Migration Amendment (Designated Unauthorised Arrivals) Bill 2006

Position Paper

Australian Lawyers for Human Rights (ALHR) made a written submission[1] and gave oral evidence[2] to the Senate Legal and Constitutional Committee inquiry into *Migration Amendment (Designated Unauthorised Arrivals) Bill 2006* ('the Bill'). The report of the Senate Legal and Constitutional Committee of 13 June 2006 recommended that the Bill be withdrawn or substantially amended. This, together with resistance to the Bill on the part of a number of members of the government backbench, prompted a set of proposed changes announced by the Prime Minister.[3] ALHR believes these proposed changes are deficient in many respects and fall well short of the recommendations set out by the Senate Legal and Constitutional Committee in its report of 13 June 2006.

This Position Paper is divided into three parts. **Part A** provides an overall summary of ALHR's continuing concerns. **Part B** summarises ALHR's principal concerns in relation to the original *Migration Amendment (Designated Unauthorised Arrivals) Bill 2006*, the majority of which remain, notwithstanding the changes that are proposed. **Part C** outlines how the proposed concessions announced by the Prime Minister fail to address those concerns.

PART A – SUMMARY OF CONTINUING CONCERNS

The original Bill is designed in particular to deny West Papuan asylum seekers the right to seek asylum in Australia.

Main objections

ALHR remains opposed to the passage of the Bill on a number of grounds. These objections fall into the following broad categories and are discussed in Part B:

- violations of core international refugee and human rights law protections
- abrogation of Australia's responsibilities in all facets of the international protection regime
- undermining basic rights of refugees, such as the right to family unity
- conferral of unfettered powers on Australian officials
- conferring discretionary ministerial powers that lack transparency and accountability

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[1] Submission 78, which can be found at: http://www.alhr.asn.au/html/main/action.html

[2] Sydney, 6 June 2006. Available at http://www.aph.gov.au/senate/committee/legcon_ctte/migration_unauthorised_arrivals/hearings/index.htm .

[3] See Prime Minister's announcement, *Offshore Processing*, 21 June 2006 and attachment, *Proposed Government Changes to the Provisions of the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006 and the Processes to Apply to Designated Unauthorised Arrivals*.

In addition, the motives for this Bill underscore how important international human rights and refugee protection standards are in ensuring that an individual's fundamental rights are not simply abandoned in favour of political expediency.

Impact of proposed changes

The proposed changes fit into three broad categories that are elaborated upon in Part C:

1. Refugee status determination (RSD) procedures and related issues;
2. Detention and conditions of detention; and
3. Protection outcomes.

Each category stands alone as important in its own right. However, without actual protection outcomes, the first two are of little importance. In essence, ALHR considers that the proposed changes in relation to RSD and detention conditions soften but do not remove some of the harsher elements of the proposal. However, the scheme proposed by the Bill remains fundamentally unchanged in terms of outcomes; in that sense, no concessions have been made. The report of the Senate Legal and Constitutional Committee of 13 June 2006 and the recommendations made therein are not reflected in the Prime Minister's proposals. On the contrary, the government remains committed to its primary purpose of keeping unauthorised boat arrivals out of Australia (except as a last resort and pursuant to discretionary powers) and beyond the reach of the judicial arm of government.

Inherent mischief of Bill remains

ALHR is therefore not persuaded that the proposals announced by the Prime Minister adequately address the majority of ALHR's concerns about the Bill. The organisation believes that even if the proposals announced by the Prime Minister were implemented in good faith and in their entirety, they would still fall short of providing adequate safeguards to asylum-seekers subject to them. The alleged alternatives to detention would still severely restrict liberty (the Pacific Solution is itself a severe restriction on liberty of movement), and independent merits review is unclear and includes inadequate safeguards. Even though access to lawyers is proposed, this would not be sufficient to defeat the inherent mischief of this Bill.

Accountability vacuum

Indeed, the changes leave the Australian Government unaccountable for:

- Nauru visa and detention conditions;
- Access by the Ombudsman to detention centres on Nauru; and
- Lack of mandatory statutory reporting requirements in relation to detention on Nauru.

They also leave Australian decision-makers with unfettered powers, unaccountable for the lawfulness of their decisions.

Sunset clause not enough

While the proposed sunset clause coupled with an 'independent review' two years hence is preferable to a legislative scheme of indefinite duration, such commitments do not resolve the inherent inadequacies of this Bill and the breaches of international refugee and human rights law which it perpetuates.

Summary of remaining problems

In short, the proposed changes yield no guarantees that:

i. the correct and preferable decision is reached in refugee status determination;
ii. arbitrary, unlawful and prolonged detention is avoided;
iii. conditions of detention (including its mental health impact) satisfy minimum standards;
iv. recognised refugees will have access to a timely durable solution in accordance with Australia's protection obligations;
v. separated refugee families will have timely access to reunification.

No solutions for refugees
Australia cannot be permitted to close its borders, either physically or legislatively, and thereby turn its back on human rights abuses taking place in neighbouring countries or turn its back on the persons seeking Australian protection from such abuses. Nor can Australia credibly look to other countries to seek resettlement as an alternative to granting protection to refugees from Australia's neighbours. Resettlement is fundamentally a mechanism for alleviating refugee burdens internationally. Resettlement is already in short supply, with less than 1% of the world's population of 9 million refugees able to access it. Australia has no refugee burden which it can credibly request other states to share and should not be permitted to misuse resettlement as a durable solution.

PART B – THE ORIGINAL BILL

ALHR's concerns in relation to the original Bill are elaborated in brief below.

The Bill **violates core international refugee and human rights law protections**, in particular:

- **the right to seek and enjoy asylum** in other countries from persecution: this Bill effectively seeks to block asylum seekers from West Papua from seeking asylum from persecution in one of their neighbouring countries;
- **equality before the law:** this Bill denies equal access to effective and independent review procedures, in particular the courts;
- **no penalties for unlawful entry:** as a general principle, the imposition of penalties on refugees for unlawful entry is prohibited; the Bill, clearly expressed as a deterrent, penalises even those persons who have come directly to seek protection in Australia;
- **non-refoulement:** the prohibition on forcible return to human rights abuses ('*refoulement*') is undermined by this Bill; the deterrent purpose of the Bill seeks to prevent asylum seekers from coming to Australia by effectively closing Australia's borders; international law considers border closure and rejection of refugees at the frontier to violate the prohibition on *refoulement;* the Bill also increases the risk of forcible return through decision-making processes that lack effective procedural safeguards and through holding people in conditions that make them feel compelled to return 'voluntarily' (known as 'constructive *refoulement*');
- **non-discrimination:** as part of the broader international prohibition on discrimination, the Bill denies access to protection to certain populations on the basis of their mode of arrival in Australia. Although not all distinctions between individuals or classes of person will be discriminatory, to be permissible such distinctions must be pursuant to a legitimate aim, have an objective and reasonable justification, and be proportionate to the object sought to be achieved.[4]
- **arbitrary detention:** the Bill creates a situation whereby detention is imposed and there is no mechanism to determine whether it can be justified in the individual case; detention which cannot be justified in the individual case is considered arbitrary; the Bill does not acknowledge or make provision for that obligation that detention of children only be used as a last resort.
- **right to health:** by exposing individuals to the prospect of prolonged, indefinite and arbitrary detention, implementation of this Bill will breach the right to health; there is a clear link between enjoyment of the right to the highest attainable standard of health, including mental health, and the ill-effects of prolonged, indefinite, or otherwise arbitrary

[4] There have been suggestions by supporters of the Bill that it *overcomes* discrimination by applying extra-territorial processing to *all* unauthorised boat arrivals, and that it 'would not be fair' to apply it to some and not others. This is an erroneous manipulation of the anti-discrimination norm. The prohibition on discrimination cannot be overcome by merely expanding the class of people to whom harsh and discriminatory treatment applies.

detention. The mental health impact of detention on Nauru and Manus Island, as well as Australia's mainland detention practices, has been well-documented.
- **best interests of the child:** the best interests of the child must be a primary consideration in all actions concerning children. Measures arising out of this Bill such as detention, procedures with inadequate safeguards, and those that interfere with the right to family unity breach this obligation.

All these obligations derive from international human rights and refugee protection instruments voluntarily assumed by Australia in accordance with its rights and responsibilities as a sovereign nation.

The Bill **abrogates Australia's responsibilities in all facets of the international protection regime** by:
- removing or 'excising' Australia from the protection map;
- failing to accord protection under the Refugee Convention to those arriving by boat who seek Australia's protection;
- ignoring the root causes of the refugee movements that have prompted this legislation and effectively interfering with the right of refugees to leave their country of origin which is guaranteed in international law;
- manipulating the concepts of 'resettlement' and 'international burden- and responsibility-sharing' to serve Australian interests rather than the rights and interests of refugees that these concepts are designed to protect; in particular the proposal deliberately obstructs access to durable solutions through denying protection in Australia in accordance with Australia's primary protection obligations and makes improper use of the resettlement option (normally reserved for alleviating undue burdens rather than political expediency) by pursuing the unlikely possibility of resettlement to a third country.

All these measures cause damage not only to the refugees whose lives are affected by them, but also to Australia's credibility as an international actor and to the international protection regime as a whole.

The Bill **undermines basic rights of refugees, such as the right to family unity,** by:
- expanding a visa regime that deliberately denies the right to family reunification in Australia;
- entrenching rather than alleviating the hardship of long and often traumatic periods of family separation that commonly arise in the course of flight from persecution by attaching conditions to temporary protection visas and related visas, such as the so-called 'secondary movement visa';
- requiring refugees on Nauru to comply with health requirements before being granted protection in Australia; requirements that would not apply onshore.

The right to family unity is inherent in the universal recognition of the family as the fundamental group unit of society entitled to protection and assistance. This Bill deliberately interferes with the right to family unity, even where there are no realistic possibilities of family reunion elsewhere. Maintaining and facilitating family unity (including family reunification) is vital in the refugee context given its importance in providing protection, physical care, emotional support and well-being, enhancing self-sufficiency, and lowering long term social and economic costs.[5]

The Bill **confers unfettered powers on Australian officials** by:

[5] UNHCR Global Consultations, *Summary Conclusions: family unity*, expert roundtable organized by UNHCR and the Graduate Institute of International Studies, Geneva, 8-9 November 2001.

- deeming the refugee status determination process on Nauru and Manus Island to be 'non-statutory' and therefore attempting to place it beyond the reach of the judicial arm of government;
- attempting to place asylum seekers (most of whom are, statistically, refugees) beyond the reach of the judicial arm of government but keeping them within the reach of the executive;
- denying access to legal counsel, independent and effective merits and judicial review, detaining them without adequate access to or recourse to the law;
- denying effective access to human rights complaints mechanisms, including the Commonwealth Ombudsman and the Human Rights and Equal Opportunity Commission.

Although this is the main area in which a number of changes have been proposed, they do not adequately address ALHR's concerns. See Part C below.

ALHR remains disturbed (even in light of the proposed changes) by the proposals inherent in this legislation given the well-documented failures of the Immigration Department in recent years, in particular following publication of the Palmer and Comrie reports, as well as successive reports of the Commonwealth Ombudsman. It is irresponsible to give a department that has struggled and continues to struggle to reform itself such wide-ranging and unfettered powers, such powers having been the very cause of the ills documented in the reports mentioned here.

The Bill **confers discretionary ministerial powers that lack transparency and accountability** in that:

- there is neither clarity nor transparency in identification of and assessment of suitability of 'declared countries';
- the Minister retains a discretionary power to admit 'designated unlawful arrivals' that is non-compellable, non-reviewable, and non-enforceable; the circumstances in which the discretionary power is exercised lack clarity.

ALHR is concerned that these powers do not contain sufficient safeguards and do not take into account the full range of issues that would be necessary in determine capacities in 'declared countries' for comparable compliance with Australia's international obligations.

PART C – 'CONCESSIONS' ARE NOT CONCESSIONS

The Prime Minister's announcement, *Offshore Processing*, 21 June 2006 and its attachment, *Proposed Government Changes to the Provisions of the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006 and the Processes to Apply to Designated Unauthorised Arrivals* set out the Government's proposed 'concessions' in relation to the Bill. Although there are some aspects of the proposed changes that appear welcome, in effect the proposal does little more than provide a clear statement of the motivations behind offshore processing. It shows that the Australian Government wishes to take no legal responsibility for detention on Nauru, for the quality of asylum determination processes, or for protection and resettlement outcomes.

The proposed changes fit into three broad categories that are elaborated upon below:

1. Refugee status determination (RSD) procedures and related issues;
2. Detention and conditions of detention; and
3. Protection outcomes.

Each category stands alone as important in its own right, but without actual protection outcomes, the first two are of little import. ALHR considers that the proposed changes in relation to RSD and detention conditions soften but do not remove some of the harsher elements of the proposal. However, the scheme proposed by the Bill remains fundamentally

unchanged in terms of outcomes; in that sense, no concessions have been made. On the contrary, the government remains committed to its primary purpose of keeping unauthorised boat arrivals out of Australia (except as a last resort and pursuant to discretionary powers) and beyond the reach of the judicial arm of government.

Refugee Status Determination and related procedures

The RSD process is described as 'non-statutory'[6] and therefore unable to attract any form of statutory safeguard such as time limits, accountable merits review, or judicial review. The clear intention is to create a process which provides no legal safeguards to asylum seekers in the OPCs. The legislation goes out of its way to remove judicial review of decision by the Australian courts.

ALHR welcomes, in principle, the agreement of the Government to fund legal counsel for asylum seekers whose claims are processed on Nauru, including merits review. While this would go some way to enhancing the quality of processing, it cannot alleviate the worst excesses proposed under this legislation; in particular, deliberately placing the asylum-seekers beyond the reach of Australian law and subject to unclear and unaccountable primary and merits review decision-making. Australian lawyers would be severely hampered in the ways they could help a refugee as compared to being in Australia.

The Government's proposal to have non-DIMA decision makers provide 'independent review' of rejected applications is ambiguous. The proposal does not make clear to whom they will be accountable, in what capacity they would be engaged (saying only in what capacity they would *not* be engaged), and by what standards and procedures they would be bound. On the face of it, it would appear the Government is seeking to create a second tier of review, as unaccountable as the first. It is not clear who would assign cases, and how such persons would be appointed. Once again, the Government is seeking to ensure that the process remains beyond the scrutiny of the courts.

Although ALHR welcomes the agreement to provide decisions in writing to asylum-seekers, ALHR considers that this is a minimum standard, and should not therefore be regarded as a concession. Moreover, practitioners in this area are well aware that there are significant inadequacies in reasons given in offshore decisions as compared to those onshore, even though they may be given in writing. Unless deficiencies such as these are addressed adequately, the proposed changes amount to little more than a misleading 'smoke and mirrors' exercise.

Detention and conditions of detention

The restrictions on movement that apply under the proposed changes are said not to be 'detention under Australian law'. Any suggestion that these restrictions are not detention is window-dressing;[7] the law and the evidence weigh heavily against the Government's position in this respect.[8] ALHR believes there is no question that 'accommodation in OPCs' is

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[6] See bullet point one "time limits" in the attachment, *Proposed Government Changes to the Provisions of the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006 and the Processes to Apply to Designated Unauthorised Arrivals* to the Prime Minister's announcement, *Offshore Processing*, 21 June 2006.

[7] Fact sheets about Australia's immigration and refugee program during the first incarnation of the Pacific Solution originally referred to the 'detention' of asylum seekers on Nauru and Manus Island. However, these have subsequently been changed to remove references to detention. See 'Offshore Processing Arrangements' Department of Immigration, Multicultural and Indigenous Affairs (DIMIA) Fact Sheet No.76, First version, 2 January 2002.
second version dated 21 May 2002 which refers to "located" instead of "detained"

[8] See DIMA evidence to the Senate Legal and Constitutional Committee, 6 June 2006; In addition, UNHCR defines detention as "confinement within a narrowly bounded or restricted location,

detention under international law and under Nauruan law. ALHR also believes that detention by one state (Nauru) on behalf of another (Australia), and indeed at the latter's expense, brings responsibility for detention within the 'effective control'[9] of Australia. Any human rights violations that flow from such detention therefore remain squarely within Australia's responsibility.

The Government has indicated that it is unable to give a commitment that it can, and will, match special arrangements for families and children already in place in Australia. This demonstrates that any commitment the Government makes, even legislatively, directing DIMA staff to work with host governments to put such arrangements in place, is worthless. Claims that detention in an OPC is 'not detention under Australian law' do nothing to diminish the negative impacts that detention of this nature is known to have on children,[10] and do not address the imperative that detention of children should only be as a last resort.

One of the chief areas in which the role of the Ombudsman is critical in Australia is in scrutiny of detention, and practices and processes that lead to indefinite detention. The Australian Government claims that it does not have any responsibility for management or control of detention on Nauru. That, it says, is the responsibility of the International Organisation for Migration (IOM) and the Nauruan Government neither of which are subject to binding obligations to protect refugees. Conferral on the Ombudsman of investigative powers over extra-territorial actions of DIMA officers and other Australian officials would therefore not appear to cover – or be intended to cover – concerns about arbitrary detention, or other transgressions of human rights related to detention. Ombudsman oversight of actions of DIMA officials would not suffice to guarantee accountability and protection of refugees on Nauru.

No commitment to provide protection outcomes

ALHR is concerned about the manipulation of the concept of 'sovereignty'. On the one hand the proposal claims that Australia's territorial sovereignty will be undermined by the arrival on its shores of refugees it would prefer not to receive. On the other, no regard appears to be had for the sovereignty of Nauru, except insofar as recognition of Nauruan sovereignty serves Australia's interest in ensuring that asylum-seekers transferred there are beyond the reaches of legal accountability. On the strength of Nauru's sovereignty, therefore, the Australian Government proposes to make itself unaccountable for visa and detention conditions on Nauru. Similarly, the Government has created a scheme whereby it is unable to legislate for Ombudsman access to investigate detention conditions because of 'sovereignty issues'. Furthermore, while the Ombudsman must report on persons detained in Australian detention facilities the Government pleads that it would be 'inappropriate' to legislate for any such obligation for those detained off shore. Australia is attempting to hide a scheme of its own making behind Nauruan sovereignty in order to avoid its obligations under international and domestic law.

This demonstrates that Australia is unable or unwilling to deliver outcomes in relation to these critical aspects of the offshore processing scheme. The Government claims this to be so, notwithstanding the fact that management and implementation of detention on Nauru is undertaken on behalf of and at the expense of the Australian government. Australia may

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including... closed camps, detention facilities or airport zones, where freedom of movement is substantially curtailed, and where the only opportunity to leave this limited area is to leave the territory." UNHCR, "Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers", February 1999.

[9] UN Human Rights Committee, General Comment No. 31, *Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, CCPR/C/21/Rev.1/Add.13, 26 May 2004, para. 10.

[10] See report of the Human Rights and Equal Opportunities Commission, National Inquiry into Children in Immigration Detention, *As last resort?*, April 2004.

therefore be viewed as having 'effective control' over the OPCs, even though such control is based on the consent, invitation or acquiescence of Nauru.[11]

The Government seeks to justify its non-committal, 'no outcome' stance on 'resettlement', claiming that to do otherwise would 'unjustifiably undermine our territorial sovereignty' and would 'encourage people not to cooperate'. A person who is recognised as a refugee and who has engaged Australia's protection obligations has the strongest possible claim to protection in Australia and this does not undermine in any way Australia's territorial sovereignty. On the contrary, Australia's agreement to be bound by the provisions of the Refugee Convention, through ratification, constitutes an exercise of Australia's sovereignty. Alleging non-cooperation on the part of unidentifiable individuals is a hollow, unconvincing and disingenuous attempt to detract from Australia's own non-cooperation in fulfilling its part of the refugee protection contract as a party to the Refugee Convention that has committed to international solidarity and burden-sharing. The same may be said for the Government's anticipation of attempts by asylum-seekers to 'frustrate' the process of resolving their claims on the basis of an approaching sunset clause.

The Government proposes that Australia remain a 'last resort' for 'resettlement'[12] but states that it will ensure that refugees are resettled 'as soon as possible' and at an 'appropriate place'. This is not a new proposal; it remains weak and non-committal ('the Government is not prepared to set limits'). The proposal does nothing more than maintain the Pacific Solution *status quo*, which has already meant processing delays of over 4 years in some cases and immense personal hardship including to recognised refugees. Of course, the commitment to resettle 'as soon as possible' is also entirely dependent on other states coming to the party; an outcome which experience shows is highly unlikely to be forthcoming. The only safeguard the Government is offering against indefinite detention on Nauru is a ministerial discretion that is non-compellable, non-reviewable, and non-enforceable; as such it is no safeguard at all.

The grant of protection in Australia must be the *first resort.*

In relation to detention, conditions of detention, and the possibility for alternatives to detention, the proposed changes lack substance. No responsibility is taken for detention, there is no scope for judicial scrutiny under Australian law or power to order release, and the scope of the powers of the Ombudsman are likely to be extremely limited. The only ways of getting out of detention are:

- An unsecured agreement to resettle by another (as yet unidentified) country;
- Eventual 'resettlement' by Australia as a 'last resort'; or
- Return to the country of origin, a result which may have life threatening ramifications for the refugee and constitute constructive *refoulement.*[13]

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[11] *Bankovic v Belgium* (ECHR) 4 ILM 517 (2002), para.60.
[12] Protection in Australia of refugees transferred to Nauru is wrongly characterised as 'resettlement'. Such individuals have, by definition, engaged Australia's protection obligations under international law, notwithstanding efforts to prevent them from applying for Australian Protection Visas.
[13] Constructive *refoulement* is the creation of conditions that are so intolerable that they effectively compel an individual to make a decision 'voluntarily' to return to a situation where they would face grave violations of their human rights.