



Submission

from

Amnesty International

New Zealand

on the

Immigration Bill 2007

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Amnesty International, recognising that human rights are indivisible and interdependent, also works to promote all the human rights enshrined in the Universal Declaration of Human Rights and other international standards, through human rights education programs and campaigning for ratification of human rights treaties.

Amnesty International's New Zealand section has approximately 7,500 members and regular donors, and active members in some 30 local community groups, specialist groups and various action networks. At any one time its members are working on cases and issues in approximately 90 countries. The work of Amnesty International's New Zealand members is supported by paid staff and volunteers based in offices in Wellington and Auckland, and the movement's International Secretariat based in London.

Amnesty International is impartial. It is independent of any government, political persuasion or religious creed. It does not support or oppose any government or political system, nor does it support or oppose the views of the victims whose rights it seeks to protect

Amnesty International's policies and plans are discussed and decided at general meetings of the membership and meetings of their elected representatives held every two years (International Councils). In New Zealand their implementation is managed by the Executive Director overseen by an elected Governance Team. Between International Councils the international affairs of Amnesty International are managed by the Secretary General, who reports to an elected International Executive Committee of members from at least seven different countries.

Amnesty International is financed by its worldwide membership and the public. Strict guidelines exist to safeguard its independence of the organisation; AI does not accept government funds for its campaigning work or organisation.

Amnesty International has formal relations with the United Nations Economic and Social Council (ECOSOC), UNESCO, the Council of Europe, the Organization of American States, the Organisation of African Unity, and the Inter-Parliamentary Union.

Amnesty International was awarded the United Nations Human Rights Prize for "outstanding achievements in the field of human rights" on the 30th anniversary of the Universal Declaration of Human Rights. The movement received the Nobel Peace Prize in 1977 for its contribution to "securing the ground for freedom, for justice, and thereby also for peace in the world".

INTRODUCTION

1. Amnesty International New Zealand (AINZ) welcomes the opportunity to make submissions on the Immigration Bill 2007 (the Bill). This submission is focussed on the likely impact of the Bill on the rights and freedoms of asylum seekers and refugees, and its consistency or otherwise with New Zealand's human rights obligations in international law.
2. Broadly speaking, Amnesty International welcomes the provisions of the Bill which:
 - Recognise international human rights conventions including the Convention Against Torture (CAT) and the International Covenant on Civil and Political Rights (ICCPR), although, as explained below, the Bill contravenes these and other conventions in a number of respects;
 - Regularise the status of 'quota refugees'; and
 - Entitle children who are not lawfully in New Zealand to receive an education.
3. However, Amnesty International considers that the Bill is seriously flawed in that it fails to provide for independent oversight of the exercise of executive power. As such, the Bill will seriously undermine public confidence in the fairness of the decision-making process and may lead to cases of serious injustice.
4. Further, many provisions of the Bill as detailed are likely to undermine New Zealand's reputation as a country which strives to protect human rights. Among other things, the Bill does not strike an appropriate balance between the Government's obligation to protect New Zealanders from the risk of harm, and its obligations to ensure that asylum seekers and others protected under international law are accorded a fair hearing and are not arbitrarily detained or returned to face persecution, torture or death.
5. Post September 11 Amnesty International has documented a dramatic

increase in the introduction of legislation that sacrifices human rights for political or economic expediency and in the name of security. Amnesty International has 46 years experience of dealing with the human cost when human rights principles are compromised or ignored. The rule of law is essential for human security, and the strongest adherence to human rights principles is the best guarantee of security.

6. This submission focuses on a number of issues of concern, being the provisions relating to:

- Advanced Passenger Processing;
- the obligations imposed on carriers;
- the detention of children;
- the requirements for granting protected person status;
- the failure to recognise and provide for the absolute character of the CAT and the ICCPR provisions precluding return in cases of risk; and including the broad reasons for declining to consider asylum claims
- the extension of the ability to detain without warrant to a period of up to 96 hours;
- the requirement for classified information to be treated as accurate (even where manifestly inaccurate) in certain contexts;
- the amalgamation of the existing specialist tribunals into the Immigration and Protection Tribunal;
- the provision for extensive powers to deport persons who threaten New Zealand's 'security', in view of the extremely vague and broad definition of that term;
- the unduly broad powers to classify information; and
- the inability of special advocates to initiate proceedings and to participate in the formulation of the summary of allegations presented to clients, or to challenge the decision to classify any information.

Advance Passenger Processing

6. It is proposed that the Advance Passenger Processing system (the APP system), which has been operating for some time, be now provided for in legislation, pursuant to clauses 87 and 89 of the Bill. Notably, clauses 87(4) and (5) prohibit any appeal or judicial review of a decision to prevent individuals without New Zealand citizenship or

residency from boarding a craft bound for this country. This lack of oversight is compounded by clause 87(6), which relieves a decision-maker of any obligation to give reasons for not allowing someone to board a craft for the purposes of travelling to New Zealand.

7. Amnesty International is concerned that these provisions could prevent asylum seekers from being able to exercise their right to seek asylum in this country. Asylum seeker claimants to New Zealand have fallen by 35% between 2005 and the second quarter of 2007. During the same period Australia experienced a 20% increase in asylum applications. These statistics are particularly concerning when one recognises that refugee numbers are increasing for the first time in some years, largely due to the displacement of some 4.2 million Iraqis.¹
8. New Zealand has chosen to ratify the 1951 Convention relating to the Status of Refugees (Refugee Convention) and the 1967 Protocol.² It is not appropriate for this country to enact legislation which undermines the spirit of the Convention and prevents asylum seekers from accessing protection.
9. Further, the APP system has the potential to infringe Article 14 of the Universal Declaration of Human Rights (1948), which provides that, “everyone has the right to seek and enjoy in other countries asylum from persecution”.
10. Amnesty International recognises that Article 14 stops short of requiring States to grant asylum.³ Nonetheless, refusing entry to asylum seekers could exclude them from the international protection they need and may amount to a violation of the fundamental principle of non-

¹ UNHCR Report “Asylum Levels and Trends in Industrialized Countries, Second Quarter 2007”, September 07

² States parties to the Status of Refugees and the 1967 Protocol. NZ acceded to the Convention on 30 June 1960, and to the Protocol on 6 August 1973

³ Hathaway, *The Rights of Refugees Under International Law*, (2005) at p 300 (footnote 113).

refoulement.⁴ UNHCR has noted in this regard that:

States have a legitimate interest in controlling irregular migration and a right to do so through various measures, including visa requirements, airport screening and sanctions imposed on airlines and other group carriers for transporting irregular migrants. When, however, these measures interfere with the ability of persons at risk of persecution to gain access to safety and obtain asylum in other countries, then States act inconsistently with their international obligations towards refugees.⁵

11. A further problem with the APP system lies in the danger that it will be implemented in a discriminatory manner, including in its application to asylum seekers. There is a risk that those responsible for implementing the policy, consciously or unconsciously, will treat persons having particular profiles with more suspicion.⁶ As in the *Roma Rights* case,⁷ this may lead to some people being subjected to more intense and intrusive questioning, violating their right to equal treatment.

12. This potential for unlawful discrimination in the operation of the APP system is exacerbated by the pressures officials increasingly face to err on the side of caution, a tendency which may manifest itself in decisions to refuse asylum seekers permission to travel on to safety. As Professor David Feldman notes, public bodies tend to overestimate risk and may become excessively risk-averse and defensive in their

⁴ Human Rights Watch, "Human Rights Watch Comments on Greek Immigration Bill", (1 February 2001). At <http://www.hrw.org/english/docs/2001/02/01/greece2961.htm>

⁵ UNHCR Position: Visa Requirements and Carrier Sanctions (September 1995), cited in Amnesty International's Submission to the Senate Select Committee on a Certain Maritime Incident. At http://www.aph.gov.au/senate/committee/maritime_incident_ctte/submissions/sub25.doc.

⁶ There might also be a dialectic relationship between selective application of policies and hate crime, as the State implicitly signals to private actors that the assumption of the guilt or 'differentness' of individuals on the basis of features such as race is justified: Ashar, "Immigration Enforcement and Subordination: The Consequences of Racial Profiling After September 11", (2001-2002) 34 Conn L Rev 1185 at p 1196.

⁷ [2005] 2 AC 1.

actions.⁸ This may cause immigration officials to come to rely even more on what Professor Nelson Lund terms the “irresistible tendency” of humans to stereotype strangers on the basis of race or ethnicity.⁹

13. Amnesty International therefore seeks the deletion of these provisions in their entirety, or the addition of provisions enabling asylum seekers to board craft bound for New Zealand in order to make a claim under the Refugee Convention.

Carrier sanctions

14. Under clauses 89 and 109 of the Bill, carriers which transport an insufficiently documented passenger (e.g. a passenger who does not have a proper passport or authorisation to enter New Zealand) are liable to pay a fine, and must also assume responsibility for the accommodation, repatriation and other related costs of the individual involved.
15. Clause 89(3) also requires the person in charge of a carrier to prevent “with such reasonable force as may be necessary” the disembarkation of certain passengers.
16. Again, clause 89 may infringe Article 14 of the UDHR, according to which every person has the right to seek asylum.
17. As recognised by Article 31(1) of the Refugee Convention, many genuine refugees may enter a country of refuge without proper documentation because circumstances may prevent them from obtaining valid paperwork before fleeing. For this reason, Article 31 prohibits states from imposing sanctions on people who are forced to flee serious threats to their life or liberty and who cannot arrange for the issuance of passports, visas, or other necessary documentation prior to their flight.
18. Clauses 89 and 109 of the Bill may contravene Article 33 of the Refugee Convention, which prohibits both direct and indirect *refoulement* of refugees.

⁸ [2006] Public Law 364 at 379.

⁹ (2002-2003) 66 Albany Law Review 329 at 342.

19. Clause 89 may also result in discrimination on the part of carriers, who may single out “suspicious” persons on criteria such as race or religion to avoid the risk of incurring significant fines.
20. Clause 89 also requires airline employees such as check-in staff and cabin crew to make assessments as to the legality of passengers’ travel arrangements. Given that staff may well lack even a basic understanding of refugee law, there is a danger that genuine refugees will be returned to the country of persecution. It is inappropriate and unfair to require untrained airline staff to make these life and death decisions.¹⁰
21. Amnesty International therefore seeks the deletion of the Carrier Sanctions, or the addition of new provisions which:
- Ensure that airline staff receive comprehensive training regarding New Zealand’s obligations under the Refugee Convention; and
 - Require an immigration officer to meet any aircraft on which a passenger is being detained on landing to provide them with an opportunity to claim asylum.
 - Provide that carrier offences are only committed where carrier staff act “without reasonable excuse”, which would allow carriers to take bona fide actions directed at ensuring that an individual is not exposed to torture or death as a result of being refused entry onto the carrier.

Detention of Children

22. Clauses 294(a)(i), 295(a)(i) and 296(2)(a) of the Bill authorise the detention of asylum seekers who are under the age of 18 years (‘minors’).

¹⁰ In 1992 the Civil Aviation Section of the International Transport Workers Federation (ITF) passed their *Resolution Concerning the Improper Involvement of Aviation Employees in Violations of the Rights of Refugees and Asylum Seekers*. In this resolution, “The ITF condemns the practice by governments of imposing carriers liability penalties against airlines, and condemns all practices of airline managements which use aviation staff in immigration control duties which are clearly beyond their proper employment duties.”

23. The detention of children is a practice which has been clearly and unequivocally condemned by the UNHCR, particularly in cases involving unaccompanied minors.¹¹ Amnesty International fully supports the UNHCR's position on this issue. See also separately provided submission by AINZ's Childrens Rights Network Co-ordinator Peter Sutton
24. The HREOC report of April 2004 entitled "A Last Resort? The National Enquiry into Children in Immigration Detention"¹² found that the Australian mandatory detention system was fundamentally inconsistent with the Convention on the Rights of the Child 1989 ('CROC').
25. Many of the reasons given for this finding will apply equally in the context of the proposals included in the Bill. These include the reasons stating that the Australian detention system:
- Fails to ensure that detention is a measure of last resort, for the shortest appropriate period of time and subject to independent review. (See in this regard, CROC, Article 37(b); Children, Young Persons, and Their Families Act 1989, s 13(a)).
 - Fails to adequately apply their best interests as a primary consideration in actions concerning minors. (See in this regard, CROC, Article 3(1); Care of Children Act 2004, s 4).
 - Fails to ensure that minors are treated with humanity and respect for their inherent dignity. (See in this regard, CROC, Articles 3(2), 37(a) and 37(c); Care of Children Act 2004, s 4).
 - Fails to ensure that minors seeking asylum receive appropriate

¹¹ See, for example: UNHCR, "Submission to the National Inquiry into Children in Immigration Detention' from the United Nations High Commissioner for Refugees", May 2002, at para. 8. At http://www.hreoc.gov.au/Human_Rights/children_detention/submission/unhcr.html.

¹²

At

http://www.hreoc.gov.au/human_rights/children_detention_report/report/index.htm.

assistance to enjoy to the maximum extent possible their right to development and their right to live in an environment which fosters the health of children recovering from past torture and trauma. (See in this regard, CROC, Articles 6(2), 19, 22(1), 24 and 39; Children, Young Persons, and Their Families Act 1989, s 13).

26. HREOC also found that children in immigration detention for long periods of time are at high risk of serious mental harm and that continued detention might amount to cruel, inhuman and degrading treatment.

27. Accordingly Amnesty International strongly opposes those provisions in the Bill which authorise the detention of children, and seeks their deletion.

Detention without warrant

28. Clause 273(b) authorises the detention without a warrant of various persons for up to 96 hours.

29. Amnesty International considers that the right not to be arbitrarily detained is a fundamental human right. Detained persons obviously encounter significant difficulties in exercising their other rights and freedoms, and in preparing a legal defence.

30. The UN Human Rights Committee ('the UNHRCt') has commented on the appropriate duration of detention without warrant in the immigration context. In *1996 Concluding Observations on Switzerland's compliance with the ICCPR* it stated:

The Committee notes that ... the time-limit of 96 hours for the judicial review of the detention decision or the decision to extend detention is ... excessive and discriminatory...¹³

31. Amnesty International seeks the amendment of Clause 273(b) to maintain the status quo.

¹³ Concluding Observations of the Human Rights Committee: Switzerland, 8 November 1996, CCPR/C/79/Add.70., at para [15].

Return to Torture

32. Clauses 127(2) and 129 of the Bill empower the Minister of Immigration to decide whether an individual who meets the terms of the CAT or the ICCPR will be accorded protected person status in cases where there are serious reasons for considering that the person has committed an international crime or other internationally significant act.
33. This clause is inconsistent with the CAT (Article 3) and the ICCPR (Articles 6 and 7), which are absolute and do not allow for any returns to torture.
34. In *Attorney-General v Zaoui* [2006] 1 NZLR 289 at pages 321-322 the Supreme Court confirmed that:

[91] Section 72 confers powers on the Minister and the Governor-General in Council. The Minister has the power to certify that the continued presence of any person in New Zealand constitutes a threat to national security. There is nothing in the statement of the broad powers conferred on the Minister and in particular the Governor-General in Council to prevent the Minister or Cabinet having regard to the mitigating factors which the Minister or Cabinet might consider indicate that the person should not be deported. The power conferred by s 72 is to be interpreted and exercised consistently with the provisions of ss 8 and 9 of the Bill of Rights and with the closely related international obligations in the Covenant and the Convention against Torture. Because the power can be so interpreted and applied, those provisions, as a matter of law, prevent removal if their terms are satisfied even if the threat to national security is made out in terms of s 72 and art 33.2.

35. This view is widely accepted, and is consistent with the approach of overseas courts. For example, the European Court of Human Rights ('the ECtHR') has recognised the absolute nature of these prohibitions in its decisions in relation to Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms ('the European Convention'), which closely resembles the wording of Article 7 of the ICCPR.¹⁴

36. In *Chahal v United Kingdom* (1996) 23 EHRR 413 the ECtHR stated:

¹⁴ "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation."

Article 3 (art. 3) enshrines one of the most fundamental values of democratic society... The Court is well aware of the immense difficulties faced by States in modern times in protecting their communities from terrorist violence. However, even in these circumstances, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct. Unlike most of the substantive clauses of the Convention and of Protocols Nos. 1 and 4 (P1, P4), Article 3 (art. 3) makes no provision for exceptions and no derogation from it is permissible under Article 15 (art. 15) even in the event of a public emergency threatening the life of the nation (see the Ireland v. the United Kingdom judgment of 18 January 1978, Series A no. 25, p. 65, para. 163, and also the Tomasi v. France judgment of 27 August 1992, Series A no. 241-A, p. 42, para. 115).

The prohibition provided by Article 3 (art. 3) against ill-treatment is equally absolute in expulsion cases. Thus, whenever substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to Article 3 (art. 3) if removed to another State, the responsibility of the Contracting State to safeguard him or her against such treatment is engaged in the event of expulsion (see the above-mentioned Vilvarajah and Others judgment, p. 34, para. 103). In these circumstances, the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration. The protection afforded by Article 3 (art. 3) is thus wider than that provided by Articles 32 and 33 of the United Nations 1951 Convention on the Status of Refugees (see paragraph 61 above).

37. Accordingly, Amnesty International seeks the amendment of clauses 127 and 129 in a manner which ensures that New Zealand meets its obligations under both the CAT and the ICCPR.

Extent of risk of harm in country of nationality

38. Clause 122(b) of the Bill states that a claimant may only receive protected person status if they can show that they face a risk of harm, “in every part of his or her country...”.

39. This clause is inconsistent with paragraph 91 of the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status (1979, re-edited 1992), which states:

91. The fear of being persecuted need not always extend to the whole territory of the refugee's country of nationality. Thus in ethnic clashes or in cases of grave disturbances involving civil war conditions, persecution of a specific ethnic or national group may occur in only one part of the country. In such situations, a person will not be excluded from refugee status merely because he could have sought refuge in another part of the same country, if under all the circumstances it would not have been reasonable to expect him to do so.

40. Amnesty International considers that there is no good reason why this position should not apply vis-à-vis the conferral of protected person status. Similarly, Amnesty International opposes the requirement under the clause that a person must establish that the risk in issue is, “not faced generally by other persons in or from [their] country”.
41. The imposition of this requirement contravenes the CAT and is not principled or reasonable.
42. Clause 122(b) of the Bill should therefore be deleted from the Bill in its entirety.

Reasons for declining to consider asylum claims

43. Clauses 125(2) and 125(3)(b) authorise determination officers to decline to accept a claim for consideration if "in light of any relevant international arrangements or agreement, the claimant may have lodged or had the opportunity to lodge a claim for recognition as a refugee or for protection in another country".
44. Amnesty International has grave concerns with these clauses. They have the potential to deny an asylum seeker their right to seek asylum (guaranteed by Article 14 of the UDHR) and may cause refugees to be *refouled*, directly or indirectly, to the country of persecution, in breach of Article 33 of the Refugee Convention. Amnesty International believes that if an applicant has a well-founded fear of persecution, they should be assessed and found to meet the refugee definition, irrespective of whether they could have sought asylum in another country.
45. Accordingly, Amnesty International recommends that clauses 125(2) and 125(3)(b) be deleted. The s129F Immigration Act status quo should remain, claims being considered on the basis of "whether the claimant is a refugee within the meaning of the Refugee Convention".

Classified information to be treated as accurate

46. Clause 289(2)(c) of the Bill stipulates that when the High Court determines certain applications “the classified information [supporting them] must be treated as accurate”.

47. Amnesty International considers that this provision is manifestly inappropriate.

48. If the courts are to effectively fulfil their role as a check on executive action, they must be empowered to reach an independent view on the accuracy and sufficiency of evidence placed before them, as they are, of course, extremely well-qualified to do.

49. Clause 289(2)(c) instead requires the Judiciary to in effect 'rubber stamp' certain executive decisions.

50. Clause 289(2)(c) of the Bill is also prima facie inconsistent with the rules of natural justice (codified in s 27(1) of BORA), which require that an affected party must be given an opportunity to correct or contradict prejudicial allegations.¹⁵

51. Amnesty International seeks the deletion of clause 289(2)(c) and express provision empowering the courts to decline any application where the evidence submitted is either inaccurate or insufficient.

52. Clause 30 extends the use of classified information to refugee status determination (RSD). Within its submission to the Immigration Act discussion document the UNCHR advised that:

22. As acknowledged in the discussion paper, refugee/protection decision making is different from standard immigration decision making. Accordingly, UNHCR urges the Government of New Zealand to maintain the status quo and not to adopt practices that allow asylum claims to be determined and rejected on the basis of classified information. Classified information should not be used unless declassified and shared with all parties concerned. In UNHCR's view, such a practice would be at variance with international standards of best practice.

53. Amnesty International acknowledges that within its submission the UNHCR advised that "a role for a security-cleared 'special counsel' who could have access to the information and represent the person" could overcome many of its natural justice concerns over the use of classified information. However, Amnesty International has identified

¹⁵ The seminal authority is *Daganayasi v Minister of Immigration* [1980] 2 NZLR 130 (CA) at 143-144, per Cooke J (as he then was).

within this submission grave concerns with both the Special Advocate (paras 78-86) and Classified Information sections (paras 72-77) of the Bill that we believe do not address natural justice concerns.

54. AINZ therefore concurs with the UNHCR recommendation to maintain the status quo and that classified information should not be used unless it is disclosed to the claimant and open to challenge. As it stands clause 30 could see asylum-seekers disadvantaged by denying them natural justice, and is contrary to the practice of similar jurisdictions, including Canada, the UK and Australia.

Provision for Stateless Persons

55. New Zealand has not acceded to the Stateless Persons Convention, and the Bill makes no provision for stateless persons to be granted protected person status.

56. The UNHCR recently supported a review of Canada's statelessness laws which recognised the predicament of stateless persons as follows:

The legal limbo in which non-status stateless persons live is detrimental not only for the individuals themselves, but also for the communities in which they live. Unable to leave and lacking access to social services and legal authorization to work, such persons may have little choice but to resort to work in the untaxed informal economy; their stateless children will be unable to pursue higher education or training; and they will be unable to fully integrate into their communities and Canadian society.¹⁶

57. The UNHCR considers that all States should work toward the reduction, and eventual elimination, of statelessness and its associated problems.¹⁷

¹⁶ Andrew Brouwer, *Statelessness in Canadian Context: A Discussion Paper*, (July 2003), at p 21. At <<http://www.unhcr.org/cgi-bin/texis/vtx/home/opendoc.pdf?tbl=RSDLEGAL&id=405f07164>>.

¹⁷ As UNHCR emphasises, an increase in the number of signatories to the Convention would, in addition to assisting those covered by the Conventions themselves, have the benefit of improving international relations through development of legal principles relating to the grant of

58. Statelessness is a cause of international instability, and measures to address it are in the interests of the international community.¹⁸ This is the corollary of the fact that nationality, and the ability to exercise the rights inherent in nationality, acts as a stabilising factor and aids in the prevention of involuntary and coerced movements between States.

59. For the individual, the Stateless Persons Convention provides a framework for the standard of treatment of stateless persons, affording stability and ensuring that certain basic rights and needs are met, including access to courts and education. In addition to decreasing the potential for future displacement, these stabilising factors improve the quality of life for those who remain stateless,¹⁹ as well as enhancing the human rights protection and dignity of such individuals.²⁰

60. Amnesty International urges the New Zealand government to accede to the Stateless Persons Convention, and to provide for the protection of stateless persons in the Bill. This is not likely to be a costly

nationality and the reduction of statelessness, thus strengthening the international protection regime. *Ibid.* at p 17.

¹⁸ Statelessness has long been recognised as a potential source of regional tension and of involuntary displacement. Its prevention is therefore in the interests of the international community. See UNHCR, *Information and Accession Package: The 1954 Convention Relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness*, (June 1996; revised in January 1999), at pp 2, 8. At <<http://www.unhcr.org/cgi-bin/texis/vtx/home/opendoc.pdf?tbl=RSDLEGAL&id=3ae6b3350>>.

¹⁹ UNHCR, *Information and Accession Package: The 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness*, (June 1996; revised in January 1999), at p 15. At <<http://www.unhcr.org/cgi-bin/texis/vtx/home/opendoc.pdf?tbl=RSDLEGAL&id=3ae6b3350>>.

²⁰ See UNHCR, *Nationality and Statelessness: A Handbook for Parliamentarians*, (2005), at pp 49-50. At <<http://www.unhcr.org/cgi-bin/texis/vtx/home/opendoc.pdf?tbl=RSDLEGAL&id=436608b24>>.

undertaking,²¹ as the number of stateless persons coming to New Zealand is not likely to increase, nor are there likely to be attempts to abuse the system were New Zealand to accede to the Stateless Persons Convention. A 2003 UNHCR report notes that there is no evidence that statelessness claims have increased where countries have ratified the Stateless Persons Convention.²²

61. Further, at a practical level, accession to the Stateless Persons Convention would also help to address the dilemma of how to deal with stateless persons.²³ Under the status quo, it may be very difficult for New Zealand to remove a stateless person. This is particularly the case where there is no country that recognises them as a resident or citizen.²⁴

Immigration and Protection Tribunal

62. Clause 193 of the Bill establishes the Immigration and Protection Tribunal.

63. Amnesty International supports initiatives to ensure the timely determination of applications for protection, but not at the expense of sound and fair decision-making.

64. Amnesty International is concerned that the amalgamation of the tribunals previously tasked with such applications may compromise the quality of decision-making.

65. In particular, Amnesty International considers that the very high standards achieved by the Refugee Status Appeals Authority (RSAA) may not be able to be sustained by a decision-making body which lacks specialist expertise in refugee law and practice.

²¹ Immigration Act Review Discussion Paper (April 2006) ('the Discussion Paper'), paragraph 1264.

²² Andrew Brouwer, *Statelessness in Canadian Context: A Discussion Paper*, (July 2003), at p 42. At <<http://www.unhcr.org/cgi-bin/texis/vtx/home/opendoc.pdf?tbl=RSDLEGAL&id=405f07164>>.

²³ Discussion Paper, paragraph 1260.

²⁴ Discussion Paper, paragraph 1244.

66. Accordingly, Amnesty International seeks the inclusion in the Bill of measures which will ensure that the ‘panel’ appointed to hear any case involving an application for asylum includes at least one member but preferably all with extensive expertise in refugee law.

Persons threatening security

67. Clause 152 of the Bill confers extensive powers on the Minister of Immigration to deport persons who threaten New Zealand’s ‘security’.

68. The term ‘security’ is defined in Clause 4 in extremely vague and broad terms, and includes the protection of New Zealand from activities within or relating to New Zealand that, “impact adversely on New Zealand’s international well-being, reputation or economic well-being”. There is no requirement that a person must pose a real risk of serious harm to New Zealand in order to be ‘caught’ by the definition. In fact, it appears that a person may be able to be deported on the basis of a slight risk of relatively trivial harm.

69. Amnesty International considers that clause 152 is a demonstrably excessive response to concerns about New Zealand’s national security. It seeks the deletion of clause 152 and the introduction of provisions which empower the Minister of Immigration to deport only in cases of a real and serious risk to the safety of New Zealanders.

71. Amnesty International also opposes Clause 152 on the basis that it contravenes the Refugee Convention, insofar as it purports to empower the Minister to refoule refugees in circumstances which do not meet the criteria set out in Article 33.1.

Classified Information

72. Clause 5 of the Bill defines the term ‘classified information’, and again, is set out in extremely broad and vague terms. Among other things, the definition enables information to be classified simply on the basis that it, ‘might’ lead to disclosure of certain operational information.

73. As set out above, a decision to classify information leads to the deprivation of a person’s fundamental right to know and respond to the case against him or her. The definition of ‘classified information’ in the

Bill is manifestly unreasonable.

74. Further, the provision for a wide number of Government agencies to classify information, many of whom will lack the expertise or resources to determine the extent of risk arising from disclosure, is likely to lead to an unduly cautious approach to the provision of information.

75. It is also inappropriate that the definition will be given retrospective effect under clause 435 of the Bill.

76. Amnesty International is also concerned that this definition, which is a significant provision with far-reaching implications, was not included in the April 2006 Immigration Act Review Discussion Paper, and the public has not been adequately consulted on it (especially given the short period (two months) allowed for submissions to the Select Committee).

77. Amnesty International seeks the amendment of Clause 5 so that information may only be classified by the Director General of the Security Intelligence Service. It also seeks the deletion of the word 'might' in subclause (2)(a) and its replacement with, 'is likely to'.

Special Advocates

78. Clauses 235 - 239 provide for the appointment of special advocates.

79. It is widely recognised that the role of special advocates is extremely fraught. Lawyers acting as special advocates face a fundamental obstacle to their ability to present the best possible case for their clients, due to their inability to discuss the evidence with them.

80. The ability to see and respond to evidence is the cornerstone of our adversarial system of justice. It ensures that the court is presented with all the relevant evidence, and is able to reach a sound decision. The special advocate system, which denies the client this right, is not supported by AINZ.

81. The Bill compounds these difficulties by denying special advocates a role in the disclosure process. The special advocate is not entitled to

either assist in or challenge the formulation of the summary of allegations presented to his or her client, or to challenge the decision to classify any information (on the basis it does not meet the statutory criteria for classified information).

82. This approach is not in accordance with the procedure followed in New Zealand previously (in the Ahmed Zaoui case), or in the UK.

83. A July 2007 report of the UK Parliament's Joint Committee on Human Rights²⁵ documents interviews with special advocates, focusing in particular upon:

- (1) the very limited disclosure of information to the individual;
- (2) the prohibition on communication between the special advocate and the person whose interests they represent once the special advocate has seen the closed material; and
- (3) the low standard of proof. It commented that the Special Advocates "portrayed a picture of a system in operation which is very far removed from what we would consider to be anything like a fair procedure. We were left in no doubt by their evidence that proceedings involving special advocates, as currently conducted, fail to afford a "substantial measure of procedural justice".

Its recommendations included :

- that there be a clear statutory obligation on the Secretary of State always to provide a statement of the gist of the closed material.
- that consideration be given urgently to allowing the court or Special Immigration Appeals Commission ('SIAC') to carry out a balancing between the interests of justice and the risk to the public interest when deciding whether closed material should be disclosed.
- that there be a relaxation of the current prohibition on any communication between the special advocate and the person concerned or their legal representative after the special advocate has seen the closed material.
- that there be a raising of the standard of proof required in SIAC proceedings in light of the fundamental fairness concerns highlighted by the special advocates

The report then stated in its conclusion:

210. After listening to the evidence of the Special Advocates, we found it hard not to reach for well worn descriptions of it as "Kafkaesque" or like the Star Chamber. The Special Advocates agreed when it was put to them that, in light of the concerns they

²⁵ UK Parliament's Joint Committee on Human Rights Nineteenth Report – Counter Terrorism Policy and Human Rights, 30 July 2007, <http://www.publications.parliament.uk/pa/jt200607/jtselect/jtrights/157/15702>.

had raised, "the public should be left in absolutely no doubt that what is happening ... has absolutely nothing to do with the traditions of adversarial justice as we have come to understand them in the British legal system."^[152] Indeed, we were left with the very strong feeling that this is a process which is not just offensive to the basic principles of adversarial justice in which lawyers are steeped, but it is very much against basic notions of fair play as the lay public would understand them.

The evidence of the Special Advocates has confirmed us in our previously expressed view that the Special Advocate system, as currently conducted, does not afford the individual the fair hearing, or the substantial measure of procedural justice, to which he or she is entitled under both the common law and human rights law. In short, as we heard in evidence, the system frustrates those who have been through it who do not feel they have had anything like a fair crack of the whip because they still do not really know the essence of the case against them.^[154] In our view, the seriousness of the consequences of control order proceedings is such that the individuals concerned are entitled to a fair hearing according to objective and well established standards of due process. We regard the recommendations we have made above as the bare minimum that is required in order for the Special Advocate system to command the public confidence that is required.

84. AINZ submits that there is no reason in principle why the special advocate should not be involved in the disclosure process, and seeks the amendment of the Bill to provide accordingly.

85. Moreover, the Bill does not enable special advocates to initiate proceedings, including judicial reviews. For example, there is no ability to challenge a decision to classify information, even where it appears to be manifestly unfounded and unreasonable. This is of grave concern, particularly in view of the fact that the ability to classify information is accorded to a wide variety of government departments, many of whom will lack knowledge or expertise in refugee law and practice.

86. Amnesty International therefore seeks the amendment of the provisions relating to special advocates, to enable them to challenge the decision to classify information, and the summary of the information, by way of judicial review. Amnesty International also seeks the introduction of an appeals process relating to these decisions