

22 May 2006

Mr Jonathan Curtis
Committee Secretary
Senate Legal & Constitutional Committee
Department of the Senate
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Mr Curtis

Please accept the enclosed submission from the Castan Centre for Human Rights Law regarding the Inquiry into the provisions of the "Migration Amendment (Designated Unauthorised Arrivals) Bill 2006". This submission was prepared by Ms Tania Penovic, Ms Azadeh Dastyari and Ms Jessie Taylor on behalf of the Centre.

We are glad, of course, to answer any questions you may have regarding the submission, and should you require, we would be happy to provide oral evidence to the Committee.

Yours sincerely,



Professor Sarah Joseph
Director



Castan Centre for Human Rights Law

Monash University

Melbourne

**Submission to Senate Legal and Constitutional Legislation
Committee Inquiry into the provisions of the
*Migration Amendment (Designated Unauthorised Arrivals) Bill
2006.***

**Prepared by Tania Penovic, Azadeh Dastyari and Jessie
Taylor**

Table Of Contents

Executive Summary.....	3
Introduction	4
Recent achievements	4
Burden Sharing	8
Offshore processing and the Refugee Convention	9
Processing of asylum seekers in Indonesia	11
Non-refoulement.....	13
Discrimination	15
Resettlement and Review	16
Right to Review at the Refugee Review Tribunal (RRT),	17
Will the expanded offshore processing arrangements constitute detention?.....	19
The effect of offshore detention on mental health.....	20
Children in detention	26
The International Organization of Migration	31
Conclusion.....	34

Executive Summary

In 2005, the Parliament of the Commonwealth of Australia made significant amendments to the *Migration Act 1958* (Cth) (*Migration Act*) in order to attenuate the oppressive operation of the mandatory immigration detention regime. These include the removal of children and families from immigration detention centres and the introduction of a review process concerning long term detainees. The *Migration Amendment (Designated Unauthorised Arrivals) Bill 2006* represents a radical departure from this position. The Bill proposes to amend the *Migration Act* to authorise the removal of all unauthorised boat arrivals in Australia's migration zone to offshore processing centres, where their claims will be processed.

We have serious concerns about the monitoring and regulation of offshore facilities in nations which are not parties to the Refugee Convention and Australia's ability to ensure that the proposed arrangements comply with the terms of the Refugee Convention. The current operation of offshore facilities by the International Organisation of Migration does not facilitate compliance with standards of international human rights law on account of the organisation's lack of a human rights mandate.

Asylum seekers processed offshore have no entitlement to merits review, with the result that refugees may be denied protection. If Australia is not willing to accept these refugees, it is foreseeable that refugees and asylum seekers may remain in offshore processing centres for extended periods of time, perhaps several years if not indefinitely. The mental health impact of long term detention and the uncertainty concomitant with being denied protection is likely to have a devastating impact on human dignity. Offshore detention arrangements raise serious concerns about compliance with a range of obligations under international human rights treaties which Australia has ratified. The obligations include the prohibition on arbitrary detention and rights concerning the highest attainable standard of physical and mental health. The return of children to the detention environment throws into question Australia's compliance with a range of human rights obligations in light of children's developmental needs and vulnerabilities. The Castan Centre for Human Rights Law therefore recommends that the *Migration Amendment (Designated Unauthorised Arrivals) Bill 2006* should not be enacted.

Introduction

We are grateful for the Committee's invitation to submit written submissions and welcome the opportunity to provide our views on the impact the proposed legislation would have on our adherence to standards of international human rights law which Australia has undertaken to comply with.

There are a number of issues of concern arising from the proposed legislation. These include the monitoring and regulation of offshore facilities and Australia's ability to ensure that the proposed arrangements comply with our international obligations with respect to refugees. The proposed law would have the effect of removing basic rights from asylum seekers and refugees. Asylum seekers arriving in mainland Australia would have only very limited rights of review and would no longer have the opportunity to reside within the Australian community under current arrangements such as a range of bridging visas or a residence determination enabling them to live in a specified place. The Bill would have the likely consequence of the detention of adults and children in remote, inaccessible facilities for extended periods of time. The effects of such arrangements on fundamental human rights, particularly on rights concerning the mental health implications of such arrangements, are well-documented. We therefore strongly recommend that the proposed legislation should be opposed.

Recent achievements

Australia has a long history of involvement in the formulation of United Nations (UN) human rights treaties. Our Executive has, on Australia's behalf, ratified the United Nations *Convention Relating to the Status of Refugees 1951*¹ (Refugee Convention) and the *Protocol Relating to the Status of Refugees 1967*² (Refugee Protocol) in addition to a number of human rights treaties including the *International Covenant on Civil and Political Rights*³ (ICCPR), the *International Covenant on Economic, Social and Cultural Rights*⁴ (ICESCR), the *International Covenant on the Elimination of all Forms*

¹ *Convention relating to the Status of Refugees*, 189 U.N.T.S. 150, entered into force April 22, 1954.

² *Protocol Relating to the Status of Refugees*, 606 U.N.T.S. 267, entered into force Oct. 4, 1967.

³ *International Covenant on Civil and Political Rights*, 999 U.N.T.S. 171, entered into force Mar. 23, 1976

⁴ *International Covenant on Economic, Social and Cultural Rights*, 993 U.N.T.S. 3, entered into force Jan. 3, 1976

*of Racial Discrimination*⁵ (CERD), the *Convention on the Elimination of all Forms of Discrimination against Women*⁶ (CEDAW), the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*⁷ (CAT) and the *Convention on the Rights of the Child*⁸ (CROC).

We regard ourselves as a society in which the standards contained in these treaties are valued and upheld. The Parliament of the Commonwealth of Australia plays a critical role in the realisation of these standards. It is a well-settled principle within Australia's dualist legal system that international treaties ratified by the Executive are not incorporated into domestic law in the absence of an Act of Parliament incorporating the treaty obligations. It is the Parliament, and only the Parliament, which has the power to legislate to incorporate treaty standards into domestic law. Where the operation of legislation has an adverse impact on the human rights of individuals within our jurisdiction, the Judiciary is constrained in its ability to protect fundamental human rights by Australia's lack of a legislative or constitutional rights regime. In its interpretation of legislation, the Judiciary must seek to discern the will of Parliament. In circumstances where the practical operation of an Act has caused concern with respect to human rights, it has fallen to the Parliament to take steps to make amendments in order to attenuate the oppressive operation of these laws.

Notable examples of the Parliament taking such steps include the extension of public interest power of the Minister for Immigration and Multicultural Affairs to grant a visa under section 195A of the *Migration Act*. The introduction of the Removal Pending Bridging Visa, which was introduced into the regulations on 11 May 2005, has ameliorated the harsh operation of sections 189 and 196 in circumstances where a detainee has requested removal from Australia under sub-section 198(1) and such

⁵ *International Convention on the Elimination of All Forms of Racial Discrimination*, 660 UNTS 195, entered into force Jan. 4, 1969

⁶ *Convention on the Elimination of All Forms of Discrimination against Women*, entered into force Sept. 3, 1981

⁷ *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 1465 U.N.T.S. 85, entered in to force June 26 1987

⁸ *Convention on the Rights of the Child*, U.N. Doc. A/44/49 (1989), entered into force Sept.2 1990

removal is not reasonably practicable. This development in the law has achieved what the Judiciary was unable to achieve owing to the clear wording of sections 189 and 196 of the *Migration Act*.⁹

A further example is the arrangements introduced by the *Migration Amendment (Detention Arrangements) Act* 2005 which made significant inroads in reducing the human impact of the mandatory immigration detention policy introduced in 1992. The parliamentary debates reveal a deep understanding of Parliament's significant role in securing human rights protections to the most vulnerable and disenfranchised members of our society. Introducing the Bill on behalf of Minister Vanstone, the Minister for Citizenship and Multicultural Affairs, Peter McGauran, stated as follows:

The government's intention is that these amendments will be used to ensure the best interests of minor children are taken into account and that any alternatives to detaining these children in detention centres are carefully considered in administering the relevant provisions of the act. Where detention of a minor is required under the act, it is the government's intention that detention should be under the new alternative arrangements wherever and as soon as possible, rather than in detention centres.¹⁰

The Minister's references to the primary consideration of the best interests of the child enshrined in article 3(1) of CROC recognises the influence and international significance of a human rights instrument with near-universal ratification. CROC's influence extends to the new Section 4AA(1), which states that '(t)he Parliament affirms as a principle that a minor shall only be detained as a measure of last resort.' The wording of the section echoes CROC's article 37(b) which calls on State Parties to use detention or imprisonment of children only as a measure of last resort and for the shortest appropriate period of time

⁹ See for example *Al Kateb v Godwin* (2004) 208 ALR 124, *Minister for Immigration and Multicultural and Indigenous Affairs v Al Khafaji* (2004) 208 ALR 201.

¹⁰ Commonwealth, *Parliamentary Debates*, House of Representatives, 21 June 2005 [57-8] (Peter McGauran, Minister for Citizenship and Multicultural Affairs).

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The review provisions inserted into the new Part 8C which require the Commonwealth Ombudsman to review detainees' circumstances when they have been in detention for two years or more, and every six months thereafter reflect the place occupied by personal liberty as a fundamental human right elaborated in Article 9 of the ICCPR and article 37 of CROC.

References to human rights and human dignity were a feature of the parliamentary debates accompanying the introduction of the amendments. These amendments did not result in an influx of boat arrivals. They did ensure that the most vulnerable and disenfranchised individuals within our society could await the determination of their refugee status with some regard for their dignity, autonomy and personal circumstances. The amendments were entirely appropriate within a nation with strong democratic traditions and a commitment to racial tolerance and human rights. The *Migration Amendment (Detention Arrangements) Act* 2005 has seen the language of CROC appear within an Act of Parliament which has for 13 years served as a vehicle for suffering and the emergence of preventable mental illness. It was the product of a strong and principled Parliament.

The *Migration Amendment (Designated Unauthorised Arrivals) Bill* 2006 would represent a radical departure from this position. The Bill replaces the descriptor of 'offshore entry persons' with the new 'designated unauthorised arrivals'. The latter term will extend to arrivals at excised offshore places in addition to mainland Australia, and enable all unauthorised boat arrivals to have their claims for protection assessed in offshore processing centres. In our opinion, the proposed legislation raises serious concerns with respect to Australia's ability to fulfil its obligations under the Refugee Convention and Refugee Protocol in addition to its obligations under human rights treaties such as CROC, the ICCPR and the ICESCR.

Burden Sharing

The Refugee Convention is predicated on burden sharing between states. The numbers of asylum seekers arriving in Australia are modest when compared with other nations. As at 1 January 2004, the total number of people of concern to the UNHCR was 17,084,100. The geographical distribution of this figure around the world was as follows: Asia: 6,187,800; Africa: 4,285,100; Europe: 4,242,300; Latin America and Caribbean: 1,316,400; North America: 978,100; Oceania (comprising Australia, New Zealand, and about 10,000 islands in and around the Pacific Ocean), 74,400.¹¹ Between the years of 1984 and 2003, Oceania was faced with an average of 0.05% of the world's movement of people of concern to the UNHCR. Australia has not been required to shoulder a disproportionate share of the international refugee burden. Our portion of the international 'burden' has been relatively low.

The Refugee Convention characterises refugee movements as an international social and humanitarian issue. State Parties are called upon to do everything in their power to prevent refugee flows from becoming a cause of tension between states. Nevertheless, within the realm of international relations, tensions concerning refugee flows will sometimes arise. But reactive amendments which compromise the rights of vulnerable individuals are no solution to such tensions.

Human rights standards, as embedded in public international law, are intimately linked with international peace and security.¹² They assume that all individuals, without distinction, are entitled to a common core of human dignity. A commitment to these standards may on occasion result in diplomatic tension. Legislation which removes rights from individuals who have a right to seek asylum¹³ is unlikely to foster enduring mutual respect between nations. An uncompromising commitment securing the

¹¹ L Boscardi, 'Helping Refugees: An Introduction to UNHCR' United Nations High Commissioner for Refugees, Geneva 2004.

¹² See for example the constitutional document of the United Nations, the Charter of the United Nations (1945).

¹³ This right, first enshrined in Article 14 of the Universal Declaration of Human Rights, is now widely considered to also constitute a norm of customary international law. The Refugee Convention is premised on the existence of this right.

fundamental human rights, particularly the rights of vulnerable asylum seekers who call on our protection, would enable us to generate an enduring respect in our international relations and enable Australia to assume its rightful place as a fair-minded and principled power within our region.

The proposed legislation seeks in effect to phase out the onshore component of Australia's humanitarian program for boat arrivals. Accordingly, undocumented boat arrivals at mainland Australia will no longer be accorded fundamental rights such as judicial and administrative review or the opportunity to reside within the Australian community under current arrangements such as a range of bridging visas or a residence determination enabling them to live in a specified place within the community.

The reception and processing of asylum seekers presents a national and international challenge. Asylum seekers who have made the perilous journey to Australia have been denied a range of human rights in their home country and risked their lives in order to seek Australia's protection. The laws and policies adopted with respect to asylum seekers test the sincerity of Australia's commitment to international human rights. If Australia is a nation committed to human rights, we must pay serious consideration to our human rights obligations under the Refugee Convention, rather than engaging in reactive responses to international tensions.

The explanatory memorandum states that a new offshore refugee status assessment process will ensure that the proposed legislation does not impact on Australia's implementation of its protection obligations under the Refugee Convention. Nevertheless, we believe that the Bill raises serious concerns with respect to our ability to comply with the terms of the Convention.

Offshore processing and the Refugee Convention

Nauru is not a signatory to the Refugee Convention or Refugee Protocol. Outsourcing the processing of asylum seekers to nations which have not assumed these obligations raises serious questions about Australia's willingness to participate in international burden sharing. This is likely not only to undermine our international standing but also

to act as an impetus for other states which might be considering similar policies; with potentially devastating global humanitarian consequences.

We concur with the comments contained in a recent media release of the UN High Commissioner for Refugees (UNHCR), which states that the proposed law

‘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.’¹⁴

A Department of Immigration and Multicultural Affairs (DIMA) factsheet on Offshore Processing Arrangements states that the facilities in question were “set up with the cooperation of the Governments of Nauru and Papua New Guinea. Asylum seekers are not detained under Australian law, or the laws of Nauru or Papua New Guinea, but are instead granted Special Purpose Visas by those countries to facilitate their stay while they await processing and resettlement or return”.¹⁵

On 3 May 2006, in an interview with Senator Vanstone on SBS’s Dateline, George Negus suggested that the *Migration Amendment (Designated Unauthorised Arrivals) Bill* would in fact renege upon promises made in 2005 by the Howard Government vis-à-vis children in detention. Minister Vanstone’s response specifically raised the point that there is no established accountability framework in the offshore system. Senator Vanstone stated that “those arrangements related to Australian detention centres... and we live up to that... At the time I think was clear that it related to Australian detention facilities. We can’t make rules in relation to facilities in other countries. We can

¹⁴ UNHCR Media Release ‘Proposed new Australian border control measures raise serious concerns-UN’ 18 April 2006 at <http://www.un.org.apps/news/printnews.asp?nid=18166>

¹⁵ DIMA Factsheet 76: Offshore Processing Arrangements’, Canberra 2005 at <http://www.immi.gov.au>

influence them but we can't make rules... I am saying that in Australian territory the arrangements we made last year apply... but Nauru is another country".¹⁶

A detainee who was kept in detention on Nauru was asked about his perception of the sharing of responsibility and accountability for the running of the camp:

Whenever we would go to a meeting about our conditions of detention, we would ask 'why are we here, why are we locked up, what is going on?' and they would say to us that 'you are on Nauru, it's a condition of your visa that you are not allowed to do this and that, and you will even be escorted by security'. Even sometimes the Nauruan police would come and search our rooms without permission to look and check. When we were asking IOM (International Organization of Migration) or DIMIA, 'why?', they would say 'it's their country, it's a condition of your visa, we can't do anything'. Sometimes people would be put in jail and IOM would say 'we can't do anything, it's their country'.¹⁷

We have serious concerns about the monitoring and regulation of offshore facilities and Australia's ability to ensure that the proposed arrangements comply with the Refugee Convention.

Processing of asylum seekers in Indonesia

Australia began returning some boats that had entered Australia to Indonesia in 2001.¹⁸ Indonesia is not a party to the Refugee Convention. The Australian government currently pays for the high cost of accommodating asylum seekers who have been

¹⁶ Negus, G. In *Dateline, Senator Vanstone Interview*, SBS Australia, 3 May 2006

¹⁷ J Taylor, Interview with anonymous refugee, May 2006, Melbourne.

¹⁸ John Howard, Transcript of Doorstop Interview: Boat people; APEC; deployment terms and conditions, Sheraton Hotel, Brisbane, 19 October 2001

<www.pm.gov.au/news/interviews/2001/interview1399.htm> (viewed 17/5/2006)

returned to Indonesia.¹⁹ Asylum seekers in Indonesia have been held in communities in various locations in the archipelago. Richard Danziger, the operations manager for the IOM in Indonesia, has admitted that the quality of food, water and housing for asylum seekers in Indonesia is inferior to that which is offered in Nauru and Manus Island.²⁰ One reason given for the poor conditions was said to be an attempt to avoid envy amongst the Indonesian population towards the refugees.²¹

The poor living conditions and the frustration of being stranded in Indonesia for many years has led to a number of disturbances amongst the asylum seekers in recent years. In 2003, Afghan asylum seekers held in Sumbawa district in West Nusa Tenggara province began a hunger strike which ended only after the protesters were hospitalised. In January 2004, asylum seekers at Wisma Nusantara camp in Mataram Lombok began a hunger strike. Some asylum seekers sewed their lips together. The hunger strike ended when UNHCR agreed to review their cases based on the most up-to-date information about the situation in Afghanistan and informed the asylum seekers that the reassessments would be finalised by March 1, 2004. In August 2004, approximately 12 Afghan asylum seekers living for more than two years in a hostel in Bogor also began a hunger strike. The protesters stitched their lips together and refused food in response to UNHCR's ruling that Afghanistan was safe for return.

The asylum seekers in Indonesia have no right to independent merit or judicial review. As at 26 October 2005, UNHCR had recognised 393 cases (826 persons) as refugees under its mandate in Indonesia. However, only 365 cases (766 persons) were resettled to third countries. Australia accepted 86 cases (261 persons) from Indonesia.²²

¹⁹ See Senate Legal and Constitutional Reference Committee Inquiry into the Administration and Operation of the Migration Act 1958, Response of United Nations High Commissioner for Refugees to Questions taken on notice, 26 October 2005.

²⁰ Deb Whitmont, Interview with Richard Danziger the head of the IOM in Indonesia. Four Corners <<http://www.abc.net.au/4corners/stories/s530005.htm>> (sited 17/5/2006)

²¹ *ibid*

²² See Senate Legal and Constitutional Reference Committee Inquiry into the Administration and Operation of the Migration Act 1958, Response of United Nations High Commissioner for Refugees to Questions taken on notice, 26 October 2005.

Of concern are the 28 cases (60 persons) recognised as refugees by UNHCR who remained in Indonesia as at 26 October 2005, because a third country could not be found to resettle them.²³ There is a danger that the fate of these refugees for whom no durable solution can be found could be repeated if all unauthorised boat arrivals are processed offshore, and in the absence of any guarantee that Australia will accept recognised refugees.

Non-refoulement

Removal to a specified country of refugees who arrive in Australia in circumstances where national security and public order are not at risk may amount to expulsion, as prohibited by article 32. Senator Vanstone's comments to the effect that Australia is not wholly responsible for the treatment of asylum seekers being detained on Nauru could constitute a breach on Australia's part of the principle of non-refoulement in Article 33 of the Refugee Convention which provides: "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." As pointed out by the UNESCO, "it is important to note, that the principle of non-refoulement does not only forbid the expulsion of refugees to their country of origin but to any country in which they might be subject to persecution".²⁴

Because Nauru and Papua New Guinea are not signatories to the Refugee Convention, they have no legal obligation to refrain from returning refugees to a place where they may face persecution. The processing of asylum seekers in Nauru or Papua New Guinea

²³. *ibid*

²⁴ United Nations Educational Scientific and Cultural Organisation, UNESCO (2006), Vol. 2006 at <http://portal.unesco.org>

may result in 'chain refoulement' and place Australia in breach of Article 33 refugees are then returned to a place of persecution.²⁵

It was asserted in the second reading speech for this Bill that: "the refugees convention does not prescribe the processes which signatory states must follow to identify refugees. The convention also does not establish an entitlement for asylum seekers to choose the country in which their claims will be assessed or in which protection will be provided. These are issues for sovereign states to settle."

The assertion is accurate. However, Guy Goodwin-Gill, a leading expert on the international law on refugees, writes:

Freedom to grant or to refuse permanent asylum remains, but save in exceptional circumstances, states do not enjoy the right to return refugees to persecution or any situation of personal danger. Protection against the immediate eventuality is the responsibility of the country of first refuge. In so far as a state is required to grant that protection, the minimum content of which is non-refoulement through time, it is required also to treat the refugee in accordance with such standards as will permit an appropriated solution, whether voluntary repatriation, local integration, or resettlement in another country.²⁶

Concerns about refoulement insofar as Nauru is concerned appear to be addressed in the Memorandum of Understanding (MOU) between the Governments of Australia and Nauru. As cited in the case of *Ruhani v Director of Police [No 2]*²⁷, the MOU states that, "consistent with paragraph 4 of this MOU, any asylum seekers awaiting determination of their status or those recognised as refugees, will not be returned by Nauru to a country in which they fear persecution nor before a place of resettlement is

²⁵ See James Crawford and Patricia Hyndman, 'Three Heresies in the Application of the Refugee Convention' *International Journal of Refugee Law* 1 (1989)155

²⁶ The Refugee in International Law, 69 (Oxford; Clarendon Press, 1983) at 122-23.

²⁷ [2005] HCA 42 (31 August 2005).

identified."²⁸ However, comments made by Senator Vanstone, and discussed above, raise serious concerns about Australia's ability to monitor and regulate offshore facilities and to prevent Nauru from breaching the terms of the MOU.

Furthermore, we understand that there is a possibility that the proposed legislation would be accompanied by the deployment of the Australian Naval Forces to interdict asylum seekers, even in circumstances where boats may be sent back to Indonesia. Such a practice with respect to Indonesian nationals would be in clear breach of article 33.

Discrimination

The Bill appears to be aimed at easing diplomatic tensions which have arisen from the granting of Temporary Protection Visas to 42 West Papuans in March 2006 and at addressing the contingency of further boat arrivals of West Papuans. To the extent that the new policy is designed to deal with asylum seekers coming from regions of Indonesia, it raises questions about our compliance with the Convention 'without discrimination as to race, religion or country of origin' in accordance with Article 3

In his second reading speech, Mr Andrew Robb makes reference to the 'incongruous' situation of onshore arrivals being able to access merits review and the Federal court system while unauthorised boat arrivals processed offshore are not accorded the same opportunities. This incongruity is wholly attributable to the introduction of offshore processing and would be best addressed by a review of the need for offshore processing rather than measures to deny onshore protection arrangements to all boat people who seek to arrive on the Australian mainland.

The asylum seekers caught by the current Bill are not 'secondary movement' refugees but refugees who did not and perhaps could not seek protection in any other country.²⁹

²⁸ Human Rights Watch; 'Australia: deterring Asylum Seekers by Violating Rights' *Human Rights News*, 10 December 2002.

²⁹ In his Second Reading Speech for the Migration Amendment (Excision from Migration Zone) Consequential Provisions Bill 2001 the then Minister for Immigration stressed that the visa

The proposed law thus punishes people who arrive by boat when compared with asylum seekers who have travelled entirely by plane. The current Bill may thus be a direct breach of Article 31(1) which states:

‘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,’

We agree with the Honourable Minister that incongruity should be avoided and all asylum seekers who come to Australia seeking protection should be treated equally. We submit that all asylum seekers should be processed in line with Australia’s international obligations, in a cost effective and humane manner and without regard to their mode of entry. It is our submission that this cannot be achieved if asylum seekers are processed offshore. Processing of asylum seekers outside Australia has in the past led to unsatisfactory results. All asylum seekers should be processed in Australia to avoid a repetition of Australia’s poor experience with offshore processing. The unsatisfactory nature of offshore processing is clearly demonstrated by the experience of asylum seekers returned to Indonesia.

Resettlement and Review

The proposed legislation assumes that designated unauthorised arrivals will be resettled in a ‘third country’ although it remains unclear whether a third country might include Australia. Under the current Bill an application for an Australian visa is not a valid application if it is made by a designated unauthorised arrival who is in Australia.³⁰ The Minister for Immigration may personally exercise her or his discretion to allow an

conditions and subclasses introduced by the 2001 Bill were intended to ‘implement a visa regime aimed at deterring further movement from, or the bypassing of, other safe countries’ by ‘creating further disincentives to unauthorised arrival in Australia.

³⁰ Migration Amendment (Designated Unauthorised Arrivals) Bill 2006 at [10]

unauthorised arrival to apply for a visa if he or she considers it in the public interest to do so.

The non-delegable discretionary power to grant permission for a visa application under s46A of the *Migration Act* is non-compellable. The High Court has found in *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Applicants S134/2002* (2003) 195 ALR 1 that when the Minister does not have a duty to consider whether to exercise this power, the Minister's refusal to use his or her discretionary power under the Migration Act is not reviewable.³¹

Given that there is no duty on the Minister to allow a visa application even to the neediest of asylum seekers, the High Court's inability to review the Minister's discretion is highly problematic. It is likely that other countries will be unwilling to accept refugees processed offshore on the basis that their protection remains Australia's responsibility. If Australia is not willing to accept these refugees and such decisions are not reviewable, it is foreseeable that they may remain in offshore processing centres for extended periods of time, perhaps several years if not indefinitely. The mental health impact of long term detention and the uncertainty concomitant with being denied protection is likely to have a devastating impact on human dignity (see below).

Right to Review at the Refugee Review Tribunal (RRT),

Designated unauthorised arrivals who are permitted to lodge an application for a visa will also lose their right to merits review. Presently, all asylum seekers whose claims for refugee status are processed onshore must first have their claim heard by a representative of DIMA. Those whose claims are rejected may challenge the factual basis of the decision by appealing to the RRT, which is an independent tribunal.³² A

³¹ *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Applicants S134/2002* (2003) 195 ALR 1 at 12 (per Gleeson CJ, McHugh, Gummow, Hayne and Callinan JJ).

³² Asylum seekers may challenge DIMA's decision at the Administrative Appeals Tribunal (AAT) in circumstances involving security issues or important questions of law.

single member of the RRT reviews the merits of the refugee status decision and is not required to assess the reasons given for the primary decision.

The RRT plays a crucial role in a decision making process that determines whether individuals are to be returned to situations of persecution. This may be a decision of life or death. Between 1 July 1993 and 28 February 2006, the RRT over turned 7,885 cases decided by DIMA. Without a right of review to the RRT, 7,885 individuals (and in some cases their families) who sought protection from persecution may have suffered a wrong result. DIMA has, in particular, erred in cases involving Iraqi and Afghan asylum seekers. Between 1 July 2005 and 28 February 2006, the RRT set aside 144 or 95% of all decisions on Afghan asylum seekers and 373 or 97% of all DIMA decisions involving Iraqi asylum seekers.³³

Under s 411(2)(a) of *Migration Act* 1958, people who are processed outside of Australia do not have a right of review at the RRT. They thus have no avenue for the re-hearing of the *facts* of the case, that is, a re-examination of the factual basis of the reasons for which they are seeking asylum. Therefore, if DIMA mistakenly finds on the facts that a person processed offshore is not deserving of protection, the applicant may be left without recourse. The return of refugees to a place where they may face persecution places Australia in breach of Article 33 of the Refugee Convention.

The relative independence of the RRT ensures that it is less influenced by the political constraints that may affect a government department. Given the highly politicised nature of refugee determination, the removal of access to RRT review may lead to unjust results for genuine refugees who are in need of protection.

In its review of *Migration Legislation Amendment (Further Border Protection Measures) Bill 2002*, the Senate Legal and Constitutional References and Legislation Committee recommended that initial assessments of claims for refugee status by

³³ RRT statistics Finalisations by country <<http://www.rrt.gov.au/statistics.htm>> (cited 17/5/2006)

offshore entry persons should be reviewed by an external body such as the Federal Magistracy or the RRT.³⁴ Review of the merits of cases brought by persons processed outside Australia is even more necessary now that the refugee claims of all unauthorised arrivals may be considered offshore.

Will the expanded offshore processing arrangements constitute detention?

While we understand that individuals are free to move around offshore island states during daytime, we believe that there is no credible argument that the arrangements envisaged do not constitute detention. The UNHCR has defined detention of asylum seekers as confinement within a narrowly bounded or restricted location, including prisons, closed camps, detention facilities or airport transit zones, where freedom of movement is substantially curtailed, and where the only opportunity to leave this limited area is to leave the territory'.³⁵ The cumulative impact of the degree and intensity of restrictions is relevant to a determination of whether an asylum seeker is in detention. In Australia's offshore processing centres, there is a very confined area in which movement can occur during the day, a strict 7pm curfew and regular, intrusive security checks. Combined with the isolation of offshore centres, which greatly exacerbates the intensity of the restrictions, we believe that these arrangements clearly constitute detention.

In an interview held on 18 May 2006 with a refugee who spent four years on Nauru, Jessie Taylor was informed as follows:

The island itself is a detention centre, even without the camp itself...For us, it was a detention centre because there was no hope, and we had no idea what was going on there. There was no future, only pressure on us, and for the first two years we weren't allowed outside the camp at all. We could not go outside the

³⁴ Senate Legal and Constitutional References and Legislation Committees *Inquiry into the Migration Legislation Amendment (Further Border Protection Measures) Bill 2002*, 21 October 2002

³⁵ UNHCR *Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum Seekers* (February 1999).

fence. Here, people want to go outside the fences, but in Nauru, the ocean around the island was more than a fence...

Don't forget that every step you take, a security [guard] is coming with you. No matter where you go, you have a security with you. Everybody will know you're in detention. When you come and go, you have to register your name. There is a curfew, and when you come and go you will be checked by many securities. The securities follow you all around the island. So when people are thinking that walking around on Nauru is really 'freedom', I will say to them every second, we are never alone. When you go to any places, you always feel like you are a criminal, people look at you like you are a criminal or something like that. They think 'oh, probably he is a criminal person' or something like that.³⁶

The effect of offshore detention on mental health

The mental health of immigration detainees has been the subject of considerable scrutiny. Clinical evidence has revealed that the experience of immigration detention has a deleterious impact on mental health. High rates of depression, anxiety, suicidal ideation and post-traumatic stress disorder have been documented within the detention centre environment.

A psychologist formerly employed by Australasian Correctional Management described her observations in the following terms:

The detention environment was emotionally stressful and mentally destructive for all detainees. This created an environment where adults were unable to create a safe caring family space. Many parents and adults tried to care for the children and protect them. This was a common element of their distress. The Detention Centre was particularly damaging to children and to families. The environment was punitive, penal and depriving of autonomy and stimulation. Added to this

³⁶ J Taylor, Interview with anonymous refugee, 18n May 2006.

detainees had frequently experienced prior trauma. Distress and self-harm and talk of suicide were daily enacted...³⁷

Dr Louise Newman of the Royal Australian and New Zealand College of Psychiatry has stated “there is clear evidence that detention is toxic for people and that mental health services cannot be delivered in those environments”.³⁸

One of the principle contributing factors to the severity of mental crisis in immigration detention facilities is their geographic remoteness. General isolation from community visitors, lawyers, the media and medical professionals exacerbates detainees’ sense of hopelessness and despair experienced by detainees. It also effectively precludes timely and efficient intervention by qualified mental health professionals. In their submissions to the Select Senate Committee on Mental Health, Commonwealth Ombudsman Professor John McMillan and his Deputy Ronald Brent raised concerns with respect to the impact on mental health of the remoteness of the Baxter Immigration Detention Facility. Mr Brent stated that “certainly there is a discrepancy in that the remoteness of Baxter creates an issue in providing any form of external support, including in physical and mental health.”³⁹ Professor McMillan indicated that “when we have visited remote detention centres it has been said to us that there is a distinct problem faced by people in those centres in accessing specialist care...”⁴⁰ The concerns expressed by McMillan and Brent with respect to Baxter are consistent with the comments of Dr John Jureidini, a consultant psychiatrist at Adelaide’s Glenside Psychiatric Hospital, who has indicated that “I’m not actually sure a psychiatrist can do anything for anyone at Baxter but if they could, it would require a great deal of attention... The whole detention centre

³⁷ L. Bender, Submission to Human Rights and Equal Opportunity Commission Enquiry into Children in Immigration Detention, see http://www.hreoc.gov.au/human_rights/children_index.html

³⁸ L. Newman, 'Mental Health Care in Detention a Contradiction of Terms: Psychiatrists', The Royal Australian and New Zealand College of Psychiatrists, Melbourne, 23 October 2002.

³⁹ (2005) In *Senate Select Committee on Mental Health* Commonwealth of Australia, Canberra.

⁴⁰ Ibid.

environment is one of hopelessness.”⁴¹

The adequacy of psychiatric care provided to people held in immigration detention was considered in the case of *S v Secretary, Department of Immigration and Multicultural and Indigenous Affairs* (2005) 216 ALR 252. The case concerned two asylum seekers, S and M who had both been held in immigration detention for several years. Both detainees suffered extensive psychological problems. The argument before the court was that the Commonwealth and the Secretary of the Department of Immigration and Multicultural Affairs (DIMA) had breached its duty of care to ensure the safety of the detainees. This argument was accepted by the court.

Finn J, in his judgment, was highly critical of the remoteness of Baxter detention centre and the lack of facilities, including psychological care that necessarily followed this isolation:

It was a decision of the Commonwealth (under s 273 of the Act) to establish and maintain Baxter in a relatively isolated part of Australia. The issue this raises, potentially, is whether its so choosing can itself affect the standard of health care services the Commonwealth is obliged to provide. Dr Frukacz, for example, described the psychiatric services he provided at Baxter as being at the level available to "remote communities". In the distinctive circumstances of this matter, I do not consider I need express a concluded view on this issue given the medical opinions available to, and what was otherwise known by, the Commonwealth in the relevant period ... However, I should say that it is my view that, having made its choice of location, the Commonwealth, not the detainees, should bear the consequences of it insofar as that choice has affected or compromised the medical services that could be made available to meet the known needs of detainees. .⁴²

⁴¹ P DeBelle; 'Baxter Drives Detainees Mad, says Psychiatrist' *The Age* Melbourne 3 April 2005.

⁴² *S v Secretary, Department of Immigration & Multicultural & Indigenous Affairs* [2005] FCA 549 at [213]

In the Palmer Report on the Detention of Cornelia Rau, the issue of remoteness is once again raised, at figure 4.2.6, entitled 'Remoteness and staffing':

A critical factor affecting the nature of operations at Baxter is the facility's location in a semi-arid remote area. As noted, in contrast with, for example, Villawood Immigration Detention Centre in Sydney and Maribyrnong Immigration Detention Centre in Melbourne, Baxter does not have immediate access to 'big city' services. Port Augusta has 15,000 inhabitants; Adelaide is 300 kilometres away.

It is one thing to draw up specifications for how a facility should be operated and to draft standards and specifications for the people who should be employed to operate it. The challenge... lies in recruiting enough experienced people who want to live in a remote location and take on what is, by any assessment, a demanding job... In relation to health care, the difficulty for Baxter is mirrored by the difficulty Port Augusta has in attracting and maintaining experienced doctors, nurses and specialists. Like all country towns, Port Augusta is supported by outpost services linked to capital city facilities; an example is the Rural and Remote Mental Health Service. For the South Australian Government, adequately servicing outlying areas of a large state where most people live within reach of Adelaide is a huge task.^{43\}

Remoteness has exacerbated the mental health impact upon detainees at Baxter Immigration Detention Facility. Baxter is indeed remote when compared with other onshore detention facilities, such as the Villawood and Maribyrnong immigration detention facilities. But it has not been completely inaccessible to outside visitors. Detainees at Baxter have had their sense of isolation and abandonment ameliorated by visits from concerned community members, lawyers, journalists and medical

⁴³ M Palmer, *Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau* Inquiry into the Cornelia Rau Matter, Canberra, 2005, p. 66.

professionals. Detainees in offshore processing places, which are considerably more remote and inaccessible, have not been favoured by such attention.

Asylum seekers in Nauru have been detained by the IOM and processed by Australia and UNHCR. In September 2004, there were 65 adults and 17 minors detained on Nauru. More than half of the detainees were Iraqis and around a third were Afghans. One year later, 27 people remained in Nauru, including eight Afghans and 13 Iraqis. By the end of 2005, all but two Iraqi detainees had been resettled in Australia.

Prolonged detention left many asylum seekers on Nauru in despair. In December 2003, detainees on Nauru began a hunger strike, with some sewing their lips together. The hunger strikers complained of the use of inappropriate interpreters by DIMIA in their assessments and disputed the safety of returning to Afghanistan. The hunger strikes ended after the Australian Government and UNHCR began reviewing the applications of Afghan nationals on Nauru in January of 2004. The Australian government denied that it was influenced by the protests and asserted that the re-examination of the Afghan cases was influenced by updated country information on Afghanistan which reported on instability and the danger of returning certain groups to the country. The case of 197 Afghans were re-examined with 168 being recognised as refugees and only 29 rejected.

Another hunger strike began in Nauru in June 2004. Some Iraqi detainees protested that Iraq was not safe for their return. The Minister for Immigration announced that the hunger strikes would not make a difference to their applications for refugee status. However, in August 2004, Senator Vanstone asked DIMIA to reassess the cases of Iraqis in the Nauru Offshore Processing Centre. In December 2004 it was announced that 27 of the 41 Iraqis re-assessed on Nauru were found to be refugees. This included 11 people who were assessed by UNHCR.

In September 2005, the Australian government sent experts to Nauru to assess the mental health of the 27 remaining asylum seekers. Many of them were believed to be depressed and reliant on sedatives for sleep. In an interview with journalist Michael

Gordon in April 2005, many asylum seekers reported giving up all hope of securing freedom or seeing loved ones again.⁴⁴ By December 2005 all but two had gained their freedom – 13 of them as refugees – with the last detainees being resettled in Australia on humanitarian visas after three and a half years in offshore detention.

Dutch psychiatrist Dr Maarten Dormaar was employed by the IOM and posted to Nauru in mid-2002.⁴⁵ Dr Dormaar has been in General Practice since the late 1960s, and began to practice as a psychiatrist in 1975.⁴⁶ Dr Dormaar reported to the Nauru camp managers in October 2002, “I seldom or never encounter an asylum seeker who still sleeps soundly and is able to enjoy life. Mental health, or psychiatry for that matter, is basically not equipped to improve their situation in any essential respect”.⁴⁷ Dr Dormaar further claims that his many reports on the severity of mental illness of detainees on Nauru were received, but completely ignored by IOM officials; “they received it but they didn’t react to it, they didn’t react to all my extensive reports”.⁴⁸ Charged with this assertion, the Department of Immigration denied that Dr Dormaar’s concerns had been ignored, and further stated that Nauru had “comprehensive mental health services in the centres to improve the residents’ psychological wellbeing”.⁴⁹ In November 2002 Dr Dormaar resigned in protest over the conditions in the camp, and in frustration at his professional clinical opinion being repeatedly disregarded.⁵⁰

In response to the proposal of the current legislative amendments, Human Rights Commissioner Mr Graham Innes issued a media release, raising his concerns in the following terms:

⁴⁴ M Gordon; ‘Experts sent to evaluate Nauru detainees’ *the Age* Melbourne 22 September 2005.

⁴⁵ D Harding-Pink, ‘Humanitarian Medicine: Up the Garden Path and Down the Slippery Slope’ *British Medical Journal*, 329, 14 August 2004 pp 398-400.

⁴⁶ ABC Radio National *PM* Programme; M Colvin and A Fowler, ‘High Rates of Mental Illness among Detainees’, 15 May 2003.

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

...the disastrous consequences of long-term detention on the mental health of asylum seekers are now beyond dispute. The proposed changes do not provide proper measures to address mental health concerns.... Finally, given the concerns about the rights of asylum seekers processed offshore, it is crucial that offshore processing centres are subject to the same level of independent scrutiny as immigration detention centres in Australia. There is no independent oversight of offshore centres by HREOC or the Commonwealth Ombudsman. This raises significant concerns both in terms of the conditions of detention and also the length of time for which persons are detained.⁵¹

We share HREOC's concerns.

Whilst similar problems of psychological harm, hunger strikes and lip sewing experienced in Nauru have been experienced by detainees in Australia, they have been to some extent addressed by the introduction of the Removal Pending Bridging Visas and monitoring of long term detainees by the Commonwealth Ombudsman. No such arrangements have been made for detainees in offshore processing centres.

The psychological harm and lengthy process suffered by detainees in Nauru and Indonesia may be suffered by future asylum seekers affected by the Bill. Such individuals would be unable to enjoy the highest attainable standards of physical and mental health in accordance with Article 12 of the ICESCR and Article 24 of CROC. It is our submission that this is an unnecessary and unjust position in which to place those who come to Australia in search of protection.

Children in detention

A result of the transfer of all unauthorised boat arrivals to offshore processing centres will be the detention of children. The transfer of all onshore arrivals to offshore processing fails to facilitate an evaluation of individual circumstances, such as

⁵¹ J von Doussa and G Innes, 'Migration Act Changes Threaten the Human Rights of Asylum Seekers' HREOC, Sydney 12 May 2006.

children's vulnerabilities and developmental needs. This would place Australia in breach of article 3(1) of CROC by failing to account for the best interests of the child and art 3(2) which provides that State Parties ensure the protection of children and take into account the rights and duties of those responsible for the children.

Children seeking asylum have suffered trauma prior to their arrival in Australia. When subjected to the uncertainty and anxiety of the detention environment, these children have been exposed to acts of self-harm and suicide by adult detainees. Due to children's developmental needs and heightened vulnerabilities, the impact of detention on children's mental health has been of great concern. Immigration detention has given rise to preventable mental illness in children.

The following observations were made with respect to the detention of children at Villawood:

Between 10 and 50 children are held at Villawood at any one time. The detention environment, exposure to actions such as hunger strikes, demonstrations, episodes of self-harm and suicide attempts, and forcible-removal procedures, all impact on a child's sense of security and stability. A secondary effect is mediated via the parents, whose ability to provide a caring and nurturing environment is progressively undermined ...with risk of neglect and physical abuse of dependent children increasing across the course of detention. Following allegations of child sexual abuse at the Woomera centre, detaining authorities have increased their monitoring of parents at Villawood for evidence of negligence and abuse, leading to parental fears of their children being removed, which has further increased family insecurity. At times, children have also become negotiating pawns in attempts to contain protests within the detention centre. For example, on a number of occasions, the authorities have separated children from their parents to pressure adults to cease their hunger strikes.

A wide range of psychological disturbances are commonly observed among children in the detention centre, including separation anxiety, disruptive

conduct, nocturnal enuresis, sleep disturbances, nightmares and night terrors, sleepwalking, and impaired cognitive development. At the most severe end of the spectrum, a number of children have displayed profound symptoms of psychological distress, including mutism, stereotypic behaviours, and refusal to eat or drink...⁵²

Article 39 of CROC requires states to take all appropriate measures to promote physical and psychological recovery and social reintegration of children who have been victims of neglect, exploitation, abuse or torture, in an environment which fosters the health, self-respect and dignity of the child. Concerns about the exacerbation of pre-existing conditions by long periods of detention and Australia's compliance with Article 39 of CROC were raised in a report released by the Human Rights and Equal Opportunity Commission (HREOC) in 2002.⁵³ The report followed a number of visits to Immigration Detention Centres around Australia. The report contains the following comments:

While any detainee who has experienced torture and trauma will undoubtedly require specialised diagnosis and treatment during their time in Australian detention, child detainees, pursuant to Article 39 of CRC, have an absolute right to expect it will be provided... There are indications the detention environment may serve to worsen any pre-existing trauma condition, making it questionable whether adequate treatment can be provided at all, within the long term detention environment... A psychologist, who had been employed at the facility for three years, estimated that 20-25 per cent of detainees had Post Traumatic Stress Disorder symptoms of some form. He suggested that stress levels translated into mental health difficulties after several months in detention, with various stages of deterioration thereafter.

⁵² A Sultan and K O'Sullivan; 'Psychological disturbances in asylum seekers held in long term detention: a participant-observer account' *Medical Journal of Australia* 2001; 175: 593-596

http://www.mja.com.au/public/issues/175_12_171201/sultan/sultan.html

⁵³ S Ozdowski, 'A Report on Visits to Immigration Detention Facilities by the Human Rights Commissioner, HREOC, Sydney 2002.

A 2003 study by Sarah Mares and John Jureidini of a group of 10 children aged between 6 and 17 revealed that all children studied fulfilled the diagnostic criteria for post-traumatic stress disorder, major depression with suicidal ideation.⁵⁴ All children within the sample reported trouble sleeping, poor concentration, little motivation for reading or study, a sense of futility and hopelessness and overwhelming boredom. Recurrent thoughts of death and dying were reported as well as recurrent thoughts of self harm. Disturbingly, the three pre-adolescent children (aged 7, 10 and 11 years), were amongst the 8 children who had acted on these impulses. The experiences of these children differ markedly to those within the Australian community, where deliberate self-harm in pre-adolescent children is rare.

The mental health impact of long term detention of children was elaborated at some length in HREOC's report of its National Enquiry into Children in Immigration Detention, *A last resort?*.⁵⁵ Australasian Correctional Management and DIMIA provided HREOC with detailed documentary evidence concerning acts of self-harm performed by children. A visit by HREOC officers to Woomera in January 2002 revealed evidence of a high level of self-harm including lip-sewing, slashing of the body and ingestion of shampoo. The deleterious effect of immigration detention on mental health formed the basis of HREOC's second major finding in *A Last Resort?*. The report's major findings were as follows:

1. The Australia's immigration detention laws as applied to children *create a detention system that is fundamentally inconsistent with CROC*.⁵⁶

⁵⁴ S Mares and J Jureidini; 'Children and Families Referred from a Remote Immigration Detention Centre' John Forgotten Rights – Responding to the Crisis of Asylum Seeker Health Care': A National Summit on the Health of Asylum Seekers convened by the Royal Australian and New Zealand College of Psychiatrists, 12 November 2003

⁵⁵ S Ozdowski; 'A Last Resort? The National Inquiry into Children in Immigration Detention' HREOC Sydney, 17 May 2004 at http://www.hreoc.gov.au/Human_Rights/children_detention_report/

⁵⁶ Particular failures were identified with respect to the following:

- Article 37(b)'s stipulation that detention is a measure of last resort for the shortest appropriate period of time and subject to effective independent review,
- The best interests of the child consideration in article 3(1),
- Treatment of children with humanity and respect for their inherent dignity in accordance with article 37(c),

2. Children in immigration detention for long periods of time are at high risk of serious mental harm.
3. Children in immigration detention as observed between 1999 and 2002 have not been in a position to fully enjoy a range of human rights.⁵⁷

The detention of child asylum seekers who have, either with their families or alone, fled conditions of peril to seek Australia's protection has been the cause of preventable mental illness. Such treatment is proscribed by CROC. Article 24(1) stipulates that state parties recognise the right of the child to the highest attainable standard of health and to facilities for treatment of illness. Furthermore Australia is required to extend appropriate assistance to children seeking asylum and children who are recognised as refugees by Article 22(1). Immigration detention of children constitutes a violation of these articles in addition to article 39 in its failure to take appropriate measures to promote physical and psychological recovery and social integration of children who have suffered neglect, abuse exploitation or torture.

In light of children's vulnerabilities and special needs, we have particular concerns about the conditions of detention combined with the effect of the geographic isolation experienced by children being detained for the purpose of offshore processing. Such detention raises concerns about Australia's compliance with a range of international norms which prohibit torture or other cruel, inhuman or degrading treatment or punishment. These include Article 37(a) of CROC, Article 7 of the ICCPR and Article 2

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- Article 39, discussed above, in addition to article 22(1)'s stipulation that children seeking asylum receive appropriate assistance' to enjoy their right to development to the maximum extent possible' in accordance with article 6(2)

⁵⁷ These rights were identified as follows:

- The right to be protected from physical and mental violence: Article 19(1), CROC,
- The right to enjoy the highest attainable standard of physical and mental health: art 24(1) CROC,
- The right of children with disabilities to enjoy a full and decent life in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community: Article 23(1) CROC,
- The right to an appropriate education based on equality of opportunity: Article 28(1),
- The right to special protection and assistance to unaccompanied minors: Article 20(1) CROC.

of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (Torture Convention).

We strongly recommend the rejection of and amendments to the *Migration Act* which would authorise the return of children to conditions of detention.

The International Organization of Migration

Much of the cost of processing all unauthorised boat arrivals offshore, as envisioned by the Bill, will be paid to the IOM. IOM currently operates offshore processing facilities in PNG, Nauru and Indonesia.⁵⁸ It also provides security, water, sanitation, power generation, health and medical services for the duration of the stay of the asylum-seekers at these Centres and co-ordinates the return of asylum seekers to their home countries.⁵⁹ IOM was paid \$150,911,706.60 for its services to the department of immigration over 2002-2005 financial years.⁶⁰ IOM has come under considerable criticism in recent years for its non-humanitarian mandate. It is seen by many organisations to be unsuitable as caretaker for refugees and asylum seekers.

The IOM currently has 93 member governments and an additional 36 states with observer status. The organisation was founded on a United States initiative in 1951. IOM is not and has never been part of the UN system. It is only accountable to its member states and is not accountable to any democratically elected body. The UNHCR, UNICEF, WHO, international trade unions, religious and welfare organisations have observer status but have no voting power within the IOM. The majority of the organisation's funds have traditionally been borne by the United States and IOM's

⁵⁸ See Department of Immigration Fact Sheet 76 for arrangements with Nauru and PNG <http://www.immi.gov.au/facts/76offshore.htm>. See UNHCR See Senate Legal and Constitutional Reference Committee Inquiry into the Administration and Operation of the Migration Act 1958, Response of United Nations High Commissioner for Refugees to Questions taken on notice , 26 October 2005 for arrangements with Indonesia.

⁵⁹ IOM, Offshore processing of Australia Bound Irregular Migrants
<<http://www.iom.int/iomwebsite/Project/ServletSearchProject?event=detail&id=AU1Z001>>

⁶⁰ Questions Taken On Notice Supplementary Budget Estimates Hearing: 1 November 2005
<<http://www.andrewbartlett.com/PDF-misc/settlement-services.pdf>>

Director-General has always been a US State Department appointee. The IOM is now a treaty based organisation but its role is dictated by member States.⁶¹

Unlike UNHCR, the IOM has no protection function and has no mandate to monitor human rights abuses. IOM's policy on 'Effective Respect for Migrant's Rights' states as follows:

“international law, protection is based on a mandate, conferred by treaty or custom, which authorizes an organization to ensure respect of rights by States. These rights may include human rights, workers' rights or the rights of refugees, and can be found in various international instruments such as United Nations conventions and declarations. IOM has no such mandate, and thus is not concerned with legal protection per se.”⁶²

The lack of a human rights mandate renders IOM unsuitable for the caretaking of designated unauthorised arrivals. Asylum seekers and refugees in the care of IOM do not have any formal or legal base for complaint or redress should their human rights be traversed. Furthermore, there is no international mechanism by which other interested parties, such as States or international organizations, might call IOM to account.

Human Rights Watch, the International Catholic Migration Committee, and the World Council of Churches have been highly vocal in their criticism of IOM activities with regards to refugees and asylum seekers:

“We are concerned that given IOM's active involvement in interception programmes - often in situations where UNHCR is not present - it does not have an explicit mandate nor the expertise to identify and protect those in need of international protection. Neither are there adequate safeguards in place to ensure

⁶¹ See IOM constitution which can be found at <http://www.iom.int/EN/who/main_constitution.shtml>

⁶² IOM Policy: Effective respect for migrant's rights
<http://www.iom.int/EN/who/main_policies_effrespect.shtml>

that those in need of refugee protection have access to UNHCR, or the appropriate authorities, and to full and fair refugee status determination procedures.”⁶³

Human Rights Watch and Amnesty International issued a joint statement in December 2002 to voice their concern with regards to IOM’s activities:

“As organizations committed to the promotion and protection of human rights, ...we come to this meeting with concerns about the human rights impact of certain IOM operations. In particular, we are concerned that IOM's work in certain contexts is adversely impacting upon basic human rights of migrants, refugees and asylum seekers, including for example the right to be free from arbitrary detention and the fundamental right to seek asylum.”⁶⁴

The Jesuit Refugee Services have also criticized IOM’s lack of transparency in the repatriation process particularly of Burmese refugees.⁶⁵ The Roma National Congress, the umbrella organization of the Roma Civil Rights Movement board have accused the IOM of being the “ ‘Henchman Organisation for deportations and dealers in de-facto internment camps for refugees’ ”⁶⁶

Human Rights Watch has acknowledged that the IOM has adopted rights language and has developed policy reflecting such language. Never the less, Human Rights Watch has found that IOM has not learnt from past mistakes and that member states should send a

⁶³ Human Rights Watch, the International Catholic Migration Committee, and the World Council of Churches NGO Background paper on the Refugee and Migration Interface

<<http://www.hrw.org/campaigns/refugees/ngo-document/>>

⁶⁴ Statement by Amnesty International & Human Rights Watch Governing Council, International Organization for Migration (Geneva, 2-4 December 2002)
<<http://www.hrw.org/press/2002/12/ai-hrw-statement.htm>>

⁶⁵ www.jesref.org

⁶⁶ Roma National Congress HDS.NGO/14/06

10 May 2006 <www.osce.org/item/18940.html>

clear message to IOM that it must observe international human rights and refugee protection norms.⁶⁷

It is our submission that in light of such criticisms, Australia's arrangements with IOM should be revised. Responsibility for the processing and care of asylum seekers who come to Australia for protection should be assumed by Australia and not an organisation with no protection mandate.

Conclusion

By reason of the matters discussed above, the Castan Centre for Human Rights Law recommends that the *Migration Amendment (Designated Unauthorised Arrivals) Bill 2006* should be not be enacted.

⁶⁷ The International Organization for Migration (IOM) and Human Rights Protection in the Field: Current Concerns (Submitted by Human Rights Watch, IOM Governing Council Meeting, 86th Session, November 18-21, 2003, Geneva) <hrw.org/backgroundunder/migrants/iom-submission>