Submission by the Human Rights Commission

Immigration Amendment Bill 2012

to the Transport and Industrial Relations Committee

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The Commission wishes to appear before the Committee

Submission of the Human Rights Commission on the Immigration Amendment Bill 2012

1. In April 2012 the Government introduced the Immigration Amendment Bill (**Bill**) to deter people smuggling and to enable the effective and efficient management of a mass arrival of "illegal immigrants". The measures proposed in the Bill have shocked the Refugee and Immigration sector domestically and internationally. The Bill is a setback to New Zealand's longstanding human rights record and international reputation.

2. The New Zealand Human Rights Commission (**Commission**) welcomes the opportunity to make a submission on the Bill and wishes to appear before the Committee to speak to its submission.

3. The Government has a right and a duty to protect its borders and to take action against people smuggling. However, the Bill achieves neither and proposes measures which breach New Zealand's obligations under the Refugee Convention 1951 (and the 1967 Protocol) and international human rights instruments to which New Zealand is a party. In addition the Bill imposes unjustifiable limits on fundamental rights codified in the New Zealand Bill of Rights Act 1990 (**BORA**). International experience has shown that measures such as those proposed do not work and lead to significant negative social and human consequences.

4. The Immigration Act 1987 recently underwent a significant review over several years with extensive public input and consultation resulting in an overhaul of the legislation. The resulting legislation (the Immigration Act 2009) has sought to achieve the appropriate balance between rights protections and border control and security. Some of the key changes to the Immigration Act, such as the codification of complementary protection and the introduction of residence and reporting agreements as an alternative to detention, have been welcomed internationally and are regarded as good practice models. Both the Immigration Act and New Zealand's refugee and immigration jurisprudence are considered as progressive and illustrate the careful balance that can be achieved in the immigration space to ensure that rights are protected.

5. The Bill risks unravelling the positive gains that have been made in New Zealand and will undoubtedly result in negative comment from United Nations bodies and other international organisations. The Bill has already been criticised by the likes of the Office of the United Nations High Commissioner for Refugees (UNHCR), the Australian Refugee Council, the Asia Pacific Refugee Rights Network, and the International Detention Coalition.

6. On 25 and 26 May 2012, the Commission organised Roundtables on the Bill in Wellington and Auckland. Participants drawn from international and domestic non-governmental organizations (NGOs), Migrant and Refugee Service providers and organisations, the Immigration Bar and academia took part. The overwhelming message from these meetings was that the Bill is unnecessary and a mass arrival (the stated concern driving the Bill) could be more appropriately dealt with within the existing framework.

7. The Commission opposes the Bill for the following reasons:

- the rationale for the Bill is flawed;
- the Bill breaches New Zealand's international obligations;
- the policy proposals enabled by the Bill breach New Zealand's international obligations and are discriminatory in nature; and
- the Bill unjustifiably limits rights protected by BORA.

The Rationale for the Bill

8. The Commission is concerned about three aspects of the rationale for the Bill:

- the basis for the modelling of the policy;
- the presumption made about the legality of mass arrivals; and
- the presumption that tough measures and penalties deter people smuggling.

The modelling of the policy

9. The Bill's Regulatory Impact Statement (RIS) states that the policy has been developed on the basis that a mass arrival would place undue burden on the Refugee and Protection determination process and the courts. In assessing the impact of a mass arrival the following assumptions have been made:

   a. a boat carrying 500 asylum seekers will arrive on New Zealand's shores; and

   b. 62 percent would be declined following assessment by designated refugee and protection officers;

10. The RIS assumes that 500 people would be involved in a mass arrival. This figure is presumably based on the MV Sun Sea which carried 490 Tamil asylum seekers to Canada. It is assumed that if this can occur in Canada it can occur in New Zealand. However, a boat carrying asylum seekers has never reached New Zealand's shores. By contrast such boats have arrived in Canada sporadically since the 1970s.

11. In addition the number 500 does not reflect the average inflow of "boat people" in the region. In 2010, 4823 people (including crew) arrived in Australia by boat seeking asylum. There were an average of about 50 people (including crew) per boat.[1]

12. The rationale for 62 percent of mass arrivals being declined at first instance also appears to be without sound basis. Presumably this number is drawn from the Australian experience where "about 38 percent of asylum seekers who arrived by sea whose claims were considered and decided in the first instance by officials in 2010-11 were found to be refugees."[2]

13. However, this figure is out of step with previous years' figures where the primary grant rate for irregular arrivals was 100 percent in 2008-09 and 74 percent in 2009-10. Furthermore 74 percent of the primary refusals in 2010-11 were overturned resulting in a final grant rate of 90

[1] Parliament of Australia, *Boat Arrivals since 1976* (2011).
[2] Australian Government, *Asylum Trends 2010-2011 – Annual Publication.*

percent.[3]

14. Given these figures the Commission considers that much less than 62 percent of mass arrivals would be declined at first instance. If such a large proportion were declined at first instance with the final approval rate being more than 90 percent (based on the Australian figures) significant questions would have to be asked about the quality of first instance decision making. Consideration should be given to improving this process to address any burden rather than imposing undue restrictions on irregular arrivals in breach of their human rights.

The legality of mass arrivals

15. The Bill is premised on the idea that those arriving as part of a mass arrival are illegal. However, although their method of arrival on New Zealand's shores may be irregular they are not illegal. Under New Zealand and International Law a person is entitled to make an application for asylum in another country when they allege they are escaping persecution. Article 14 of the Universal Declaration of Human Rights states "Everyone has the right to seek and to enjoy in other countries asylum from persecution".

16. New Zealand has obligations to protect the human rights of all asylum seekers regardless of whether they arrive with or without a visa. As a party to the Refugee Convention, New Zealand must:

    - ensure that people who meet the United Nations definition of refugee are granted asylum; and
    - not impose any penalties on an asylum seeker based on their mode of entry.[4]

17. Furthermore, while New Zealand voluntarily accepts an annual quota of 750 refugees for resettlement, this should not be compared to or conflated with the legitimate and lawful right of asylum seekers arriving at New Zealand's borders to have their claim for refugee status determined, and where appropriate asylum granted. UNHCR's 2011 statistics record over 43 million forcibly displaced people in the world.[5] Less than 1 percent of these will ever be resettled under the UNHCR quota programme.

18. Applying for protection onshore is not a means of "jumping the queue" or bypassing the "correct" process of applying for protection. In fact, applying onshore is the *standard and correct procedure* for seeking protection under the Refugee Convention.

Tough measures as a deterrent

19. The explanatory note to the Bill states that the Bill:

> "contains a range of measures that, combined with associated amendments to Government Immigration Instructions, will enhance New Zealand's ability to deter people-smuggling to New Zealand by making it as unattractive as possible to people-smugglers and the people to whom they sell their services. The measures also enable

[3] The final grant rate was 100 % in 2008-09 and 98% in 2009-10.
[4] Refugee Convention, Article 31.
[5] http://www.unhcr.org/pages/49c3646c4d6.html

the effective and efficient management of a mass arrival of illegal migrants, should one occur, through the use of group warrants and mandatory detention and streamlined refugee and protection claims processes."

20. People smuggling is already a crime under the Crimes Act 1961 and can be punished accordingly. The Bill does nothing to strengthen the penalties imposed on people smugglers and instead unlawfully and inappropriately punishes those vulnerable individuals who are smuggled to escape persecution and seek protection.

21. International evidence has clearly shown that tough immigration policies do not act as a deterrent to people-smugglers. Despite increasingly tough detention policies being introduced in many Western countries over the past 20 years, the number of irregular arrivals has not reduced.[6]

22. The principle aim of asylum seekers and refugees is to reach a place of safety. Most asylum seekers have very limited or no understanding of the migration policies of destination countries before arrival.[7] A key study in Australia assessed whether the use of detention and other penalties was an effective tool for disseminating a message of deterrence. The study found that those refugees who are aware of the prospect of detention before arrival believe it is an unavoidable part of the journey. The study also found that refugees who had been detained on arrival in Australia did not pass on a message of deterrence to their friends and family overseas as the relief of escaping persecution and reaching a place of safety overrode the trauma and sense of rejection they had experienced as a result of detention.[8]

23. The UN Guidelines on Detention of Asylum Seekers[9] make it clear that detention of asylum seekers as part of a policy to deter future asylum seekers is contrary to the principles of international protection.

24. The Australian experience clearly shows that mandatory detention does not act as a deterrent and is extremely costly both in human and financial terms. In 2011 the cost of detention in

[6] Edwards, A (2011). *Back to basics: The right to liberty and security of person and 'alternatives to detention of asylum seekers, stateless persons, and other migrants*. UNHCR Legal and Protection Policy Research Series. Geneva: UNHCR.

[7] Robinson, V., & Segrott, J. (2002). *Understanding the decision-making of asylum seekers.* London: Home Office. http://rds.homeoffice.gov.uk/rds/pdfs2/hors243.pdf.

[8] Havinga, T., & Bocker, A. (1999). Country of asylum by choice or by chance: Asylum-seekers in Belgium, the Netherlands and the UK. *Journal of Ethnic and Migration Studies, 25*(1), pp 43-41; Richardson, R. (2009). *Sending a strong message? The refugee's reception of Australia's immigration deterrence policies.* Unpublished PhD thesis. Charles Sturt University; Richardson, R. (2010). Sending a message? Refugees and Australia's deterrence campaign *Media International Australia*(135), 7-18; Robinson, V., & Segrott, J. (2002). *Understanding the decision-making of asylum seekers*. London: Home Office. Retrieved 16.06.2010 at http://rds.homeoffice.gov.uk/rds/pdfs2/hors243.pdf.

[9] UNHCR's Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers at http://www.unhcr.org/refworld/pdfid/3c2b3f844.pdf.

Australia was $137,317[10] per year per person. By contrast community based processing is up to 90 percent cheaper.[11]

The Bill breaches New Zealand's International Obligations

25. The Bill raises significant human rights concerns and is in breach of a number of New Zealand's international obligations. The Commission is concerned by the manner in which the Bill undermines these fundamental rights and principles. The Commission considers three aspects of the Bill to be particularly problematic:
    - the detention provisions;
    - the suspension of refugee and protection claims; and
    - the removal of some rights to appeal and review.

Detention Provisions

26. In broad terms the Bill:

- establishes a definition of mass arrival group; and

- allows for the mandatory detention of mass arrivals, under a group warrant, for an initial period of up to 6 months.[12]

27. A mass arrival is defined in the Bill as a group of more than 10 people who arrive in New Zealand on board the same craft, on board the same group of craft at the same time, or on board the same group of craft and within such a time period or in such circumstances that each person arrived, or intended to arrive, in New Zealand as part of the group.

28. Clause 12 of the Bill inserts new sections 317A to 317E to the Immigration Act 2009 to enable an Immigration officer to apply to the District Court for a group warrant of commitment authorising the detention, for a period of not more than 6 months, of members of a mass arrival group. Where an application is made and certain criteria are met a judge must grant the warrant of commitment. The discretion available to a judge under the current legislation to release an individual with or without conditions has been removed.

29. Although an immigration officer retains some discretion in relation to whether to apply for a group warrant, this discretion is an empty one. The requirements to apply for a warrant of commitment for mass arrival (under a group warrant) are conditions which would inevitably exist in any such arrival. Although drafted as a may this does not allow for any real discretion and in practice will effectively result in mandatory detention for this group. This approach is reflected in the explanatory note to the Bill which states that the Bill "allows for the mandatory detention under a group warrant."

[10] http://www.immi.gov.au/managing-australias-borders/detention/facilities/statistics/
[11] The Red Cross estimates it costs them $11,248 per year per person for community based asylum seekers. This is in comparison to the cost of $137,3173 per year per person in immigrationdetention.
[12] With further periods of detention available for up to 28 days with court approval, or release on conditions.

30. Clause 14 of the Bill inserts a new section 324A to the Immigration Act 2009 removing the right of an individual to apply with leave of the District Court to vary a warrant of commitment or to be released on conditions. The Bill reserves the right to apply for a review of a group warrant to immigration officers.

31. International law clearly sets out the permissible purposes and conditions of immigration detention. It is a fundamental human right that no one shall be subject to arbitrary or unlawful detention. This means that detention must not only be lawful but must be necessary, reasonable and proportionate. It can only be justified when other less invasive and restrictive measures have been considered and found insufficient to safeguard the lawful objective. Criminalising illegal entry or irregular stay would exceed the legitimate interest of States.[13]

32. In relation to asylum seekers the UN guidelines on detention of asylum seekers state that detention of asylum seekers is only a legitimate purpose where it relates to verification of identity or the protection of national security or public order. Even then it must only be used as a matter of last resort and on exceptional grounds - after all possible alternatives to detention have been exhausted and for the shortest time possible.

33. The right to seek asylum is not an unlawful act and detention for the mere fact of having sought asylum is unlawful. International refugee law prohibits penalties imposed on refugees on account of their illegal entry or presence, which includes automatic forms of detention.[14] Using detention to penalise refugees for irregular entry into a country contravenes New Zealand's obligations under Article 31 of the Refugee Convention. The UNHCR has confirmed that detention, as part of a policy to deter future asylum seekers, is contrary to the principles of international protection.

34. Refugees lawfully staying in the territory have the right to enjoy freedom of movement and choice of residence.[15] Therefore, systematic detention of refugees and asylum-seekers is incompatible with international refugee and human rights law.

35. The use of detention for an initial 6 month period (and beyond) raises issues relating to the enjoyment of other rights to which asylum seekers are entitled such as health and education. Evidence from Australia shows the long-term adverse health and social impacts of detaining asylum seekers.

36. The Convention on the Rights of the Child provides specific international legal obligations in relation to children. In addition to detention only being used as a matter of last resort and for the shortest time possible, conditions of detention must respect the rights of children and in particular promote the best interests of the child. The Bill does not specifically address the rights of the child in its framework.

[13] Working Group on Arbitrary Detention, Report to the Seventh Session of the Human Rights Council, A/HRC/7/4, 10 January, 2008, para. 53.
[14] Article 31 of the 1951 Convention relating to the Status of Refugees.
[15] Article 26 of the 1951 Convention relating to the Status of Refugees.

The suspension of refugee and protection claims

37. Clause 7 of the Bill enables regulations to be made to allow the suspension of a refugee or protection claim. The period for which such a suspension can be made and on what grounds is unclear from the Bill.

38. The blanket suspension of applications from nationals of specific countries without providing them protection is discriminatory[16] and violates the right to seek asylum as guaranteed by the Universal Declaration of Human Rights. Even if human rights conditions have improved or are improving in a country of origin, a state is still required under international law to provide individuals with an opportunity to claim protection and asylum and to have their claim promptly determined.

39. The suspension of refugee and protection claims will place individuals in a state of limbo where they face uncertainty about their ability to remain in New Zealand. This will contribute to poor settlement outcomes and have a significant effect on the social and mental wellbeing of individuals concerned.

Review and Appeal rights

40. The right to justice is fundamental to international human rights law. The right to justice is referred to in the International Covenant on Civil and Political Rights (**ICCPR**)[17] and affirmed by customary international law. Article 2 of the ICCPR provides in relevant part that state parties must:

> (a) ensure that any person whose rights or freedoms as herein recognised are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
>
> (b) ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
>
> (c) ensure that the competent authorities shall enforce such remedies when granted.

41. The right to judicial review of a determination made by a public authority is a long standing principle of New Zealand's legal system and has been codified in BORA.[18]

42. In addition, the notion that decision-makers, including judges, should abide by the principles of natural justice is a common law principle. Natural justice requires that an individual has the right to be heard.

43. Contrary to New Zealand's international obligations the Bill limits the right to be heard before the Immigration and Protection Tribunal for subsequent refugee or protection claims

[16] Article 7 of the Universal Declaration of Human Rights.
[17] The ICCPR underscores the right to impartial and independent justice, cornerstones of the right to justice. For example, see Articles 13 and 14.
[18] New Zealand Bill of Rights Act 1990, s 27(2).

made on the basis of a significant change in circumstances. It also limits certain rights of judicial review.

The Policy proposals

44. The Bill enables two policy proposals that unjustly penalise mass arrivals:

    - the reassessment of a grant of refugee status after three years with permanent residence not granted until that reassessment has occurred; and
    - limited availability of family reunification to immediate family.

45. Individuals forming part of a mass arrival are precluded from gaining permanent residence until after a reassessment of their claim for refugee or protected person status. This reassessment will take place three years after the initial grant.

46. Such a policy is incompatible with New Zealand's obligations under Article 34 of the Refugee Convention which provides that:

    > "The contracting States shall as far as possible facilitate the assimilation and naturalization of refugees. They shall in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings."

47. The uncertainty of status resulting from this measure will contribute to negative health and social consequences as well as poor settlement outcomes. Questions have also been raised about the equal access to services that will be available to individuals caught by this proposal.

48. The second policy proposal limits the availability of family reunification for individuals who formed part of a mass arrival to immediate family.

49. Family reunification is a fundamental principle of refugee protection. It derives directly from the right of the family to protection by society and the State, codified in Article 23 of the ICCPR. Family reunification is critical to effective settlement and the right to family unity is considered by the UNHCR to be a fundamental aspect of effective protection.

50. The UN Human Rights Committee has acknowledged, when commenting on the term "family" under the ICCPR that a broad interpretation needs to be given to include all those comprising the family in a given society or community. The proposed change fails to acknowledge this and unduly limits the scope of family reunification for this group.

51. Both these policy proposals penalise individuals based on the mode of arrival in New Zealand in breach of Article 31 of the Refugee Convention. They effectively create a second class of refugees who will face increased and unjustified barriers to successful settlement.

The Bill unjustifiably limits rights protected by BORA

52. The long title to the BORA describes it as an Act to "affirm, protect and promote human rights and fundamental freedoms in New Zealand." The Bill impacts on the right to be free from arbitrary detention: s22.

53. Section 22 of BORA recognises that there are circumstances in which it will be necessary for the state to detain individuals but that there are limits on the legitimate use of state power for that purpose.

54. Arbitrariness is not to be equated with unlawfulness, but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability. The jurisprudence of the UN Human Rights Committee indicates that, to avoid the taint of arbitrariness detention must be a proportionate means to achieve a legitimate aim, having regard to whether there are alternative means available which are less restrictive of rights.[19] In general terms:

    - detention must be for a legitimate and authorised purpose;
    - must be a proportionate way to achieve the purpose; and
    - must be limited to a period which is reasonably necessary for that purpose to be carried out.[20]

55. The Ministry of Justice in its advice to the Attorney General concluded that:

> "...there is a legitimate purpose for detention, as detention of multiple individuals under a single warrant for a longer initial period of detention may be justified in the unique circumstances of a mass arrival. These circumstances, coupled with proper safeguards to ensure the detention is necessary and limited to a reasonable period, leads us to conclude that the Bill does not enable arbitrary detention. The Bill, therefore, appears to be consistent with the right to be free from arbitrary detention affirmed in s22 of the Bill of Rights Act."[21]

56. The Commission disagrees with this advice and considers that the detention provisions place a prima facie limit on the right to be free from arbitrary detention which can not be justified.[22]

57. In relation to asylum seekers UN guidelines make it clear that detention is only a legitimate purpose where it relates to verification of identity or the protection of national security or public order. The Bill requires one of these factors to be present, as well as an administrative need, in order for a group warrant to be granted.

58. However, the use of detention must also be a proportionate way to achieve the purpose. It is a well established principle of protection that detention must only be used as a last resort and on

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[19] *A v Australia* (Communication 560/1993), 3 April 1997).
[20] *R v Governor of Durham Prison, ex parte Hardial Singh* [1984] 1 WLR 704, 706 [1984] 1 All ER 983, 985; *Chief Executive of the Department of Labour v Yadegary* [2008] NZCA 295, at [125] & [139].
[21] Ministry of Justice, *Advice to the Attorney General on the Immigration(Mass Arrival) Amendment Bill)*, 3 April 2012.
[22] The rights and freedoms in the BORA are not absolute. They can be limited if the limitation can be "demonstrably justified in a free and democratic society" (Section 5 BORA). The test for deciding whether infringement of a right is justified involves asking whether the objective it seeks to achieve is significant and important and, if this is the case, whether the way it is achieved is rational and proportionate in how it goes about this. (Blanchard J. *Hansen v R* at Para 79)

exceptional grounds after all possible alternatives to detention have been exhausted (and for the shortest possible time). The Bill does not envisage a consideration of alternatives, nor does it require that the grant of a group warrant be a matter of last resort.

59. The assumptions made in the policy design also have a bearing on the proportionality of the detention measures. The perceived necessity of detention is premised on an artificially high decline rate at first instance and an assumption that 500 people would arrive. The measures are not necessary let alone proportionate for a small group of 10 people. However, the detention measures in the Bill relate to mass arrivals of more than 10 and are not restricted to the 500 number on which they were modelled.

Conclusion

60. Penalising asylum seekers for irregular entry into a country is contrary to New Zealand's obligations under the Refugee Convention. The Commission considers the Bill to be fundamentally flawed and recommends that it does not proceed.

61. There is no need for this Bill. It will harm New Zealand's international reputation and raises serious human rights concerns. The Bill risks eroding the careful balance that has been achieved by the Immigration Act 2009 between the State's right to protect its borders and the State's duty to comply with international instruments.

62. Detention and other penalties have not worked as an effective deterrent to stop boats arriving in Australia. It has also proven to have significant health and social impacts. The detention experience in Australia has been described as an assault on health, human rights and social development.

63. Overwhelmingly evidence shows that placing asylum seekers in the community is much less costly both financially and in human terms, and that the risks of asylum seekers in the community absconding are low. Treating persons with respect and dignity, including due regard to human rights standards throughout the asylum or immigration processes contributes to constructive engagement in that process, including improved voluntary return outcomes.

64. Detention of asylum seekers as part of a policy to deter future asylum seekers is contrary to the principles of international protection.[23] Alternatives to detention – from reporting requirements to structured community release programmes – are a necessary part of any assessment of the necessity and proportionality of detention. Detention must only be used as a matter of last resort and only after all possible alternatives to detention have been exhausted.

65. The current Immigration Act which has only recently been through a major overhaul provides sufficient avenues and mechanisms to deal with a mass arrival situation within a human rights framework. There are alternatives to detention which are less costly, do not overburden the

[23] Including: UN Guidelines on detention of asylum seekers; A. Edwards, *Back to Basics: The Right to Liberty and Security of Person and 'Alternatives to Detention' of Refugees, Asylum-Seekers, Stateless Person and Other Migrants*, UNHCR, Legal and Protection Policy Research Series, PPLA/2011/01.Rev.1, April 2011, available at: http://www.unhcr.org/refworld/docid/4dc935fd2.html; R. Sampson, G. Mitchell and L. Bowring, *There are Alternatives: A Handbook for Preventing Unnecessary Immigration Detention*, International Detention Coalition, Melbourne, 2011, available at: http://www.unhcr.org/4dde23d49.html.

Immigration determination process, respect fundamental human rights and uphold New Zealand's obligations under the Refugee Convention.[24]

66. New Zealand can and should continue to lead the way in the Refugee and Immigration context and develop a response to a mass arrival which strikes the appropriate balance. The Commission would be happy to assist the Government in its considerations of an appropriate response within the current legislative settings, which would include at a minimum:

- a legislated presumption against detention;
- detention being used as a last resort and only after all alternatives have been considered;
- no penalties for irregular arrival;
- equality of rights for all asylum seekers regardless of their mode of arrival;
- full consideration and protection of the rights of children and young people; and
- codified minimum standards of detention reflecting international human rights norms and best practice.

[24] See R. Sampson, G Mitchell and L Bowring, *There are Alternatives: A Handbook for Preventing Unnecessary Immigration Detention*, International Detention Coalition, Melbourne, 2011, available at http://www.unhcr.org/4dde23d49.html