



SUPPLEMENTARY SUBMISSION OF

THE HUMAN RIGHTS AND EQUAL OPPORTUNITY

COMMISSION

TO

THE SENATE LEGAL AND CONSTITUTIONAL

COMMITTEE

INQUIRY INTO THE PROVISIONS OF THE

MIGRATION AMENDMENT (DESIGNATED

UNAUTHORISED ARRIVALS) BILL 2006

Human Rights and Equal Opportunity Commission

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Supplementary Submission by the Human Rights and Equal Opportunity Commission to the Inquiry into the Provisions of the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006

1. The Human Rights and Equal Opportunity Commission (the Commission) makes this supplementary submission to the Inquiry to respond to the following submission of the Department of Immigration and Multicultural Affairs (DIMA):

People transferred to OPCs are not detained under the *Migration Act 1958* or any other Australian law. On Nauru residents of the offshore processing centre are accommodated under the Government of Nauru visa arrangements. These visas impose some restrictions on movement and place of residence for the visa holder, in accordance with domestic law in Nauru.¹

2. While it is correct to state that people are not detained in OPCs under Australian law, for the reasons that follow the Commission is strongly of the view that people transferred to OPCs are nevertheless held in detention. Because this detention is a consequence of the policy and practices to which the Bill gives effect, Australia continues to bear responsibility for breaches of human rights that foreseeably result from that detention.

Significance of ‘Detention’

3. The question of whether persons in OPCs are being held in detention is relevant to determining whether Australia is in compliance with its international obligations under the International Covenant of Civil and Political Rights (ICCPR) and the Convention on the Rights of the Child (CRC). The United Nations Human Rights Committee has held consistently that a State will contravene its obligations under the ICCPR if it removes a person to another country in circumstances in which there is a real risk that their rights under the ICCPR will be violated.²
4. Article 9(1) of the ICCPR prohibits arbitrary detention. 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 as a measure of last resort and for the shortest appropriate period of time.
5. The ways in which this Bill may, or is likely to, result in a breach of these obligations is set out in the Commission’s substantive submission to this Inquiry: see paras 5.1-5.8; 5.12-5.20.
6. It is not sufficient, for the purpose of complying with Australia’s international obligations, to assert that persons are not detained under Australian law. Rather, it is necessary to focus on the practical reality of the operation of OPCs. The Commission submits that, for the reasons set out below, persons who would be removed to OPCs under the Bill are, in substance, being held in detention.

¹ DIMA, Submission no 118, Senate and Legal Constitutional Committee Inquiry into the Provisions of the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006, p 3

² 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.

Meaning of 'Detention'

7. The Human Rights Committee General Comment 8 states:

Article 9 which deals with the right to liberty and security of persons has often been somewhat narrowly understood in reports by State parties, and they have therefore given incomplete information. The Committee points out that paragraph 1 is applicable to all deprivations of liberty, whether in criminal cases or in other cases such as, for example, mental illness, vagrancy, drug addiction, educational purposes, immigration control, etc.

8. The Committee on the Rights of the Child has adopted the definition of deprivation of liberty contained in the United Nations Rules for the Protection of Juveniles Deprived of their Liberty. This definition states:

The deprivation of liberty means any form of detention or imprisonment or the placement of a person in another public or private custodial setting from which this person is not permitted to leave at will, by order of any judicial, administrative or other public authority.³

Indicia of Detention

9. The conditions under which persons are held in OPCs go beyond mere restrictions on freedom of movement and are correctly characterised as a deprivation of liberty amounting to detention. In particular, the Commission observes the following features apparent in the operation of OPCs:
- a. Persons found to be 'Designated Unauthorised Arrivals' are forcibly removed to OPCs under the *Migration Act*;
 - b. Those people are then subject to a legal requirement (as part of their visa arrangements in Nauru) that they reside in the OPCs;
 - c. Persons are confined to the OPCs for certain periods everyday and are not free to leave the OPCs during these times⁴;
 - d. Persons 'residing' in OPCs are only permitted to leave for certain periods and must return to the OPCs;
 - e. Persons 'residing' in OPCs are subject to other restrictions on their movement as part of the conditions of their visa (i.e. there are certain parts of Nauru to which they are not permitted to go);
 - f. Persons 'residing' in OPCs have no control (in any meaningful sense) over their living accommodation, conditions or the circumstances of their detention;
 - g. Persons 'residing' in OPCs are subject to supervision and monitoring by security guards;
 - h. There is no public access to OPCs.⁵

³ Committee on the Rights of the Child, *General Guidelines Regarding the Form and Contents of Periodic Reports to be Submitted by States Parties*, adopted by the Committee on the Rights of the Child on 11 October 1996, Part V111B(2), UN Doc CRC/C/58, 20 Nov 1996, para 138.

⁴ The Commission notes that it is no answer to assert that asylum seekers may leave the OPCs at any time to 'return home'. A refugee is, by definition, unable or unwilling to do so owing to a well-founded fear of persecution. Such argument can therefore only be relevant to persons who are not, in fact, refugees: a matter that cannot be known to authorities until processing of their claims is undertaken.

⁵ DIMA has stated that security guards at OPCs are present to prevent 'unauthorised and unnecessary access' by residents of Nauru. DIMA, Submission no. 118, Senate and Legal Constitutional Committee Inquiry into the Provisions of the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006.

10. The Commission is of the view that because existing OPCs are in substance, places of detention, the proposal to forcibly remove all persons found to be 'designated unauthorised arrivals' to OPCs is in breach of Australia's obligations under article 37(b) of the CRC and increases the risk of Australia committing a breach of article 9(1) of the ICCPR.

Human Rights and Equal Opportunity Commission

1 June 2006