



amnesty international australia

Submission to the

Senate Legal and Constitutional Legislation Committee

regarding the

Migration Amendment (Designated Unauthorised Arrivals) Bill 2006

May 2006

Submitted by

Amnesty International Australia

PO Box 1708

CANBERRA ACT 2601

Phone: Rebecca Smith (02) 6202 7503

Fax: (02) 6257 7588

The global defender of human rights

Executive Summary

Amnesty International Australia believes that the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006 punishes genuine asylum seekers and potentially places Australia in breach of its international legal obligations. Along with concern that Australia adhere to its international human rights responsibilities, Amnesty International Australia draws attention to the following key considerations:

- Remote and long-term detention of refugees and asylum seekers penalises those in need of protection and is known to have detrimental effects on the individual.
- Childhood should not be spent in immigration detention.
- A fair and just refugee determination process requires access to review procedures.
- This Bill will undermine the positive changes made by the Australian Government in 2005 relating to the refugees and asylum seekers.

Amnesty International Australia opposes the Bill in its entirety and wishes to see Parliament vote to disallow this Bill. The policy is inhumane, unprecedented and harsh. The human rights of future asylum seekers would be severely jeopardised by these laws.

Introduction

In this submission Amnesty International outlines its concerns in relation to the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006 (the Bill). This submission addresses both the policy announcements made by the Australian Government since 13 April 2006 as well as the content of the Bill and related Explanatory Memorandum tabled on 11 May 2006.

Overall, the legislation would result in Australia turning its back on asylum seekers and our international legal responsibilities under the Refugee Convention 1951, Article 31 of which states:

(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 authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

As the group most likely to be first affected by this legislation would be Papuans, this group can be used to illustrate how the law is in direct contravention of the above Article. It is highly probable that Papuans arriving by boat will have travelled directly from a territory where their lives and freedom are threatened. On 23 March 2006, Senator Vanstone announced that 42 individuals from Papua province faced persecution and would be granted (temporary) protection in Australia.¹ Immediately removing asylum seekers, detaining them offshore and denying them protection in Australia amounts to penalty.

¹ Media Release 36.6, Senator Amanda Vanstone. 23 March 2006.
<http://www.vanstone.com.au/default.asp?Menu=36.06>

The Australian Government's own figures refer to how small the number of boat arrivals have been in recent years.² The United Nations High Commissioner for Refugees Regional Representative based in Australia, Neill Wright stated that the April 2006 proposal announced by the Australia Government was unprecedented, given the current situation and lack of any major asylum seeker influx. Amnesty International Australia sees no justification for the harsh and inhumane policy developments towards asylum seekers and refugees.

1.0 Policy statements

Many of the policy statements made by the Australian Government since the initial announcement of the proposed Bill on 13 April 2006 are not detailed in the legislation. We are concerned that the measures outlined in these policy statements may be contained in regulations associated with the proposed legislation. For this reason, the following submission also makes reference to Amnesty International Australia's concerns with the policy announcements.

1.1 'Third country'

Since 13 April 2006, the Minister for Immigration and Multicultural Affairs, Senator Amanda Vanstone has commented that in the future, refugees who flee by boat will be resettled in 'third countries', not in Australia. Presently, refugees processed offshore are granted a visa permitting at least temporary protection in Australia. This change would see Australia ignore its responsibilities for all refugees arriving by boat and shift this to other nations. No detail has been provided in terms of naming these 'third countries' or the arrangements that will be made. Amnesty International Australia's main concerns are:

- Whether the Australian Government will ever consider Australia to be a 'third country' for the resettlement of any refugee processed offshore – for example, those who have been detained long-term, those with connections in Australia or those who have not been accepted by a 'third country'.
- Which countries will be involved in this resettlement and what protection guarantees will be in place.
- The length of time this resettlement may take; refugees may face years of detention.
- Australia has international humanitarian obligations to family unity, yet no provisions have been outlined for refugees with family in Australia, nor for unaccompanied minors who may flee by sea.

Article 10.1 of the United Nation Covenant on Economic, Social and Cultural Rights requires:

The widest possible protection and assistance be accorded to the family, which is the natural and fundamental unity of society, particularly for its establishment and while it is responsible for the care and education of dependent children.

² Point 21 of Outline to House of Representatives, Migration Amendment (Designated Unauthorised Arrivals) Bill 2006, Financial Impact Statement p.5 'Since 2001 less than 200 people have arrived by boat'.

1.2 Children in detention

Amnesty International Australia shares the concerns of several other non-government organisations and health professionals that detention is detrimental to a child's mental health and overall development.

In 2004 the Human Rights and Equal Opportunity Commission (HREOC) conducted a national Inquiry into children in immigration detention to which Amnesty International Australia made a significant contribution. The first major finding of this Inquiry was that Australia's immigration detention laws were inconsistent with the Convention on the Rights of the Child (CRC).³

In major finding number two, the Inquiry stated that the Commonwealth's repeated failure to implement recommendations made by health professionals in relation to the removal of children and their families from immigration detention amounted to cruel, inhumane and degrading treatment of those children.⁴

Recommendation 2 of the HREOC Inquiry stated:

(a) There should be a presumption against the detention of children for immigration purposes.

...

(d) (i) detention of children must be a measure of last resort and for the shortest appropriate period of time.⁵

In 2005 the Australian Government appeared to acknowledge these independent and expert findings. Children and their families (in most cases) were released from immigration detention facilities and the Migration Act 1958 was altered to reflect that "children would only be detained as a measure of last resort"⁶. Sending children directly to Nauru or other offshore facilities is a first, rather than last, resort.

The number of places available on Nauru is being reduced from 1,500 to 500.⁷ There have been no details provided in relation to the type of accommodation to be provided for children and families. Regardless of the accommodation type, access to education, medical facilities, legal representation, interpreting services, media monitoring and engagement with the Australian community is greatly limited by such remote locations. These conditions are unsuitable for the development of children and do not permit parents to raise their children in a culturally appropriate, positive or independent manner.

The case of Iranian asylum seeker (now refugee) Shayan Badraie, who was detained between the ages of 5 - 7 years, highlighted the detrimental effects of immigration detention on children. In an out-of-court settlement the Australian Government paid Shayan \$400,000. This decision was in recognition of the post-traumatic stress disorder and lasting adverse mental effects detention has had upon Shayan.⁸

³ *A Last Resort*, National Inquiry into Children in Immigration Detention HREOC April 2004 p.849

⁴ *Ibid* p.850

⁵ *Ibid* p.856

⁶ Section 3.14 Protection Visa Procedures Manual, announced 17 June 2005.

⁷ Point no.22 of Outline to House of Representatives, Migration Amendment (Designated Unauthorised Arrivals) Bill 2006, Financial Impact Statement p.5

⁸ <http://www.smh.com.au/news/national/immigration-pay-boy-400000/2006/03/03/1141191820943.html>

1.3 Use of Australian Navy

The legislation contains no reference to the use of the Australian Navy in returning boats en route to Australia. It is these harsh practicalities of the regulations that raise concern and require discussion. Should the Australian Navy forcibly turn around boats, Australia could be responsible for returning genuine refugees to places where their human rights may be abused.⁹

Article 33 of the Refugee Convention 1951 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 or a particular social group or political opinion.

The principle of non-refoulement has evolved beyond the Refugee Convention. Article 3 of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment stipulates that no State Party

shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

There are many variables and possibilities for error in the logistics of asylum claims being made from on-board a vessel in the ocean. With language barriers, fear and uncertainty there may be many miscommunications and Australian Navy personnel may not necessarily recognise a call for protection. Considerations are:

- Whether the Navy will forcibly board each boat.
- What action will be taken in relation to vessels whose seaworthiness is in doubt.
- Exactly how an asylum claim can clearly be made from one boat to another across an expanse of water.
- The degree of force and responsibility taken in the turning around of vessels.

1.4 Remote detention

In November 2001, an Amnesty International delegate visited the detention facility on Nauru and reported the following: "Conditions are harsh, with the heat and humidity consistently in the upper thirties [degrees centigrade] and health facilities are basic."¹⁰ Afghan women handed a letter to the delegate, stating that "[w]e have a lot of problems here in Nauru Refugee camp. The weather is hot. There are mice and mosquitoes around. As a result we have developed rashes and it lead[s] to infections. We are living in plastic tent[s]. It is dangerous as it may get on fire on stormy nights."¹¹

When interviewed, the Amnesty International delegate referred to 'rudimentary facilities and health care' and the adverse mental health impact caused by the uncertainty facing the people detained on Nauru.¹² Under the proposed Bill

⁹ "Refoulement means the expulsion of persons who have the right to be recognised as refugees". United Nations Educational, Scientific and Cultural Organisation.

<http://portal.unesco.org/shs/en/ev.php->

[URL_ID=4145&URL_DO=DO_TOPIC&URL_SECTION=201.html](http://portal.unesco.org/shs/en/ev.php-URL_ID=4145&URL_DO=DO_TOPIC&URL_SECTION=201.html)

¹⁰ AI Index: ASA 12/009/2002, 25 August 2002

¹¹ AI Index: ASA 12/009/2002, 25 August 2002

¹² <http://www.abc.net.au/worldtoday/stories/s434267.htm>

uncertainty for individual asylum seekers, and now even refugees, will only be increased with unnamed 'third country' resettlement without a clear timeframe.

Amnesty International Australia strongly opposes the use of any offshore detention facilities in relation to persons who travel to Australia seeking protection. Announcements by the Australian Government to date discuss the use of Nauru as a place of detention. The media has reported that Manus Island, Papua New Guinea will also be used as a place of detention in the implementation of this expanded 'Pacific Solution'.¹³ Amnesty International Australia has particular concerns over this location. It is highly probable that persons affected by this legislation will be those fleeing persecution from the neighbouring Papua province of Indonesia. To detain these people so near to the source of their fear is especially inhumane.

2.0 Contents of the Bill and Explanatory Memorandum

2.1 Subsection 5(1)

The legislation is punitive and its focus is to dismiss asylum seekers as "designated unauthorised arrivals", rather than to achieve a humane and durable policy meeting Australia's obligations. As it stands, the Migration Act 1958 refers to boat arrivals as an "offshore entry person". Replacing this terminology with the phrase "designated unauthorised arrival" implies immediate penalty and judgement of persons who may be genuine refugees.

Creation of the term "transitory person" in reference to a boat arrival being on the Australian mainland is a further punitive measure. There is no reference to genuine refugees being processed offshore and later being permitted entry to Australia for the purposes of protection. The legislation refers only to "transitory persons" being permitted entry to Australia and places severe restrictions on such persons during their stay here. Amnesty International Australia is gravely concerned the reality of such practice will mean long term and potentially indefinite detention in remote locations such as Nauru. "Transitory persons" include those who would be transferred, for example, from Nauru to Australia for medical treatment. In itself this is an indication of awareness that there are insufficient resources available in places of offshore detention and that even basic welfare needs cannot be met at such locations. For a long-term detainee, these medical trips could become exceptionally frequent especially given the lack of mental health treatment available in places such as Nauru, combined with the effects of long-term detention on a person's mental state. Amnesty International Australia strongly calls for consideration to be given to the findings of studies such as the *Australian and New Zealand Journal of Public Health* (December 2004).¹⁴ The detrimental effects of remote and indefinite detention are comprehensively addressed in Amnesty International's 2005 report; *The Impact of Indefinite Detention: the case to change Australia's mandatory detention regime*.

¹³ <http://www.theage.com.au/news/NATIONAL/Rights-groups-slam-govt-over-Papuans/2006/05/12/1146940724788.html>

¹⁴ <http://www.phaa.net.au/anzjph/anzjph/2004Edition/Vol28no6/December/ANZJPH2004-6contents.htm>

2.2 Part 8D - reports. s486R

The amendments to this section refer to the provision of statistical reports regarding asylum applications, accommodation, health care and education of these persons. The amended legislation states that the report should not specifically identify an individual. While Amnesty International Australia recognises the need for statistical data, it is also vital to have an individual case reporting system. In 2005 the Australian Government acknowledged this need by implementing the Commonwealth Ombudsman reporting function for all onshore long-term detainees. No such function appears to be in place for those facing indefinite detention as a result of this Bill. The reports in s486R do not refer in any way to the welfare or decision to continue the detention of individual refugees or asylum seekers. Amnesty International Australia is concerned that the appropriateness and effects of long-term detention on refugees, children and asylum seekers being held in isolated places will not be reviewed or assessed by any independent body.

2.3 Retrospective legislation

The legislation would be retrospective, applying to all boat arrivals from 13 April 2006, the date the proposal was announced. It is of great concern to Amnesty International Australia that, if an asylum seeker were to reach Australia by boat tomorrow and their protection visa had not been granted by the time the law is passed, their application would be considered invalid. The reality of the legislation, if enacted in its current form, is that an asylum seeker could be transferred to Nauru mid-way through the determination of his or her case. Without access to Ministerial intervention (denied to offshore detainees) this person is unable to lodge a second protection visa application and may face a life-time of remote detention.

2.4 Processing of applications, lack of review

At point 20, the outline to the legislation includes the following comment:

Australia has developed an offshore refugee status assessment process for use in declared countries (Nauru) which is modelled closely on the process followed by the United Nations High Commissioner for Refugees. Australia's offshore refugee processing regime includes provisions for a merits review of refugee decisions.

Amnesty International Australia has concerns regarding exactly what type of processing will occur and how this process will be managed. It is not clear whether determination will be undertaken by the United Nations Human Rights Commission, the Department of Immigration and Multicultural Affairs (DIMA) or if Australia's obligations be handed to the International Organisation for Migration.

Given the fact that there is currently no capacity for offshore detainees to access the Refugee Review Tribunal (RRT), Amnesty International Australia cannot perceive what these 'review provisions' may be. Will such 'provisions' be provided in exceptional circumstances only and what would define such cases? Without a fair and independent review process, Australia may be responsible for returning refugees to face persecution. Between July 2004 and June 2005, the RRT overturned 1,000 DIMA decisions. In this same time frame, approximately 158 RRT decisions were

overturned by Australian Courts.¹⁵ This means that, as a result of the appeals process, at least 1,158 people (the real figure would be greater, given that more than one family member may be affected by a single decision) were saved from return to places where they would face human rights abuses, such as persecution or torture. Each of these people were deemed to be genuine refugees, owed protection by Australia. In each case DIMA made a decision that was subsequently found to be incorrect.

The RRT figures provided above indicate that providing one agency with the sole refugee determination responsibility can easily lead to Australia breaching its *non-refoulement* obligations and could result in people being subject to persecution. These figures do not even take into account the decisions made under Ministerial discretion, powers that were increased in changes made during 2005. It does not appear likely that under this Bill offshore detainees will be permitted to make applications to the Minister. Article 33 is qualified in that it refers to persons whose refugee status may not yet be formally adjudicated.¹⁶

Article 16 of the 1951 Refugee Convention states:

A refugee shall have free access to the courts of law on the territory of all Contracting States.

When defining the “transitory person” (discussed in section 2.1 above) the Bill expressly prevents this person from having access to any Australian court. The proposed Bill will deny refugees access to Australia’s courts, tribunals and independent review mechanisms based on the fact that they used a boat to flee persecution. To meet its international obligations Australia must ensure that all refugees have access to our standard determination process.

¹⁵ http://www.rrt.gov.au/publications/annrpts/0405/1_glance.html

¹⁶ http://www.hrw.org/press/2001/10/terrorcom1017.htm#_ftn1