UNHCR
United Nations High Commissioner for Refugees
Haut Commissariat des Nations Unies pour les réfugiés

MIGRATION AMENDMENT (DESIGNATED UNAUTHORISED ARRIVALS) BILL

Submission of the Office of the United Nations High Commissioner for Refugees to the Senate Legal and Constitutional Legislation Committee

A. INTRODUCTION

1. The Senate Legal and Constitutional Legislation Committee has invited comments on the *Migration Amendment (Designated Unauthorized Arrivals) Bill 2006* ("the Bill"). The Office of the United Nations High Commissioner for Refugees ("UNHCR") welcomes the opportunity to comment on the Bill insofar as it impacts on Australia's international obligations as they relate to asylum-seekers and refugees.

2. UNHCR is concerned that the proposed off-shore processing measures will detract from Australia's responsibilities, as a State party to the 1951 Convention relating to the Status of Refugees ("the 1951 Convention"), to put in place a system which reliably identifies refugee status and protection requirements, as well as offers timely opportunities for proper and appropriate solutions. Australia, like other comparable State parties, normally implements these responsibilities by providing asylum-seekers arriving on its territory with access to a full and efficient refugee status determination process, carried out on its territory, which abides by due process requirements for applicants, including access to legal guidance and representation, as well as the possibility of appeal to Australia's Refugee Review Tribunal ("RRT") and national courts. The proposed new arrangements would deviate significantly and negatively from this long standing practice, which has been endorsed as the right approach by UNHCR's Executive Committee ("EXCOM"), of which Australia is a member, and represents the norm in all countries in the developed world. In addition UNHCR is concerned by the likelihood that the new off-shore processing system will preclude asylum-seekers, and indeed those recognised through the system, from being able to stay in proper and decent conditions which respect basic rights like family unity.

3. UNHCR understands that the Bill, by extending the off-shore processing regime to cover all designated unauthorised arrivals, will expose those affected to lesser procedural safeguards in the determination of their asylum claims, thus heightening the risk of *refoulement,* which would, if refoulement occurs in future, be a clear breach of Article 33 of the 1951 Convention. In addition, the Bill risks being incompatible with the 1951 Convention in relation to the following additional provisions: Article 3 concerning non-discriminatory treatment of refugees based on, *inter alia*, country of origin; Article 16 concerning free access of refugees to courts of law in the territory of the Contracting State; and Article 31 insofar as an unauthorised boat arrival may be coming from a territory where his/her life or freedom was threatened in the sense of Article 1A (2) of the 1951 Convention.

4. From the *Financial Impact Statement* in the *Explanatory Memorandum* for the Bill, and from the Second Reading Speech, it is clear that Australia proposes that the off-shore processing of

unauthorised boat arrivals take place in Nauru, where UNHCR understands that the facilities are currently being refurbished for this purpose.

5. It is the opinion of UNHCR that the experience gained from off-shore processing on Nauru, introduced by Australia in October 2001, should not be considered the "outstanding success" it is characterised as in the Second Reading, but to the contrary has resulted in prolonged detention-like situations of asylum-seekers and refugees alike, as well as extended separation of families. The practice is also known by UNHCR to have contributed to serious mental health problems.

6. With regard to the proposal that those taken to Nauru for off-shore processing be resettled in countries other than Australia, UNHCR is concerned that this creates the possibility of refugees being unable to find durable solutions in a timely manner.

7. Overall, what this amounts to, in UNHCR's assessment, is a set of proposals which are not in accordance with the object and purpose of the 1951 Convention, to which Australia was among the first to accede, and which, amongst others, seeks to ensure that the protection needs of refugees are addressed and solutions are found in appropriate and timely ways, in full respect for the rights and freedoms of the people affected and in a way which takes proper account of the circumstances they have already suffered and the need to avoid any further penalisation.

8. UNHCR takes this opportunity to reiterate its offer to cooperate with Australia in developing a response to the problem of irregular arrivals, including refugees, which would strike an appropriate balance between security and border control concerns - the significance of which UNHCR fully appreciates - with Australia's responsibility to provide protection. UNHCR urges Australia to consider such alternatives to the present Bill.

B. UNHCR STANDING TO COMMENT

9. Australia has assumed responsibility to extend protection to refugees through accession to the 1951 Convention. Insofar as refugees are asylum-seekers prior to their being recognized as refugees, such responsibility also extends to asylum-seekers.

10. Pursuant to its Statute[1] and the 1951 Convention, UNHCR's competence to provide for the protection of refugees extends, *inter alia*, to encouraging the development of laws and regulations concerning refugees which are consistent with international protection requirements. Article 35 of the 1951 Convention obligates States Party to cooperate with UNHCR in its duty of supervising the application of the provisions of the 1951 Convention, which is also reflected in the Preamble to the 1951 Convention. On this basis, UNHCR is regularly requested to comment on national legislation regarding refugees and related issues by States Party to the 1951 Convention.

11. In this context, UNHCR is concerned that the Bill was shared with the organization only after it was tabled, precluding any effective possibility for the observations of UNHCR to be considered in any meaningful way, prior to the Bill being presented to parliament. General briefings by senior officials of the Department of Immigration and Multicultural Affairs,

[1] General Assembly Resolution 428(V), 14 December 1950: Statute of the Office of the United Nations High Commissioner for Refugees.

which did take place prior to the tabling of the Bill, cannot be a substitute for discussion on the basis of the actual provisions.

12. This comment examines the Bill in light of relevant international instruments and Conclusions of UNHCR's governing body, the Executive Committee of the High Commissioner's Programme, of which as mentioned earlier, Australia is a member.

C. COMMENTS ON THE AMENDMENTS

13. New sub-section 46A (1) expands upon the categories of persons who will not be permitted to make an application for visas unless granted an exemption by the Minister. Sub-section 198A (1) allows such persons to be taken to another country for the processing of their refugee claims. Given the broadly similar impact of this legislation on the rights of asylum-seekers and refugees as that of the *Migration Legislation Amendment (Further Border Protection) Bill 2002,* UNHCR wishes to refer to, and incorporate, its previous submission on that legislation.[2] It should be noted that, with the passage of four years since the "Pacific Solution", a number of concerns not readily appreciated at that time, and not evident until after implementation of the legislation, have emerged.

International Obligations

14. The Bill expands the practice of removing persons from the territory of Australia. UNHCR submits that treatment of such removed persons must be in accordance with Australia's international protection responsibilities which include the following:

    a. Respect for the principle of *non-refoulement* and the right to seek and enjoy asylum.[3]

    b. A proper process to accurately identify those in need of international protection. In this connection, EXCOM has repeatedly promoted that this process be by way of full and effective procedures for determining refugee status.[4]

    c. Treatment which respects basic and internationally agreed human rights and refugee protection standards, notably those contained in the 1951 Convention.

15. Paragraphs 3, 5 and 6 above are particularly relevant in setting out UNHCR's concerns. A fundamental problem in being more specific here lies in the fact that UNHCR has not sighted the agreement reached between Australia and Nauru, which is presumably the basis for the actual treatment persons who are transferred to Nauru under the law will receive. UNHCR has asked to see the terms of this agreement as it relates to the treatment of the asylum-seekers and refugees. The agreement might also clarify whether the off-shore processing

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[2] See http://www.unhcr.org.au/pdfs/amendprotectbill.pdf

[3] Article 33 of the 1951 Convention prohibits *refoulement* of 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." Article 14(1) of the 1948 Universal Declaration of Human Rights provides that "everyone has the right to seek and to enjoy in other countries asylum from persecution".

[4] EXCOM Conclusions adopted by consensus among members including Australia which specify these standards include: Conclusion No. 81 (1997), Conclusion No. 82 (1997) and Conclusion No. 85 (1998).

regime is in the form of a transfer of responsibilities to Nauru, or in the form of extraterritorial processing by Australia. Differing legal considerations arise depending upon which framework is used to structure the off-shore processing regime.

Off-shore asylum processing regime

In regard to transfer of responsibilities:

16. UNHCR recognizes that the 1951 Convention does not explicitly require that the determination of refugee status has to take place within the territory of the country where the claim is lodged and that a transfer of responsibilities is permissible. However, such transfer of responsibilities should normally only be envisaged as between States with comparable protection systems, on the basis of an agreement which clearly outlines their respective responsibilities, and which at least guarantees the standards of protection afforded by the transferring State. Otherwise, such transfer of responsibilities may fall short of the international protection obligations assumed by the transferring state. A good example of an arrangement for the transfer of responsibilities for asylum-seekers, and one which is the most often cited, is the Dublin II Regulation of the European Union[5]. This arrangement respects the aforementioned parameters.

17. The criteria set out for the Minister's declaration of a country for transfer in Subsection 198(A) would not satisfy the parameters in that they would not seem to be sufficient to ensure that the standards of protection afforded in Australia are those that will be the standards met in the territory of transfer. Of particular concern is the absence, among these criteria, of the requirement that the principle of *non-refoulement* to be respected by the declared country, and that the declared country be a signatory to the 1951 Convention. Where the declared state retains its sovereignty over its territory, absent such requirements, there is no guarantee that international Convention obligations assumed by and respected in Australia will be similarly respected in the declared state.

In regard to extra-territorial processing:

18. In regard to extra-territorial processing, which presumes that Australia retains jurisdiction and control over the facilities, the individuals concerned, and procedures applied, Australia is deemed to retain its primary responsibility to ensure the international protection of those transferred to the declared country in accordance with obligations and responsibilities it has assumed and grants in Australia. Given that Australia retains primary responsibility for determining asylum claims, the procedures applicable in Australia to other arrivals should also be applicable to those in the off-shore processing centre.

19. However, under the framework of the proposed Bill, the off-shore processing regime bars individuals from appealing to the RRT, as well as bars them from accessing the national courts of Australia. Barring access to the RRT and national courts would seem to be a serious flaw in the off-shore processing regime, given that the RRT and the national courts of Australia, being independent of DIMA, are key bodies guaranteeing the accuracy of asylum decisions and therefore important legal safeguards against *refoulement*. The merits review process put in place cannot be an adequate substitute for access to the RRT and national

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[5] Council Regulation (EC) No. 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national.

courts. The likely end result is that there is a heightened risk that refugees may be *refouled*. The availability of other safeguards in the processing of claims, such as legal representation and counselling also needs to be clarified. If these elements are also not guaranteed, the procedures fall additionally short and the risk of *refoulement* of cases is further heightened.

Reception Conditions

20. EXCOM Conclusion No. 93 [6] sets out a number of recommendations in regard to standards for reception of asylum-seekers. These include respect for human dignity and applicable international human rights law and standards; gender and age-sensitivity including meeting the needs of children and women with specific needs; family unity; and a degree of self-reliance. The off-shore asylum processing regime does not meet the standards which the EXCOM espouses. As mentioned above, Australia is a member of the EXCOM which has adopted these standards. UNHCR promotes reception conditions based on these standards set by the EXCOM. Australia's actions tend to undermine the EXCOM's authority.

Fair and efficient asylum procedures

21. Concerning the question of whether or not asylum-seekers removed to a declared country will have access to a "fair and efficient" asylum procedures, the following are points of concern:

    a. No provision for legal assistance;

    b. No access to *independent* merits review of negative decisions on refugee status;

    c. No access to Australian courts of law; and

    d. No legal requirement for the Minister to report to Parliament on cases that take more than 90 days to process.

    It certainly might be questioned, in UNHCR's assessment, whether such discrepancies between what is available on-shore and what is envisaged for off-shore processing will amount to a procedure which handles off-shore claims fairly and efficiently.

22. UNHCR recognizes that the "minimum" procedural standards articulated by EXCOM, are very well respected by Australia in its on-shore refugee status determination processing. What UNHCR is suggesting is that this off-shore asylum processing system holds itself to lesser standards than onshore processing. To reiterate the point made in UNHCR's 2002 submission to this same Committee, "If lesser standards relating to procedures or lesser status accorded under these procedures are envisaged due to the nature of arrival of asylum-seekers, this would not be in accord with international protection obligations".

UNHCR "model" procedures

23. The *Explanatory Memorandum* accompanying the Bill at paragraphs 6 and 59 suggests that the proposed procedures for refugee status determination in off-shore processing centres will be "modelled closely on that used by UNHCR". As earlier noted, UNHCR does not have

[6] EXCOM Conclusion No. 93, 2002, "Conclusion on Reception of Asylum-Seekers in the Context of Individual Asylum Systems".

sight of the Nauru/Australia agreement, and the current Bill does not outline in detail the asylum procedures to be implemented. In the absence of the details, UNHCR is unable to assess the extent to which the procedures to be implemented will indeed respect UNHCR's own processes under its Mandate. However, it is seriously to be questioned, in UNHCR's view, whether Australia has chosen the correct model, given the qualitative differences between the processes of a state and an international organization, with the limits the latter entails, together with the fact that an organization, obviously, is not a state with capacity to provide for protection and solutions. Clearly the more appropriate model would be that of a State, in particular Australia itself. This being said, UNHCR does have clear and detailed procedural guidelines, including in relation to issues such as giving the benefit of the doubt, the burden of proof, and the evidence which carries weight. Before it could be said that UNHCR's processes are the "model", all these safeguards and standards would have to be built into the system. It is not clear that this would be the case.

24. UNHCR does not take this reference to its processes as a suggestion that UNHCR assesses the applications. Were this to be the case, however, UNHCR would like to express its disinclination to participate in such an off-shore scheme, as it is currently understood by UNHCR. While UNHCR does undertake refugee status determination under its mandate, this is normally undertaken in situations where signatory States have no resources or capacity to conduct the exercise, or where a State is not signatory to the 1951 Convention, thus requiring that UNHCR undertakes refugee status determination in order to ensure the protection of refugees. In the context of extraterritorial processing by Australia, given that Australia is a long-time signatory to the 1951 Convention and has in place its own procedures, these procedures should be applied.

Penalization of unauthorized arrivals [7]

25. The *Explanatory Memorandum* makes clear that the off-shore asylum processing regime serves a deterrent purpose.[8] Subjecting all unauthorized arrivals by sea to differential treatment which abides by lesser standards as a deterrent measure is arguably an imposition of penalties on this category of persons.[9] Such penalization could amount to a breach of

[7] Article 31 of the 1951 Convention (Refugees unlawfully in the country of refuge):

> (1) The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory, without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.
> (2) The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary, and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The contracting State shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.

[8] "[The Bill] is designed to operate as a disincentive to people who arrived on the mainland unauthorised by boat to defeat the existing excision provisions". *Explanatory Memorandum* to the Migration Amendment (Designated Unauthorised Arrivals) Bill, 2006. at paragraph 21.

[9] In relation to the International Covenant on Civil and Political Rights, the Human Rights Committee, in a case concerning Canada, noted the following: "…The parties have made extensive submissions, in particular as regards the meaning of the word "penalty" and as regards relevant Canadian law and practice … the meaning of the work "penalty" in Canadian law is not as such, decisive. Whether the word

Article 31 of the 1951 Convention where it impacts those arriving directly from a place of danger.

26. This is particularly the case if conditions in the declared country involve treatment which is seriously discriminatory when compared to that of on-shore arrivals.

Non-justiciable decisions on unauthorized entry

27. Insofar as the proposed Bill will prohibit the institution or continuation of court proceedings relating to an unauthorized entry by a "designated unauthorized arrival", it would be inconsistent with Article 16 of the 1951 Convention[10]. Article 16 is non-derogable, and obligates States to ensure refugees free access to the courts of law in their territory. Denying asylum-seekers access to courts to adjudicate issues relating to their unauthorized arrival would effectively bar unauthorized arrivals from challenging the declaration of the Minister in regard to a country for transfer.

Enjoyment of Convention rights and durable solutions

28. The proposed legislative changes do not clarify the situation as regards those recognized as refugees. Individuals recognized as refugees should be able to access durable solutions and in the interim enjoy their rights under the 1951 Convention. Based on past precedents, there is risk that those recognized as refugees on Nauru pursuant to off-shore processing arrangements, if barred from a durable solution in Australia, would be compelled to remain for a prolonged period under unacceptable conditions in the off-shore processing country pending a durable solution. For women and children, the situation can be particularly harsh.

"penalty" in article 15(1) should be interpreted narrowly or widely, and whether it applies to different kinds of penalties "criminal" and "administrative", under the Covenant, must depend on other factors. Apart from the text of article 15(1), regard must be had, *inter alia*, to its object and purpose." Van Duzen v Canada, Communication No. 50/1979, UN doc. ICCPR/C/15/D/50/1979, 7 April 1982, para. 10.2 Nowak, in his commentary on the ICCPR, refers to the term "criminal offence:" in Article 14 of the ICCPR, and argues that "every sanction that has not only a preventive but also a retributive and/or deterrent character is to be termed a penalty…" M. Nowak, UN Covenant on Civil and Political Rights – ICCPR commentary (Engel Verlag, Kehl am Rhein, Strasbourg, Arlington, 1993,; pg. 278). More generally, refer to the article by Guy S. Goodwin-Gill on "Article 31 of the 1951 Convention relating to the Status of Refugees: non-penalization, detention, and protection", in "*Refugee Protection in International Law*", UNHCR' s Global Consultations on International Protection; ed. by Feller, Turk and Nicholson; Cambridge University Press, 2003.

[10] Article 16 of the 1951 Convention (Access to Courts):

"(1) A refugee shall have free access to the courts of law on the territory of all Contracting States.
(2) A refugee shall enjoy in the Contracting State in which he has his habitual residence the same treatment as a national in matters pertaining to access to the Courts, including legal assistance and exemption from *cautio judicatum solvi.*
(3) A refugee shall be accorded in the matters referred to in paragraph 2 in countries other than that in which he has habitual residence the treatment granted to a national of the country of his habitual residence."

Precedent within the region and elsewhere

29. The draft legislation would, UNHCR fears, create a negative precedent for other States, particularly in the South Pacific. State capacity for asylum and local integration is limited in the South Pacific, but a number of States have acceded to the 1951 Convention (Fiji, Papua New Guinea, Samoa, Solomon Islands and Tuvalu) and progress is being made with regard to establishing domestic asylum systems on a proper legislative basis. Australia is looked to in the region by way of example. An off-shore regime, particularly one offering lower standards of treatment and fewer protection safeguards than an on-shore process, is not a good precedent in UNHCR's view. It would be most regrettable if this were to become a model for the regime where asylum and refugee protection are emerging concepts. It would work to undermine, rather than support, the 1951 Convention in the region, and possibly beyond.

C. CONCLUDING REMARKS

30. UNHCR remains ready to participate in any further dialogue on the various matters raised insofar as they relate to the protection of asylum-seekers and refugees, and again thanks the Senate Legal and Constitutional Legislation Committee for this invitation to comment on the *Migration Amendment (Designated Unauthorized Arrivals) Bill 2006*.

22 May 2006

Questions on Notice

Ref: 26 May 2006 Hearing of the
Senate Legal and Constitutional Legislation Committee
Regarding the *Migration Amendment (Designated Unauthorised Arrivals) Bill 2006*

Question 1 (p. 4 *Proof Hansard*)

The Government of Papua New Guinea, in accordance with article 42 paragraph 1 of the 1951 Convention relating to the Status of Refugees, made a reservation with respect to the provisions contained in articles 17 (1) (Wage Earning Employment), 21 (Housing), 22 (1) (Public Education), 26 (Freedom of Movement), 31 (Refugees Unlawfully in the Country of Refuge), 32 (Expulsion) and 34 (Naturalization) of the Convention and does not accept the obligations stipulated in these articles.

Whereas previously UNHCR understood that the Government of Papua New Guinea was considering removing its reservations to all but articles 26 and 34, UNHCR is currently informed that the Government of Papua New Guinea is engaging in inter-ministerial consultations with regard to removing its reservations to all seven of the above-mentioned articles.

In practice, since the establishment of "Permissive Residence" which has allowed recognized refugees freedom of movement within Papua New Guinea, refugees have been able to move freely about the country, and have access to wage earning employment, housing and public education.

Question 2 (p. 5 *Proof Hansard*)

With regard to the request for the percentages of asylum-seekers processed by the Government of Australia accepted as refugees broken down by sea versus air arrivals, pursuant to discussions between UNHCR and the Department of Immigration and Multicultural Affairs (DIMA), DIMA has kindly agreed to provide the answer to this question.

Question 3 (p. 8 *Proof Hansard*)

There is no Convention provision relating to "deportation".

However, Article 32, which relates to "Expulsion" is among those articles to which the Government of Papua New Guinea has made a reservation (see reply to Question 1 above).

Article 32 reads as follows:

"***Article 32. Expulsion***

1. The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.

2. The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.

3. The Contracting States shall allow such a refugee a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary. "

To UNHCR's knowledge, since 2003, no person who has manifested a request to seek asylum has been expelled from Papua New Guinea. Notwithstanding Papua New Guinea's formal reservation to article 32, UNHCR considers Papua New Guinea's current practice to be in conformity with its provisions.