

# asylum seekers centre *of new south wales*

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

### **Introduction**

The Asylum Seekers Centre Inc. (ASC) welcomes the opportunity to provide input into the inquiry being conducted by the Senate Legal and Constitutional Committee into the provisions of the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006.

The ASC was established in 1993 and is an independent, not-for-profit, non-government organisation which aims to provide a welcoming environment and practical front-line support to community-based asylum seekers residing in NSW via our case management, health care, recreation and education programs. Our vision is that asylum seekers are welcomed to Australia and afforded a dignified, meaningful and safe existence pending the fair, transparent and expeditious resolution of their claims.

ASC has a current caseload of 186 clients - comprising asylum seekers who arrived to Australia both by boat and by plane, and both with and without a valid visa.

### **The Bill**

In the absence of terms of reference for the inquiry, and in light of the scope of the mandate of our Centre and the limited time available for preparation of a fuller submission, we have restricted our commentary to those matters which we consider to be of greatest concern - specifically with respect to the serious impact which passage of the Bill would have upon designated future asylum seekers who might otherwise at some stage have become eligible to receive assistance through our centre.

Our principal concerns regarding the Bill relate to its apparent contravention of our international obligations and its effective repudiation of the many onshore reform initiatives conceived and implemented in response to the serious criticism and

**Our Vision-** *Asylum seekers are welcomed to Australia and afforded a dignified, meaningful and safe existence pending the fair, transparent and expeditious resolution of their claims.*

**Our Mission-** *To provide a welcoming environment and practical support for community-based asylum seekers residing in NSW, while building community support and pursuing social justice outcomes for asylum seekers.*

recommendations of the Palmer and Comrie reports. Our principal concerns are as follows:

- It is clear the purpose of the Bill is to act as a deterrent to unauthorised entry.<sup>1</sup> While a sovereign state has the right to determine entry to its territory, there is a caveat to this. Individuals have a legitimate right to seek protection from persecution<sup>2</sup> and states are bound, under international law<sup>3</sup> and international customary law, to ensure that those seeking protection are not returned to a country in which they would face persecution. Given that the Bill is a direct result of the arrival of 43 people from Papua, 42 of whom have been found to be refugees, ASC is deeply concerned about any action taken by the government that would prevent people from seeking the protection to which they are entitled.
- The Bill explicitly discriminates against asylum seekers on the basis of their mode of arrival to Australia. As an avowedly deterrent mechanism, it therefore ‘imposes a penalty’ upon a designated category of asylum seeker - namely unauthorised boat arrivals (including “persons who travel most of the way to Australia by sea but travel the last leg by air...and become unlawful on entry”<sup>4</sup>). This would appear to place us in contravention of Article 31 of the Refugee Convention.
- Given that the Bill was formulated in response to the West Papuan asylum seeker controversy, and seeks to deter prospective West Papuan asylum seekers from seeking to invoke Australia’s protection obligations, it may also contravene Article 3 of the Refugee Convention, which prohibits discrimination against asylum seekers on the basis of their race or country of origin.
- Given that Nauru is not a signatory to the Refugee Convention, it is under no legal obligation to not return refugees or expel them from its territory. As such, Australia is no position to guarantee the safety of asylum seekers who are relocated to Nauru for offshore processing, specifically in respect of the *non-refoulement* provisions set out in Article 33.
- It is unclear from the available information whether children, families and single individuals will be uniformly detained during offshore processing, or variously provided alternative forms of accommodation. Any return to the routine detention of children would appear to contravene Articles 3(1) and 37(b) of the Convention on the Rights of the Child, which, respectively, oblige parties to act in the best interests of the child and to detain children only as a measure of last resort. This practice would also disavow our own domestic legislation in which the commitment to detain children only as ‘a measure of last resort’ was recently enshrined. This onshore commitment was made in the context of compelling evidence to the effect that

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<sup>1</sup> *Explanatory Memorandum* to the Migration Amendment (Designated Unauthorised Arrivals) Bill, 2006, para. 21

<sup>2</sup> Article 14 of the Universal Declaration of Human Rights.

<sup>3</sup> Article 33 of the 1951 Convention relating to the Status of Refugees (the Refugee Convention).

<sup>4</sup> *Explanatory Memorandum* to the Migration Amendment (Designated Unauthorised Arrivals) Bill, 2006, paragraph 3

detention poses dramatic and unacceptable risks to the mental health and well-being of children.

- Under the offshore processing regime, applicants for protection will have limited appeal rights and those that are embedded in the determination procedures are not independent. The Bill only allows access to onshore merits review in exceptional cases and provides no access to judicial review. Any steps that limit access to review have the potential to deny legitimate refugees access to protection.
- A broad range of independent health professionals, lawyers and advocates have expressed serious concerns regarding the lack of opportunities for contact with detainees and for independent scrutiny of detention conditions in Nauru under the Pacific Solution. We understand that the caseload of asylum seekers previously held on Nauru and now granted access to the Australian mainland have been found to have developed extreme and complex mental health difficulties during the period of their offshore detention. Given its failure to allow for any independent scrutiny of conditions on Nauru, it appears that the current Bill would replicate these problems.
- Under the current Bill, decision-makers would not be subject to any of the performance standards, including timeframes for decisions, to which onshore decision-makers are now held. As such, it is possible that detainees will be subjected to far longer waiting periods for immigration decisions than their onshore counterparts. In our experience, being subjected to lengthy and indeterminate waiting periods for immigration decisions greatly increases the levels of anxiety and despair commonly suffered by already traumatised asylum seekers.
- We understand that, under the current Bill, Australia accepts no obligation towards asylum seekers found to be refugees other than to investigate whether a third country will accept them for resettlement. Given that other countries are likely to perceive Australia as the country which holds primary protection obligations to any such individuals, refugees may well be left without a durable solution for extended periods and be exposed to all of the problems associated with refugee warehousing.
- The Bill envisages that any unauthorised boat arrivals reaching Australia on or after 13 April whose asylum applications have not been finalised at the time of its passage, will have their applications cancelled and will be forcibly removed to Nauru, for offshore processing. The arbitrariness of this approach is deeply concerning and we can only imagine that such a scenario would prove horrendously traumatising for the individuals in question.
- The current Bill does not include safeguards to mitigate against interception or interdiction of boats by Australian naval or coastguard vessels.

- The UNHCR has expressed concern regarding the offshore processing proposal in the following terms: *“If this were to happen, it would be an unfortunate precedent, being for the first time, to our knowledge, that a country with a fully functioning and credible asylum system, in the absence of anything approximating a mass influx, decides to transfer elsewhere the responsibility to handle claims made actually on the territory of the state.”*<sup>5</sup> If other countries were to enact similar systems, the impact upon our international system of refugee protection could be catastrophic.

This submission has been authorised by the Asylum Seekers Centre Board.

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UNHCR media release, 18/04/06, Geneva