MIGRATION AMENDMENT (DESIGNATED UNAUTHORISED ARRIVALS) BILL 2004

SENATE CONSTITUTIONAL AND LEGAL COMMITTEE

SUBMISSION

In my submission the Committee should recommend that the *Migration Amendment (Designated unauthorised Arrivals) Bill 2006* be withdrawn and not proceeded with.

It is not easy to recall legislation which more directly challenges Australia's values than the Bill before the Committee.

Here we are not concerned with the criminality of People Smugglers, the complexities of second country asylum movements or, to any relevant degree, the influx of arrivals whose motives are economic. The clear issue raised by the proposal is whether we, as a country, are prepared to legislate so as to obstruct a group of people who are fleeing to Australia to escape political persecution. The purpose and effect of the measure is to deter Papuans with a "well-founded fear" from seeking asylum in this country or in obtaining asylum should they arrive here.

Hitherto it might have been assumed Australia would never repel from its shores peoples belonging to a group if identified universally and incontrovertibly as suffering human rights abuses – a national value embodied in its adherence to the *Status of Refugees Convention*.

The policy reflected in the measure before the Committee arose out of the granting of temporary protection visas to 42 of the 43 Papuans who arrived at Cape York from West Papua in January. It was a reaction to an angry response by the Indonesian Government to the granting of the visas. A review of the Migration Act – resulting in the present legislation – was immediately ordered. The head of Foreign Affairs flew to Jakarta. Joint Naval Patrols to stop any more refugees was foreshadowed.

But at no point throughout the ensuing 'hand-wringing' was it ever suggested that the departmental decision to grant the visas was wrong. No Minister has even mentioned the possibility that any of the Papuan asylum seekers to whom the visas were granted did not have a 'well-founded fear' – indeed on the ABC 7.30 Report subsequent to the grant of the visas, Senator Vanstone reaffirmed the propriety of the decision. And so the proposed legislation before the Committee has not resulted from some flaw in the process which had produced an incorrect result. To the contrary, it is because the correct result is inexpedient that we have the legislation before the Committee.

The extremity of the Indonesian reaction surprised the government. It will be recalled that in January upon the arrival of the Papuans Senator Vanstone told ABC Radio, "Australia has always made decisions in relation to Protection claims on the basis of

the merit of the claim and that has to be the case whether we'll upset one or other of Australia's friends and allies"(S.M.H. 20/1/2006). The Minister's'statements following upon the granting of the visas and the Indonesian reaction to it, have a very different emphasis (See ABC 7.30 Report, 13/4).

In introducing the Bill, Mr Robb, the parliamentary secretary to the Minister for Immigration and Multicultural Affairs made no mention of the Indonesian Government's reaction to the granting of the visas nor to our own government's response to that reaction. The arrival of the Papuans in January is mentioned in one sentence only, as bringing to light an incongruity in the Act. Mr Robb's *suppressio veri* averted the need for an admission that the "right to seek and enjoy in other countries asylum from persecution" is, in the case of Australia, qualified by the superior claim of our diplomatic relations with Indonesia.

To achieve the objective of ensuring the paramountcy of our relations with Indonesia, policy was directed to:-

(a) enhanced patrolling of Australian northern waters to intercept asylum seekers and to joint patrols with the Indonesian navy. The Minister for Defence "indicated that he discussed the navy conducting joint patrols when he recently met the Chief of the Indonesian navy "I must say to Indonesia, I remain very committed to having the Royal Australian Navy, if it were able to, conduct joint patrols with the Indonesian navy'"

(b) introduction of the proposed legislation –

  (i) In order to maximise the deterrence of refugees, processing is to take place off-shore and detention imposed at remote locations such as Nauru. [25 of the last remaining 27 failed asylum seekers on Nauru were brought to Australia in 2005 because of serious mental health problems]

  (ii) No time limit is to apply to the period of processing. The period of detention is indefinite. A difference is thus drawn between Papuan refugees and applicants for asylum on-shore where a 90 day limit resulted from the July 2005 agreement. One might ask, what is the reason for this difference unless to deter genuine refugees?

  (iii) The West Papuan asylum seekers would, by virtue of the proposed legislation, be processed solely and finally by Immigration officials. Review by the specifically established Refugee Review Tribunals is excluded. Review by the Federal Court is excluded. Such exclusion is an exception to the ordinary processes designed to secure independence and correctness in the decision making process. Why should this be? After all, given the background of human rights abuse in West Papua, the probabilities are that most arrivals are genuine refugees. Perhaps though that indeed is the explanation. By removing any judicial element of independence from the process the full weight of government policy in preserving our relations with Indonesia can be brought to bear. It is asking from departmental decision makers an almost heroic assertion of independence to resist governmental pressures when, unlike the position in January, they would not even be able to rely upon the support of their own Minister. It is to be noted that no supervisory function is to be exercised by the Ombudsman. The provision for an annual report by the Secretary of the Department of Immigration and Multicultural Affairs, the officer to

whom the Departmental officials are subordinate, does not require comment, except as an admission that a 'fig leaf' is necessary.

The whole process as envisaged by the Bill may fairly be described as a kind of preemptive refoulement.The United Nations High Commissioner for Refugees in commenting upon Australian policy drew attention to the consequences of this to the international system --- " 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 to a mass influx, decides to transfer elsewhere the responsibility to handle claims made actually on the territory of the state."

The President of the Human Rights and Equal Opportunity Commission and the Human Rights Commissioner Graeme Innes issued a statement on the 12th May 2006 criticising the Bill. I agree with their criticisms and presume the Committee is aware of their statement. I wish only to call attention to their remarks below about the children.We now know, not least because of HREOC's 2004 report, "National Inquiry into Children in Immigration Detention,A last resort?", of the terrible harm done to children kept in detention.

In their comments on the Bill before the Committee, HREOC said:-

" The changes, which will allow for offshore processing of all asylum seekers arriving in Australia by boat, will reverse important recent reforms to Australia's treatment of asylum seekers, including the removal of children from immigration detention.

The Commission is concerned the proposed changes breach Australia's obligations under the Convention on the Rights of the Child 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).

In recent years the Government has made significant efforts to remove women and children from immigration detention by finding alternative means of accommodation while asylum claims are being processed.

The practical effect of the present Bill is that children, once again, will be detained in conditions which endanger their well-being and mental health. Being held in an offshore processing centre is, without doubt, a form of detention.
The Convention on the Rights of the Child provides that detention of children must be a last resort and for the shortest possible period of time. Under the proposed changes detention of children will be a measure of first resort, not last resort."

These are serious criticisms. They come from an independent and eminent source. This was explained by the Attorney-General, Mr Ruddock, as recently as the 24th April of this year when in a letter to Senator Humphries he said that
" the Human Rights and Equal Opportunity Commission(HREOC) … plays a vital role in human rights protection in Australia. HREOC can and does inquire into

acts and practices of Commonwealth authorities that are alleged to infringe human rights as set out in specific international instruments to which Australia is a party."

These are very serious matters to which HREOC has drawn attention, but one is inevitably drawn back to the principle of the Bill and the question arising from it. That question is whether as a nation we do believe in the value enunciated in Article 14 of the Universal Declaration of Human Rights that "everyone has the right to seek and enjoy in other countries asylum from persecution" or whether we don't.

Postscript

Following a recent meeting between the Australian and Indonesian Ministers for Foreign Affairs it was reported that the Australian Minister said the Indonesians are pleased with the broad approach that Australia is taking to asylum seekers and Mr Wirajuda praised the introduction of a toughened "Pacific Solution"that would see future asylum seekers from Papua processed offshore.(Sydney Morning Herald 17th May 2006)

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