrutiny of OPCs by the Commission and the Ombudsman to ensure that OPCs are subject to the same level of independent scrutiny as immigration detention centres on the Australian mainland.**

**Recommendation 6: In the event that the Bill is passed, the Commission recommends that the Bill should not have retrospective application.**

## **4 GENERAL CONCERNS**

### **Background**

4.1 The Bill can be seen as a continuation and extension of the so-called 'Pacific Solution' developed by the Australian Government in 2001. Under this regime unauthorised boat arrivals arriving in an 'excised offshore place' were defined as 'offshore entry persons' and removed to 'declared countries' where their asylum claims were processed.<sup>2</sup> For this purpose OPCs were established in two declared countries: Nauru and Papua New Guinea.

4.2 The Bill will expand the offshore processing regime to apply to effectively all unauthorised arrivals who entered Australia by sea in Australia on or after 13 April

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<sup>2</sup> It is noted that DIMA has previously acknowledged that Australia's obligations to asylum seekers are engaged as soon as they enter Australia territory. See, for example, the Senate Legal and Constitutional Committee *Report on the Inquiry into the Migration Legislation Amendment (Further Border Protection Measures) Bill 2002*.

2006. The Bill omits the current definition of an ‘offshore entry person’ and inserts a definition of ‘designated unauthorised arrival’.<sup>3</sup>

### **Justification for the new Bill**

4.3 The Government has stated that the objective of the Bill is to:

- ‘strengthen border control measures in relation to unauthorised boat arrivals’<sup>4</sup>; and
- address the ‘incongruous’ situation whereby an unauthorised boat arrival in an excised offshore place is subject to offshore processing arrangements, where an unauthorised boat arrival that reaches the Australian mainland is able to access the onshore protection arrangements, with the consequential opportunities for protracted merits review and litigation process.<sup>5</sup>

4.4 The Commission recognises the importance of border control in protecting border security. The Government has invested considerable resources in patrolling Australia’s northern waters.<sup>6</sup> The Commission recognises it is necessary, proper and desirable to facilitate the detection of unauthorised boat arrivals in Australian territorial waters. However, the Commission is of the view that once detection of unauthorised boats has occurred, any unauthorised arrivals should be processed onshore in a manner which is consistent with Australia’s human rights obligations.

4.5 The Commission believes that the ‘incongruous’ distinction between asylum seekers processed offshore and asylum seekers processed onshore results in unequal access to independent merits review and judicial review. The Commission challenges the implication contained in the second reading speech that this Bill creates a level playing field for all asylum seekers. Rather, it creates an incongruous distinction between asylum seekers processed offshore and asylum seekers processed onshore, resulting in unequal access to independent merits review and judicial review.

4.6 The Commission observes that the consequence of the Bill will be that the refugee status determination process will distinguish between asylum seekers who are processed onshore (for example, where an asylum seeker applies for protection visa after lawfully arriving on another kind of visa, or the applicant holds a bridging or

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<sup>3</sup> Proposed section 5 F defines a ‘designated unauthorised arrival’ as a person who becomes an unlawful non-citizen because: the person entered Australia at an excised offshore place after the excision time for that offshore place; or entered Australia by sea on or after 13 April 2006. Proposed section 5F will not apply to New Zealand citizens, permanent residents of Norfolk Island and persons brought to Australia purely for Customs Act purposes. Proposed subsection 5F(6) provides the Minister with a discretionary power to exempt a person or classes of person from ‘designated unauthorised arrival status’. Proposed section 5F(8) provides a person will be taken to have entered Australia by air if the person has travelled to Australia by sea and entered the migration zone by sea or by air. This covers situations where a person’s entry into the migration zone entry occurs by air after being found on a detained ship or rescued at sea.

<sup>4</sup> Explanatory Memorandum, *Migration Amendment (Designated Unauthorised Arrivals) Bill 2006*, para 1.

<sup>5</sup> Second Reading Speech, *Migration Amendment (Designated Unauthorised Arrivals) Bill 2006*

<sup>6</sup> The Government has indicated that this Bill will be accompanied by measures to increase the Government’s capacity to patrol Australia’s northern waters to identify and locate any potential unauthorised arrivals. See DIMA Media Release, ‘Strengthened Border Controls for Unauthorised Boat Arrivals’, 13 April 2006 available at [http://www.minister.immi.gov.au/media\\_releases/media06/v06048.htm](http://www.minister.immi.gov.au/media_releases/media06/v06048.htm). The recent Federal Budget provided that, in addition to the continuation of operation RELEX II, Defence and Customs will receive funding of \$95.6 million over four years to enable Defence to operate two Hoon Class Coastal Mine Hunters to increase surveillance and patrolling of Australia’s high threat maritime approaches and an additional \$20.2 million to enable Customs to increase the number of surveillance flights over high threat approaches to Australia’s North. In addition, the Government has announced a \$388.9 million plan to combat illegal foreign fishing in northern Australian waters. See Joint Media Release by Minister for Defence and Minister for Justice and Customs, Budget 2006-2007 ‘Protecting Australia’s Northern Borders’, Tuesday 9 May 2006.

other visa providing lawful status<sup>7</sup>) and asylum seekers arriving illegally by sea who are processed offshore.

- 4.7 The Commission believes that the solution to the situation where one group of people are able to access review rights and the other group is not should be to provide both groups with access to review rights. Expanding the size of the group to whom the rights are denied simply further entrenches an inequitable situation.

**Recommendation 1: The Commission recommends that this Bill is not passed.**

### **Rolling back recent reforms**

- 4.8 The Commission is concerned that the proposed Bill represents a backward step in Australia's treatment of asylum seekers. Recent reforms, including the *Migration and Ombudsman Legislation Amendment Act 2005* and *Migration Amendment (Detention Arrangements) Act 2005* have introduced important reforms to the processing of asylum seekers in Australia, including:

- Requiring that the determination of protection visa applications for detained asylum seekers occur within 90 days;
- Introducing the principle that the children should only be detained as a measure of last resort into the *Migration Act 1958(Cth)*;
- Requiring reports by DIMA to the Commonwealth Ombudsman on persons being held in detention for more than two years.

- 4.9 In May 2006 DIMA reported that: '[t]here are no children in immigration detention centres. Children are only detained as a last resort'.<sup>8</sup>

- 4.10 The practical effect of the Bill will be that the benefits of the recent reforms will not apply to unauthorised boat arrivals. The Commission is particularly concerned that children who arrive unlawfully by sea will be detained in OPCs.

### **Problems exposed by the Pacific Solution**

- 4.11 The Commission is of the view that the experience of asylum seekers who were detained in OPCs as part of the so-called 'Pacific Solution' provides cause for concern that detention in OPCs undermines the human rights of asylum seekers.

- 4.12 Since 2001, the Commission understands that, a total of 1509 asylum seekers have been held on Nauru alone. Of these asylum seekers, Australia accepted for resettlement 586, New Zealand, 360, Sweden 19, Canada 10, Norway 4, and 482 were returned to their country of origin.<sup>9</sup>

- 4.13 Asylum seekers processed offshore do not have access to independent merits review by the Refugee Review Tribunal (RRT) or judicial review under Australian law.

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<sup>7</sup> See RRT Annual Report 2004-2005 available at [http://www.rrt.gov.au/publications/annrpts/0405/2\\_contacts.html](http://www.rrt.gov.au/publications/annrpts/0405/2_contacts.html). In 2004-2005 93% of claims lodged with the RRT. It is noted that over stayers can be given temporary lawful status through the grant of a bridging visa: See DIMA Fact Sheet no. 86 'Over stayers and People in breach of Visa Conditions' Available online at <http://www.immi.gov.au/facts/86overstayers.htm>

<sup>8</sup> Immigration Detention Facilities, Detention Statistics Summary, available at [www.immi.gov.au/detention/facilities.htm](http://www.immi.gov.au/detention/facilities.htm)

<sup>9</sup> Julie Macken, 'Boat policy hopes sink', *The Australian Financial Review*, 8 May 2006

- 4.14 Some asylum seekers processed offshore under the ‘Pacific Solution’ were reported to have been detained for up to four years.<sup>10</sup>
- 4.15 The detrimental effects of placing asylum seekers in long-term detention are well known.<sup>11</sup> In 2005 the UNHCR called on Australia to find a more humanitarian solution for asylum seekers suffering mental health problems as a result of prolonged detention in OPCs.<sup>12</sup> The UNHCR has subsequently commented that it had ‘a bad experience with the arrangements set in place in Nauru in 2001’ where asylum seekers were kept ‘in detention like conditions for a long period of time with no timely solutions for the refugees, who suffered considerable mental hardship’.<sup>13</sup>
- 4.16 The Commission observes that in October 2005, the Australian Government announced that all remaining detainees held in OPC on Manus Island and Nauru (with the exception of two detainees) would be transferred to mainland Australia.<sup>14</sup> The *Sydney Morning Herald* reports this was in response to an independent expert report warning of the deteriorating mental health of the remaining detainees.<sup>15</sup> To the Commission’s knowledge, this report has not been made publicly available.
- 4.17 The Commission is concerned about the lack of publicly available information about the conditions of detention in OPCs; the period of time for which persons processed offshore were detained; and the mental health implications of detention in OPCs.

**Recommendation 2: The Commission recommends that the policy of processing unauthorised arrivals in offshore processing centres be abandoned.**

## 5 AUSTRALIA’S INTERNATIONAL LEGAL OBLIGATIONS

### Civil and Political Rights

#### Arbitrary Detention

- 5.1 Forcible removal to an OPC where asylum seekers are held pending refugee status determination and resettlement has the practical effect of placing people in detention.

<sup>10</sup> Michael Gordon, ‘Detainees to Leave Nauru’, *Sydney Morning Herald*, 13 October 2005; see also Michael Gordon, ‘Experts sent to evaluate Nauru Detainees’, *Sydney Morning Herald*, 22 September 2005

<sup>11</sup> See Human Rights and Equal Opportunity Commission (2004) Mental health of children in Immigration Detention, in *A Last Resort? National Inquiry into Children in Immigration Detention*. pp357-454. Available at [http://www.hreoc.gov.au/human\\_rights/children\\_detention\\_report/report/chap09.htm](http://www.hreoc.gov.au/human_rights/children_detention_report/report/chap09.htm); Amnesty International Australia. Fact Sheet: Health Conditions in Australia’s detention centres. Available at [http://www.amnesty.org.au/resources/fact\\_sheets/health\\_conditions\\_in\\_australias\\_detention\\_centres\\_-\\_fact\\_sheet](http://www.amnesty.org.au/resources/fact_sheets/health_conditions_in_australias_detention_centres_-_fact_sheet); Mares S, Jureidini J. *Children and Families Referred from a Remote Immigration Detention Centre: Paper presented at National Summit on Asylum Seeker Health Care*. Sydney November 12, 2003. Available at [http://www.psychology.org.au/members/current\\_issues/sarah\\_mares\\_paper.pdf](http://www.psychology.org.au/members/current_issues/sarah_mares_paper.pdf); Mares S, Newman L and Dudley M. (2002). ‘Seeking refuge, losing hope; Parents and children in immigration detention’. *Australasian Psychiatry* 10: 91-96; Steel, Z.(2003) *Psychiatric Harm and Long Term Detention: Summary of Evidence*. Paper presented at National Summit on Asylum Seeker Health Care. Sydney November 12, 2003. [http://www.psychology.org.au/members/current\\_issues/zachary\\_steel\\_presentation.pdf](http://www.psychology.org.au/members/current_issues/zachary_steel_presentation.pdf); Steel Z, Momartin S, Bateman C, Hafshejani A, Silove D, Everson N, Roy K, Dudley M, Newman L, Blick B, Mares S. 2004. ‘Psychiatric status of asylum-seeker families held for a protracted period in a remote detention centre in Australia’. *Aust N Z J Public Health*. 28:527-36.

<sup>12</sup> ABC, The World Today, ‘UN Critical of Refugee Detention on Nauru’, 18 April 2006

<sup>13</sup> UN News Services, ‘UN agency will ask Australia to change offshore refuge processing legislation’, 12 May 2006, <http://www.un.org/apps/news/story.asp?NewsID=18450&Cr=australia&Cr1=>

<sup>14</sup> [http://www.minister.immi.gov.au/media\\_releases/media05/v05123.htm](http://www.minister.immi.gov.au/media_releases/media05/v05123.htm)

<sup>15</sup> Michael Gordon, ‘Detainees to Leave Nauru’, *Sydney Morning Herald*, 13 October 2005

- 5.2 The Bill does not address the possibility of excessive or indefinite detention in OPCs. There is no maximum time period for offshore processing of claims for asylum and no maximum time in which a person who is determined to be a refugee must be resettled in a third country.
- 5.3 The potential for asylum seekers to be detained for an excessive period of time raises serious concerns that the detention may, by reason of its indeterminacy, breach Article 9(1) of the ICCPR which provides that no one shall be subjected to arbitrary arrest or detention.
- 5.4 The Commission is also concerned that the proposed legislation removes the rights of persons detained offshore to challenge their detention. Under the Bill court proceedings can not be instituted or continued in relation to the lawfulness of detention of a designated unauthorised arrival.<sup>16</sup>
- 5.5 The Commission notes that Article 9(4) of the ICCPR provides that:
- anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.
- 5.6 In *A v Australia*<sup>17</sup> the Human Rights Committee emphasised that every detention decision should be open to periodic review so that the justifying grounds can be assessed.
- 5.7 The Commission is concerned that asylum seekers in OPCs will not have an effective remedy for unlawful arbitrary detention or any other breach of their rights under the ICCPR. The Commission notes that Article 2(3) of the ICCPR states:
- Each State party to the present Covenant undertakes:
- (a) To ensure that any person whose rights or freedoms as herein recognised are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
  - (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
  - (c) To ensure that the competent authorities shall enforce such remedies when granted.
- 5.8 This obliges States to develop effective remedies to prevent future breaches of rights and freedoms guaranteed by the ICCPR as well as rectify current breaches.<sup>18</sup>

### **Non-Discrimination**

- 5.9 The Commission is concerned that the Bill potentially breaches Article 26 of the ICCPR which provides that all persons are equal before the law and are entitled without any discrimination to the equal protection of the law.<sup>19</sup>

<sup>16</sup> See proposed section 494AA(1)(c)

<sup>17</sup> Communication no. 560/1993 Human Rights Committee, 3 April 1997

<sup>18</sup> See, for example, *C v Australia*, Communication no 900/1999, UN doc CCPR/C/76/D/900/1999, [10] where the UNHRC noted that the ‘State party is under an obligation to avoid similar violations in future’.

<sup>19</sup> See HREOC, Submission no. 35, Senate Legal and Constitutional Committee *Inquiry into the Migration Legislation Amendment (Further Border Protection Measures) Bill 2002*.

- 5.10 As the Commission noted above [at para 4.5-4.7] the suggestion that the Bill creates a level playing field for asylum seekers is erroneous: the Bill will clearly result in a distinction between the processing of asylum applications of persons who arrive in Australia by authorised means and subsequently apply for asylum and unauthorised boat arrivals.
- 5.11 Such discrimination on the ground of immigration status is inconsistent with Australia's obligations on Article 26.

### **The Rights of the Child**

- 5.12 The Commission is of the view that, if passed, the Bill will breach Australia's obligations under the CRC.
- 5.13 Article 37(b) of the CRC states:
- No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.
- 5.14 The Bill will result in children seeking asylum who arrive in Australia without authorisation being detained in an OPC. The principle that children should only be detained as a measure of last resort will not be applied.
- 5.15 The Bill also undermines Australia's obligations under Articles 3, 20 and 21 of the CRC which provide:
- In all actions concerning children 'the best interests of the child shall be a primary consideration' (Article 3(1)).
  - Unaccompanied asylum seeker children are to be given special protection and assistance by the Government (Article 20);
  - States should provide special protection to children who are seeking refugee status. They are to 'receive appropriate protection and humanitarian assistance in the enjoyment of their [CRC rights and also other human rights and humanitarian instruments to which the State party is a party]' (Article 22).
- 5.16 The Commission's National Inquiry into Children in Immigration Detention ('The National Inquiry') expressed strong concerns about the impact of the Pacific Solution on the rights of the child:
- Children who are excised offshore persons and are detained on Christmas Island or transferred to detention facilities in Nauru or Papua New Guinea, have no entitlement to a visa even once they are found to be refugees. In other words, even after the processing has finished and the children have been recognised as refugees, there is no automatic trigger for release from detention. They have no rights to a bridging visa, nor to transfer to an alternative place of detention. The children must therefore wait in detention until a country offers them resettlement. While it can be argued that asylum seeking children in camps in Pakistan, for example, also face a similar hiatus after they have been found to be refugees the difference is the waiting period does not occur in a detention environment.<sup>20</sup>

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<sup>20</sup> Human Rights and Equal Opportunity Commission (2004) Mental health of children in Immigration Detention, in *A Last Resort? National Inquiry into Children in Immigration Detention*. Available at [http://www.hreoc.gov.au/human\\_rights/children\\_detention\\_report/report/chap09.htm](http://www.hreoc.gov.au/human_rights/children_detention_report/report/chap09.htm)



- 5.17 The National Inquiry concluded that under international law, Australia continues to be responsible for any foreseeable breach of the human rights of the children that it forcibly relocates to third countries.<sup>21</sup> Therefore, Australia is responsible for any breaches of human rights that it can foresee will occur with respect to the children that the Australian authorities transfer to Nauru and Papua New Guinea. This includes the decision to detain, and the length of detention of children, in those countries. The Inquiry also observed that:
- ...since September 2001, when a family or unaccompanied child is intercepted by the Australian Navy, or lands on Christmas Island, Ashmore and Cartier Islands or Cocos (Keeling) Islands without a visa, detention is strictly discretionary. However, as a practical matter the children have either been detained on Christmas Island, or transferred to detention facilities in Nauru or Manus Island in Papua New Guinea. The Inquiry is unaware of any instances where these children have been presented any option other than detention in one of these three facilities. Therefore, there is no evidence of detention being anything other than the 'first resort'.<sup>22</sup>
- 5.18 Recommendation 5 of the National Inquiry stated: 'There should be a review of the impact on children of legislation that creates 'excised offshore places' and the 'Pacific Solution'.
- 5.19 This recommendation was not implemented. The Commission believes that the unresolved human rights concerns it held about the impact of 'Pacific Solution' on children need to be addressed before this Bill can be considered.
- 5.20 The Commission notes with concern a recent media article by Mary Crock and Jane McAdam that states 32 of 55 unaccompanied children processed in OPCs in 2002-2003 were returned to Afghanistan; of the 290 children from Afghanistan who were processed onshore, none were returned during this period.<sup>23</sup>

**Recommendation 3: In the event that the policy of offshore processing is not abandoned, the Commission recommends that there should be an independent review of the impact of offshore processing on the rights of children.**

## Non-Refoulement

- 5.21 The prohibition on the forced return of a refugee – 'refoulement' – is recognised as one of the most fundamental principles in international refugee law. Article 33(1) of the Refugee Convention states:
- No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
- 5.22 The Commission notes that the principle of non-refoulement extends beyond the limited terms of the Refugee Convention. The United Nations Human Rights Committee has held that a state will contravene its obligations under the ICCPR if it

<sup>21</sup> See the decisions of the Human Rights Committee (HRC) in *GT v Australia*, Communication No 706/1996, UN Doc CCPR/C/61/D/706/1996, 4 December 1997; *C v Australia*, Communication No 900/1999, UN Doc CCPR/C/76/D/900/1999, 13 November 2002; *Kindler v Canada*, Communication No. 470/1991, UN Doc CCPR/C/48/D/470/1991, 18 November 1993; *Ng v Canada*, Communication No. 469/1991, UN Doc CCPR/C/49/D/469/1991, 7 January 1994; *Cox v Canada*, Communication No. 539/1993, UN Doc CCPR/C/52/D/539/1993, 9 December 1994

<sup>22</sup> HREOC, *A Last Resort, National Inquiry into Children in Immigration Detention*, April 2004, Para 6.6.4

<sup>23</sup> Mary Crock, Jane McAdam, 'Nauru is no place for Asylum Seekers', *The Australian*, 15 May 2006.

removes a person to another country is circumstances where there is a real risk that their rights under the ICCPR will be violated.<sup>24</sup>

- 5.23 Article 7 of the ICCPR provides that 'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment'. General Comment 20 to the ICCPR confirms that State parties 'must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement'.<sup>25</sup>

### Review Rights

- 5.24 The Commission recognises that under a narrow reading of Article 33(1) of the Refugee Convention a country will still be in accordance with these obligations if it sends an asylum seeker to a 'third country' which is considered to be safe and he or she will receive 'effective protection'.<sup>26</sup>
- 5.25 However, the Commission is of the view that inadequate procedural safeguards in the determination of applications for refugee status create an unjustifiably high risk of a wrong decision being made and a person being sent to a place where they face persecution.
- 5.26 The United Nations General Assembly and the UNHCR's Executive Committee have affirmed that the duty of non-refoulement encompasses the obligation that all asylum seekers must be granted access to fair and effective procedures for determining their protection needs.<sup>27</sup>
- 5.27 While the instruments of the UN treaty and charter bodies do not represent the only interpretation of international obligations, they do represent the most persuasive interpretation of what should be done to comply with the Refugee Convention, the ICCPR and the CRC.
- 5.28 The Executive Committee of the UNHCR (EXCOM) has noted the need for fair and protective procedures for determining refugee status and protection needs. EXCOM 8 has laid down some minimum standards for the determination of refugee status, including:
- The competent official should have clear instructions for dealing with cases which might come within the purview of the Refugee Convention and other relevant international instruments.

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<sup>24</sup> See: *GT v Australia*, Communication No 706/1996, UN Doc CCPR/C/61/D/706/1996; *C v Australia* Communication No 900/1999, UN Doc CCPR/C/76/D/900/1999; *Kindler v Canada*, Communication No. 470/1991, UN Doc CCPR/C/48/D/470/1991; *Ng v Canada*, Communication No. 469/1991, UN Doc CCPR/C/49/D/469/1991; *Cox v Canada*, Communication No. 539/1993, UN Doc CCPR/C/52/D/539/1993.

<sup>25</sup> Human Rights Committee, General Comment 20, Article 7 (Forty-fourth session, 1992), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 30 (1994).

<sup>26</sup> 'The prohibition on refoulement applies only in respect of territories where the refugee or asylum seeker would be at risk, not more generally. It does, however, require a State proposing to remove a refugee or asylum seeker [to] undertake a proper assessment as to whether the third country is indeed safe'. See E Lauterpacht and D Bethlehem, 'The scope and content of the principle of non-refoulement: Opinion' in E Feller, V Turk and F Nicholson (eds), 2003, *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, Cambridge University Press, p122, para 116

<sup>27</sup> UNHCR, 2001, Background Paper no. 2 'The application of the 'safe third country' notion and its impact on the management of flows and on the protection of refugees' available online at [http://www.unhcr.bg/global\\_consult/background\\_paper2\\_en.htm](http://www.unhcr.bg/global_consult/background_paper2_en.htm)

- The applicant should receive the necessary guidance as to the procedure to be followed.
  - There should be a clearly identified authority with responsibility for examining refugee status.
  - The applicant should be given the necessary facilities, including the services for a competent interpreter for submitting his case and the opportunity to contact UNHCR.
  - There must be provision for appeal.<sup>28</sup>
- 5.29 The existing OPC refugee status determination process is not subject to the same review mechanisms as the refugee status determination process on mainland Australia. An asylum seeker processed offshore is able to request an internal review of a negative decision by a Department officer who is more senior than the one who made the primary decision. However, there is no mechanism for independent merits review or independent judicial review. These restrictions will continue to apply under the Bill.<sup>29</sup>
- 5.30 The review mechanisms for independent merits review and judicial review contained in the Australian refugee status determination process provide a vital mechanism for checking the validity of the primary decision about refugee status and reducing the risk of refoulement as a result of a wrong primary assessment.
- 5.31 The RRT 2004-2005 annual report states that in 2004-2005 the RRT set aside the primary decision of DIMA in one in three or 33 per cent of cases.<sup>30</sup> This is a significant indicator of the importance of an effective review process, including independent merits review and judicial review, to ensure persons who should be accorded refugee status are not wrongfully returned or expelled from Australia.
- 5.32 The devastating impacts of wrong decision-making at a departmental level are illustrated by the wrongful detention of Cornelia Rau and the wrongful removal of Vivian Solon. These cases demonstrate the need for transparency and accountability in the process for determining a person's status under the *Migration Act 1958* (Cth).<sup>31</sup>
- 5.33 In the Commission's view if the Bill is passed, it should be amended so that asylum seekers processed offshore have, at a minimum, access to independent merits review.

**Recommendation 4: In the event that the Bill is passed, the Commission recommends that asylum seekers processed in OPCs have, at a minimum, access to independent merits review.**

<sup>28</sup> EXCOM no.8 'Determination of Refugee Status' in *Compilation of Conclusions Adopted by the Executive Committee on the International Protection of Refugees 1975-2004*

<sup>29</sup> Explanatory Memorandum, *Migration Amendment (Designated Unauthorised Arrivals) Bill 2006*, para 11.

<sup>30</sup> 2208 applications for judicial review of RRT decisions were made. Eleven per cent of these cases were remitted to the RRT for reconsideration. The Commission notes that The RRT Annual Report 2004-2005 also states that detention cases comprised only 7 per cent of lodgements in 2004-2005. 93 per cent are of 'community' cases, where the protection visa application was made after lawful arrival on another kind of visa, and the applicant holds a bridging or other visa providing lawful status during the course of the review'. See RRT Annual Report 2004-2005 available at [http://www.rrt.gov.au/publications/annrpts/0405/2\\_contacts.html](http://www.rrt.gov.au/publications/annrpts/0405/2_contacts.html).

<sup>31</sup> It is noted that in a speech on future changes in DIMA the Department Secretary stated one of the goals of DIMA was to create 'a more open and accountable organisation' and deal 'more fairly and reasonably with clients'. See Andrew Metcalfe, 'Implications of the Palmer Report Future Changes', *IPPA Seminar*, 25 November 2005, available at: [http://www.immi.gov.au/media\\_releases/media05/ippa\\_speech.pdf](http://www.immi.gov.au/media_releases/media05/ippa_speech.pdf)

## Article 31 of the Refugee Convention

5.34 Article 31 of the Refugee Convention provides:

- (1) The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorisation, provided they can present themselves without delay to the authorities and show good cause for their illegal entry or presence.

5.35 The Refugee Convention recognises that where persons are in fear for their life or freedom they may be forced to enter a country of refuge unlawfully. It therefore prohibits nations from penalising refugees on account of their illegal entry where they are ‘coming directly from a territory where their life or freedom was threatened’.<sup>32</sup> The term penalties is not defined in Article 31. Penalties may include but are not limited to prosecution and fines as well as punitive measures such as detention.<sup>33</sup>

5.36 In *Refugee Protection in International Law: UNHRC’s Global Consultations on Refugee Protection* Sir Guy Goodwin Gill observes it has been held that ‘any treatment that was less favourable than that accorded to others and was imposed on account of illegal entry was a penalty with Article 31 unless objectively justifiable on administrative grounds’.<sup>34</sup>

5.37 The Commission observes that there are significant differences between the offshore processing arrangements proposed by the Bill and onshore processing arrangements. In particular, the Commission is concerned by:

- the potential risk of excessive detention in OPCs;
- the removal of access to independent merits review and judicial review; and
- the unavailability of legal advice or assistance in OPCs.

5.38 The Commission is concerned that the absence of maximum statutory time limits for processing claims on OPCs and the potential difficulty in locating a safe third country willing to accept refugees for resettlement will increase the risk of asylum seekers processed in OPCs being detained for an excessive period of time.

5.39 If persons are subject to excessively long detention as a result of the particular features of offshore processing arrangements this may constitute a penalty in breach of Article 31(1). Relevantly, the Sir Guy Goodwin Gill has observed:

Provisional detention is permitted if necessary for and limited to the purposes of preliminary investigation. While administrative detention is allowed under Article

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<sup>32</sup> The UNHCR have stated the phrase ‘coming directly’ in Article 31(1) covers the situation of a person who enters the country in which asylum is sought directly from the country of origin, ‘or from another country where his protection, safety and security could not be assured’. ‘No strict time limits can be applied to the concept of ‘coming directly’ and each case must be judged on its merits’. See UNHCR *Guidelines and Applicable Criteria and Standards Relating to the Detention of Asylum Seekers*, para 4. The Commission notes that one of the justifications for *Migration Amendment (Excision from Migration Zone) (Consequential Provisions Act) 2001* was that it would ‘provides for a hierarchy of benefits depending on whether the applicant has been involved in secondary movement, and where people made their application’ and ‘t [deter] further movement from, or the bypassing of, other safe countries’ (See DIMA, Fact Sheet no.71, ‘New Measures to strengthen border control’. This Bill clearly applies to all unauthorised arrivals including asylum seekers who ‘come directly’.

<sup>33</sup> See G Goodwin Gill, ‘Article 31 of the 1951 Convention Relating to the Status of Refugees: non-penalisation, detention, and protection’ in E Feller, V Turk and F Nicholson (eds), 2003, *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection*, Cambridge University Press, p194.

<sup>34</sup> See Social Security Commission in Case no. CIS 4439/98, 25 Nov. 1999 as cited in *Ibid*, p 204

31(2), it is equivalent, from the perspective of international law to a penal sanction whenever basic safeguards are lacking (review, excessive duration etc).<sup>35</sup>

- 5.40 The Commission notes that persons detained in OPC are unable to challenge the validity of their detention in Australian courts. Unlike cases of long-term detention in immigration detention centres onshore, cases of long-term detention in OPCs will not be subject to review by the Commonwealth Ombudsman.
- 5.41 The Commission observes that there appears to be no objective justification on administrative grounds for differences between offshore and onshore processing arrangements. It is arguable that aspects of the offshore processing arrangements of unauthorised boat arrivals are less favourable than the onshore processing arrangements. As this distinction is made on the basis of mode of entry to Australia, it is arguable that, insofar as offshore processing arrangements may produce less favourable treatment for asylum seekers processed offshore as compared to asylum seekers processed onshore, these arrangements may constitute a penalty, in breach of Article 31(1) of the Refugee Convention.<sup>36</sup>

## **6 MINISTERIAL DISCRETION**

- 6.1 A designated non-authorised arrival is unable to apply for a visa in Australia without the non-compellable personal intervention of the Minister under proposed section 46A.
- 6.2 The Commission is of the view that an unfettered and non-compellable Ministerial discretion to allow asylum seekers processed in OPCs to apply for visas is an inadequate recognition of Australia's international human rights obligations in respect of these persons.

## **7 DECLARED COUNTRIES**

- 7.1 The Bill amends the *Migration Act 1958(Cth)* to enable a DIMA officer to take a designated unauthorised arrival to a 'declared country'.<sup>37</sup> A 'Declared country' can be declared under section 198A of the *Migration Act 1958 (Cth)* which provides that the Minister must declare that the 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.

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<sup>35</sup> See G Goodwin Gill, 'Article 31 of the 1951 Convention Relating to the Status of Refugees: non-penalisation, detention, and protection' in E Feller, V Turk and F Nicholson (eds), 2003, *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, Cambridge University Press, p219

<sup>36</sup> See further the discussion in the Senate Legal and Constitutional Committee *Report on Inquiry into the Migration Legislation Amendment (Further Border Protection Measures) Bill 2002*, p47-48

<sup>37</sup> Section 198A(1) currently enables an officer to take an 'offshore entry person' to a 'declared country.'

- 7.2 The Commission is concerned that the relevant human rights standards are not defined. The lack of a statutory requirement for an undertaking of non-refoulement by a declared country has been previously noted by this Committee.<sup>38</sup>
- 7.3 The Commission is concerned that under proposed section 494AA(1) (d) there is a bar on designated unauthorised non-arrivals challenging proceedings relating to the exercise of power under section 198A.
- 7.4 The Commission believes that it is not possible to accurately assess whether asylum seekers are going to be able to access effective assessment procedures in conditions which occur accord with human rights obligations without ongoing independent scrutiny of the conditions of OPCs and the refugee status assessment process.

### **Protecting the institution of asylum**

- 7.5 The Commission is concerned that the effect of taking designated unauthorised arrivals to declared countries is to create a system in which Australia's non-refoulement obligations are not specifically being fulfilled by Australia; instead we are ultimately relying on other sovereign countries behaving appropriately in complying with the non-refoulement even though this obligation still has its origin in Australia.<sup>39</sup>
- 7.6 The Commission is concerned that in addition to increasing the risk of refoulement, as discussed above, the proposed amendments will have the effect of undermining the 'institution of asylum'.<sup>40</sup>
- 7.7 Signatories to the Refugee Convention are required to interpret the Convention in good faith.<sup>41</sup> The Preamble to the Refugee Convention focuses on the notion of international responsibility and 'burden sharing', emphasising that international cooperation between states and with the UNHCR is vital to deal with the problem of refugees and to prevent the resolution of the refugee problem being borne unduly by particular states.<sup>42</sup>
- 7.8 Following the introduction of the 'Pacific Solution' in 2001, the UNHCR has emphasised the damaging effect on the principle of burden sharing and international

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<sup>38</sup> Senate Legal and Constitutional Committee *Report on the Inquiry into the Migration Legislation Amendment (Further Border Protection Measures) Bill 2002*, p 37

<sup>39</sup> The Commission has previously made a similar observation in submissions to the Senate Legal and Constitutional Committee *Inquiry into the Migration Legislation Amendment (Further Border Protection Measures) Bill 2002* to the See Senate Legal and Constitutional Committee *Report on the Inquiry into the Migration Legislation Amendment (Further Border Protection Measures) Bill 2002*, p 34.

<sup>40</sup> The UNGA Resolution 55/74 of 12 February 2001 states the General Assembly: 'Reaffirms that, as set out in Article 14 of the Universal Declaration of Human Rights, everyone has the right to seek and enjoy in other countries asylum from persecution, and calls upon all States to refrain from taking measures that jeopardise the institution of asylum, particularly by returning or expelling refugees or asylum seekers contrary to international standards. Condemns all acts that pose a threat to the personal security and well-being of refugees and asylum seekers, such as refoulement'.

<sup>41</sup> Article 26 of the *Vienna Convention on the Law of Treaties* provides, 'every treaty in force is binding upon the parties to it and must be performed by them in good faith.'

<sup>42</sup> The preamble to the Refugee Convention states: 'Considering that the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognized the international- scope and nature cannot therefore be achieved without international co-operation, Expressing the wish that all States, recognizing the social and humanitarian nature of the problem of refugees, will do everything within their power to prevent this problem from becoming a cause of tension between States, Noting that the United Nations High Commissioner for Refugees is charged with the task of supervising international conventions providing for the protection of refugees, and recognizing that the effective co-ordination of measures taken to deal with this problem will depend upon the co-operation of States with the High Commissioner'.

cooperation of countries outsourcing refugee claims to ‘safe third countries’.<sup>43</sup> In response to the media release announcing the Government’s intention to process all unauthorised boat arrivals offshore, the UNHCR commented:

[I]f this were to be 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....<sup>44</sup>

## **8 INDEPENDENT SCRUTINY OF OFFSHORE PROCESSING**

- 8.1 Immigration detention in Australia is subject to scrutiny from independent agencies including the Commission and the Commonwealth Ombudsman.
- 8.2 The Bill includes a requirement for the Secretary of DIMA to provide annual reports on offshore processing arrangements and refugee assessment outcomes. These reports will be tabled in both Houses of Parliament.<sup>45</sup>
- 8.3 The Bill does not, however, provide for any independent scrutiny of OPCs by either the Commission or the Commonwealth Ombudsman.
- 8.4 The Commission believes that independent scrutiny of immigration detention is an essential measure to guard against human rights abuses and to help ensure accountability and transparency in the immigration detention process.
- 8.5 The Commission submits that if the Bill is passed it is crucial that explicit statutory safeguards are introduced to alleviate concerns about the Bill’s impact on the human rights of asylum seekers.

**Recommendation 5: In the event that the Bill is passed, the Commission recommends that provision be made for independent scrutiny of OPCs by the Commission and the Ombudsman to ensure that OPCs are subject to the same level of independent scrutiny as immigration detention centres on the Australian mainland.**

## **9 RETROSPECTIVE APPLICATION**

- 9.1 The Commission notes that the Bill is retrospective in application and will apply to all unauthorised boat arrivals arriving in Australia on or after the 13 April 2006.<sup>46</sup>
- 9.2 The Commission is of the view that a Bill that will result in the abrogation of important review rights should not have retrospective application.

**Recommendation 6: In the event that the Bill is passed, the Commission recommends that the Bill should not have retrospective application.**

<sup>43</sup> UNHCR, ‘The State of the World’s Refugees 2006 - Chapter 8 Looking to the future: Need for greater responsibility-sharing’ available at <http://www.unhcr.org/cgi-bin/texis/vtx/publ/opendoc.htm?tbl=PUBL&page=home&id=4444d3cf2>

<sup>44</sup> UN News Centre, ‘Proposed new Australian border control measures raise serious concerns’, 18 April 2006, available at: <http://www.un.org/apps/news/story.asp?NewsID=18166&Cr=australia&Cr1=>

<sup>45</sup> Proposed section 486R

<sup>46</sup> The Commission notes that the Government’s intention that the Bill would have retrospective application was announced on 13 April 2006. See DIMA Media Release, ‘Strengthened Border Controls for Unauthorised Boat Arrivals’, 13 April 2006 available at [http://www.minister.immi.gov.au/media\\_releases/media06/v06048.htm](http://www.minister.immi.gov.au/media_releases/media06/v06048.htm).