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Sunday, 31 July 2005

Dear Secretary

**Additional Submission to "Submission No 8" as listed on the Committee's website at [http://www.aph.gov.au/Senate/committee/legcon\\_ctte/migration/submissions/sublist.htm](http://www.aph.gov.au/Senate/committee/legcon_ctte/migration/submissions/sublist.htm)**

**Public Submission to Senate Legal and Constitutional Committee  
Inquiry into the administration and operation of the Migration Act 1958**

**Proposal to amend the Migration Act: *The Refugee Determination Process***

**Summary:** The primary refugee determination system and also the Refugee Review Tribunal determinations have led to prolong the sheer agony of thousands of asylum seekers who asked for Australia's help when they arrived, especially for 'unannounced arrivals'.

The failure of these processes has become part of the problem instead of the solution. Australia should urgently implement considerable and lasting changes to the procedures and ways of determining claims. It is not true that the length of time spent in detention is a result of 'too many court appeals', but plainly and with overwhelming evidence a result of flaws in the determination process.

**Attachment:** an attachment - not for publication - has also been forwarded to the Committee. This attachment contains the names and contact details of several individuals who have confirmed to be willing to appear before the Inquiry to testify about several issues raised in this and our previous submission.

**Introduction**

Immediately following the Coalition party room discussions on May 31 2005 of the two Bills seeking considerable changes to the Migration Act, as presented by the so-called "Petro Georgiou group", several coalition MP's have raised suggestions that the time spent in detention centres by asylum claimants could be considerably reduced by limiting the

opportunities for court appeals by those claimants, and they announced that upon gaining a Senate majority after July 1 2005, the Howard government would seek to enact limitations to court appeals available to asylum seekers.

These opinions were expressed by several MP's, amongst them Mr Malcolm Turnbull, Member for Wentworth, Mr Mal Washer, Member for Moore, the Attorney-General Hon Phillip Ruddock, Member for Berowra, and the Treasurer Hon Peter Costello, Member for Higgins.

On the face of it, these suggestions sound very plausible, and put so simply, Australian people may well have supported these suggestive propositions if they were presented as part of a political platform. Upon close scrutiny however, the statements are not what they appear to be, because the reason for the many court appeals can be convincingly traced back to what Project SafeCom claims to be a shocking and extremely disturbing error rate in primary DIMIA refugee assessments, which has given rise to lengthy appeals, first to the Refugee Review Tribunal (RRT), and subsequently to the Federal Court, the Full Federal Court, the High Court, and in several cases submissions to the full bench of the High Court.

This submission makes the case of the error rate of the primary assessments and following this also highlights some quoted examples of debatable decision-making by members of the RRT, and suggests that urgent review is needed of

- the fact that both phases of refugee assessment are controlled by one single agent, and
- that both phases of refugee assessment are controlled by agents who may well be subject to political bias rather than to be fully in tune with expert knowledge about international standards of refugee assessment, about country information readily available from human rights organisations and refugee organisations, and about internationally recognised refugee law and procedures.

This submission also suggests how the changes would improve expertise, impartiality, and fairness to the legitimate claimant in Australia's refugee assessment and determination processes.

### **Primary DIMIA assessment**

#### ***shocking error rates***

As early as August 2002, Jesuit priest and lawyer Fr Frank Brennan produces some results of his research in the Bowral Town Hall. Brennan states:

During this last financial year [2001-02], the Refugee Review Tribunal (RRT) set aside 62% of all Afghan decisions appealed and 87% of all Iraqi decisions appealed. This means that Afghan asylum seekers got it right 62% of the time when they claimed that the departmental decision makers got it wrong. And the public servants got it wrong 87% of the times that the Iraqi applicants claim to have been mistakenly assessed. (See <http://www.safecom.org.au/brennan.htm> )

Frank Brennan's figures put the average error rate of the DIMIA primary decision maker in this context *at about seventy-five per cent.*

When fifty-three Vietnamese asylum seekers in 2003 "almost" entered the Port Hedland harbour undetected on their boat, the Hao Kiet, and were subsequently sent to the detention

centre on Christmas Island, initial DIMIA assessment concluded that none of them were refugees.

Last week however, on July 29, the last of those refugees flew from the island to Perth, concluding the sorry saga of more than two years of imprisonment for the members of just one large extended family. The Minister for Immigration, the Hon Senator Vanstone, last week also announced she had reconsidered a refusal, by the one RRT member who had concluded in June that 14 members of the group he had reviewed were not refugees, and she admitted that she had done so because their circumstances had been similar to the others, who had already been determined to be refugees.

The Hao Kiet story thus produced an error rate of the DIMIA primary decision maker of *one hundred per cent*.

This situation gives one to think that the DIMIA primary assessment procedure is entirely broke and void of any credibility whatsoever. There is however more. Dr David Corlett of Latrobe University in his recent book Following them Home: the fate of the returned asylum seekers (Black Inc Agenda), writes:

The Immigration Department, then the Refugee Review Tribunal and the Federal Court, rejected Amir's claim for refugee status in Australia. He was one of those asylum seekers that the former Minister for Immigration, Philip Ruddock, would have cited as pursuing unmeritorious claims through the courts. The Minister said that this was to delay departure from Australia. Maybe. But more important for Amir was the sense that his claim had never been properly heard. Other refugees and asylum seekers with whom I have spoken have said that their treatment on arrival - often kept in isolation and being denied access to legal advice and information about the refugee determination system, being told that Australia would not accept them and that they should return - set the tone for the rest of their time in Australia.

From that moment on, they simply did not trust Australian officials. Their experience of a refugee determination process in which decision-makers were inconsistent and uninformed added to their lack of faith in the Australian system and demonstrated to them that the process was both highly politicised and stacked against them. Amir's distrust was confirmed by the incompetence of the government-appointed legal advisers during the early stages of the refugee determination process. (pages 115-6)

### **'making up' another barrier?**

Project SafeCom places serious doubts, not just on the competence levels of the primary decision makers at the DIMIA, but also on the integrity of the DIMIA "sticking to the rules", even to the point that officers could stand accused of warping the fairness of open and transparent assessment in the initial phase. Dr Corlett also lifts the lid of other aspects in the determination process, which suggests that the DIMIA makes up its own "extra phase" in primary assessments. From his book again:

Upon arrival in Australia, he was granted a short initial-entry interview in which he gave the Australian authorities some basic details about his identity and where he had come from. He was then 'screened out': immigration officials deemed, from his cursory interview, that Australia had no protection obligations towards Mr Al-Khateeb. Unlike those 'screened in', he was denied the right even to apply for asylum. So he - and others from his boat - sat for six or seven months in 'separation detention', a part of the detention centre in which those people who were 'screened out' were kept away from other detainees and where they were denied access to any means of communication with the outside world. Twice a day, for ten minutes, he was allowed outside for a cigarette.

Men, women and children were all confined in this way. 'And every day someone from DIMIA [the Immigration Department] came and he said, "You don't have a chance in Australia and you are illegally in Australia and we don't accept you," Mr Al-Khateeb explained. "You have to bring your passport and you have to go back and if you don't go back we send you back by force. You don't have any choice in Australia. You have to go back." Seven months like this.' (pages 151-2)

## The Refugee Review Tribunal

If the primary determination by officers of DIMIA is in serious discredit to the point where an outside observer may well say that if DIMIA were a private company, its shareholders would have long left, the board would have long ago been sacked, and the company would be in receivership, then it is all the more important that the Refugee Review Tribunal performs impeccably, thoroughly, and with the highest credits and standard.

### ***plenty of credentials, but the right ones?***

That cannot be claimed however, and recent writings of Professor Mirko Bargaric - a part-time member of the RRT - his questionable opinions on torture and the ensuing media frenzy have shown some shortcomings of the RRT structure. The members of the RRT may well be senior public servants with a good track record, some lawyers, some academics, but that says nothing about their capacity to review places of danger on the world map or about their capacity to patiently hear, work with interpreters, or independently assess, also independently of international politics, asylum claims, where things are often a matter of life and death.

In the RRT the term "tribunal" is a disturbing misnomer, because just one person constitutes that "tribunal", and the member does not have to be physically present - the claim can be heard by videolink.

Does the Senate Inquiry know all the anecdotal stories and details of all the Federal Court cases where an RRT member was plainly wrong, where the member did not seem to show any interest in the claimant or the case whatsoever, or where the member showed serious lack of knowledge, whether this was country-specific knowledge or other facts about forms of acknowledged persecution in countries, widely known amongst representative organisations such as Human Rights Watch, Amnesty or UNHCR? Is the Senate Inquiry informed about the percentage of RRT determinations that were re-determined after court actions?

### ***some examples***

*Once more back to the Vietnamese from the Hao Kiet:* about two months ago most of the 53 asylum seekers were granted a Temporary Protection Visa. But at the time they were almost ready to embark on Federal Court action after the primary assessment determined they were not refugees, and after the RRT determination affirmed this refusal. Shortly before their Federal Court action however, the lawyers were informed by the DIMIA that "an error of law" had been made and they were given permission to return to the RRT. Following this admission that both the primary decision maker had been wrong and that following this the RRT had been wrong, the RRT member who dealt with "most" of the application that returned - following the DIMIA error of law admission - to the RRT found them to be refugees. Yet another member of the RRT remarkably, then maintained that fourteen members of this same family brought before him, were NOT refugees.

So last week, the Immigration Minister Senator Amanda Vanstone, so it was reported, had intervened because the remaining Vietnamese claimants were in a similar situation as those approved earlier when re-assessed by another RRT member. With that statement she only just stopped short of admitting the negative RRT member decision, determining that the last fourteen Vietnamese claimants were not refugees, was seriously flawed and had to be overturned through her intervention.

Mr David Corlett, once again in his book [Following them Home: the fate of the returned asylum seekers](#), reports about the RRT member Ms Genevieve Hamilton:

In May 2001, Roqia Bakhtiyari had her application for a protection visa refused. The decision-maker did not believe her story. Roqia appealed this decision to the Refugee Review Tribunal. While accepting that Roqia was a Hazara, the tribunal member, Genevieve Hamilton, determined that Roqia was not from Afghanistan. In part this assessment was based on a language analysis which found that the dialect she spoke originated in Pakistan.

Furthermore, Hamilton noted, Roqia could not name the currency of Afghanistan. Hamilton found this 'barely plausible'. She found it implausible that Roqia could not name the months of the Afghan calendar. Roqia could not explain the route she and her family had taken from Afghanistan. Nor was she able to describe, to Hamilton's satisfaction, her life under the Taliban or recognise the language spoken by the majority Pashtoon ethnic group in Afghanistan. 'This is simply not possible if she lived in Afghanistan,' Hamilton wrote.

Roqia claimed that she had led an extremely sheltered life. Hamilton found her credibility 'remarkably poor'. She called Roqia's responses 'facile' to questions about her husband's treatment at the hands of the Taliban and her failure to question the people smuggler she had used about her husband's whereabouts.

But Hamilton's written decision reflects as much about her own lack of imagination and intellectual sophistication as it does Roqia's ignorance or duplicity. It seems not unreasonable that a woman who had grown up in an extraordinarily patriarchal society where she was confined to the home, where she had lived in an exceptionally remote area whose economy was predominantly barter oriented, and where, because of years of war, currencies rose and fell with the fortunes of the battlefield, would not know the national currency of that country. Nor is it obvious that such a woman would speak in detailed terms to her husband, in the single night they had together before he fled, of his imprisonment under the Taliban.

This is not to advance a judgement about the truth of Roqia Bakhtiyari's story. That remains an open question. What is noteworthy is that the tribunal member, a well-paid, tertiary-educated and highly literate member of a complex post-industrial society, was unable or unwilling to make the imaginative leap into the life of a woman from what might well have been a different universe, one which had been governed since the mid-'90's by an aggressive anti-modern regime which sought to make the already war-destroyed country back to the days of the Prophet. (pages 16-7)

And elsewhere, Corlett speaks about *Sayed* from Afghanistan:

Once in Australia, he had difficulty Australian decision-makers of his case. Initially, they said that he was not Afghan. Then, after a language test - where a recording of his speech was sent to a language 'expert' to determine from his accent and the words he used whether he was from Zabul - Sayed's Refugee Review Tribunal (RRT) member accepted that he spoke Hazarigi from central Afghanistan, but did not accept that he was from the particular area he claimed. Sayed could not locate his particular village on the map. No matter that he was uneducated. No matter that he could describe the mountains and houses in the area. The fact that he could not find his home on a map of Afghanistan was enough to convince the tribunal member that Sayed was not from where he said he was. (page 90)

### **Systemic corruption?**

To use the phrase 'systemic corruption' may have been unthinkable before The Palmer Report became public, and even after the Palmer Report these are big words. At Project SafeCom we would not have grounds to conclusively state this as our direct involvement with asylum seekers and refugees is somewhat limited. Not so for Dr Corlett:

The tales of Mr Al-Khateeb and others are evidence of a form of systemic corruption within the Immigration Department. (page 165)

The writer of this submission would call it *the His Masters Voice effect*. There is no doubt that the damaging undermining of internationally formulated rights also of unannounced boat-arrivals by politicians in the lead-up to the 2001 Federal election has brought the DIMIA staff member charged with Mr Al-Kahteeb's group in the detention centre to add to him "*You don't have a chance in Australia and you are illegally in Australia and we don't accept you*".

We contend that this attitude points straight back to a combination of the Prime Minister's election slogan "*We shall control who comes to Australia and in which way they come*" and

the rather hissed and strangely stressed repeated labelling during media interviews used by the former Immigration Minister to denote boatpeople as "*unlawful non-citizens*", giving rise to the notion amongst millions of Australians as well as detention guards and DIMIA staff to think that it's "illegal" to come to Australia on your own steam and ask for asylum.

## **Related issues**

A brief mention needs to be made of other issues intersecting with refugee assessment. This submission will only summarily mention the issues of *language assessment* and of *dob-ins*.

### ***language assessment***

In both phases of the assessment language tests as mentioned by Corlett above are used, but Australian Financial Review reporter Julie Macken in September 2004 revealed two deeply disturbing issues around the reliability of language assessment. Ms Macken revealed that in the case of Hazaras an ethnically hostile population group - part of the persecution claims put forward by the Hazara ethnic minority group - was responsible for the language assessment of claimants from Hazara origin. She even pointed to links between two interpreters and the Taliban and Osama Bin Laden. From her article - copied to our website:

Finding qualified interpreters who were fluent in Dari, Farsi, Hazargi - the three languages used by Afghans - and English was nearly impossible. In the end, DIMIA drew many of its interpreters from the previous wave of Afghan refugees - those who had fled to Australia during the 1980s when Russia and the United States turned Afghanistan into yet another Cold War battleground. These were almost exclusively Pashtuns.

The problem for the Hazara Afghans, who made up the bulk of the asylum seeker population in detention, was the deep ethnic animosity and power difference that exists between the Pashtun and Hazara tribes.

It is not clear whether the Department of Immigration was unaware of these tensions or just unconcerned by them. Whatever the reason, two interpreters and translators who were used extensively in Woomera, Port Hedland, Curtin and Nauru were Pashtun Afghans.

Malyar and Sayar Dehsabzi are Afghan-Australian brothers. They work as migration agents through their company, Ethnic Interpreters & Translators, located in Parramatta, Sydney. Both men have worked extensively as interpreters and translators for DIMIA and are registered migration agents. ([Australian Financial Review 25-26 September 2004, Julie Macken: Lost in Translation, The dangerous undercurrents of refugee politics see <http://www.safecom.org.au/macken-afr.htm>](#) )

High-profile Melbourne barrister Julian Burnside QC has compared the use of Parshtoon language interpreters to aid in the assessment of refugee claims of Hazaras with putting a Nazi in charge of the refugee assessments of Jews.

### ***dob-ins***

Since *The Palmer Report* became public in July this year, we know that the DIMIA is a government department that has been for some time deeply devoid of measures of accountability, managerial checks and balances and systems of information review and confirmation - or conversely, void of systems that may lead to elimination or dismissal of information that cannot be confirmed.

In such a climate a situation may arise where an anonymous *dob-in* can develop its own life, remaining unconfirmed, and growing in importance and significance beyond any proportion related to its relevance, and more importantly, its credibility.

There is evidence of this happening - and it may have happened many more times than we are yet aware of, for example, it has not yet been ruled out that a false *dob-in*, for example by

one of Ms Vivian Alvarez' former partners or husbands, may have led to convince the DIMIA that she was an illegal immigrant and thus should be deported. According to one of Australia's most renowned and experienced migration agents, Ms Marion Lê OAM, in a speech delivered in October 2004 at the Sydney Institute:

Poor Ali Bakhtiari was dobbed in. He was dobbed in, along with another person who became my client. The men were said to be brothers, Pakistani citizens rather than Afghani, guilty of giving false details of their families and nationalities to the DIMIA. I went all the way to the Afghanistan to prove that my client was who he said he was and I proved it. We have not, however, yet been able to find the identity of the dob-in. It's very complicated so just take it from me.

Dob-ins generally have nothing to do with terrorism but are often based on gossip - asylum seekers married to someone or not married to someone - very trivial stuff in fact, but untested and unrevealed can lead to people being detained and removed from Australia.

With the Afghani case-load, the DIMIA put a lot of faith in the now largely discredited language tests and dob-ins which led to many genuine Afghani asylum seekers being detained on suspicion of being Pakistani for four years before eventually being released on temporary three year protection visas (TPVs).[7]

Documents on one DIMIA file indicate that a number of unnamed informants have told the Department that the applicant is lying about his identity. While some informants, however, had apparently given similar information there were apparent inconsistencies. The Refugee Review Tribunal requested, from the DIMIA, details of the sources of these dob-ins but was advised that DIMIA is "under strict obligation to keep the identities of persons who are the sources in these circumstances completely confidential". Isn't that incredible?

There was another dob-in case of a young couple in Adelaide. Theirs is a very sad story. They fled to Australia from the Milosovic ethnic cleansing in 1999. They were terribly traumatised, came here and they are much loved by the local community who have supported them during the time they have had no work permits - over two years whilst they waited for an answer to their request for Ministerial intervention.

Someone dobbed them in. We didn't know this and we couldn't work out why Phillip Ruddock would not intervene in this case. He kept saying to me, "I know you've put another letter in about that case but there's an allegation on the file". We put in another request for files under the Freedom of Information legislation (FOI). I've had a separate case on foot for the little girl in the family, so I decided to wait.

Then, back it came, an unanswered, unexplored dob-in, not a letter, but a file note recording that on a particular day a man who identified himself only by his first name and who left a mobile telephone number, walked into the office of the DIMIA in Sydney and said that Mrs A in South Australia (she's never been to Sydney) is living under a false name with her husband, and that a woman called Mrs B who is living with them is in reality her mother. Mrs B also had an application before the Tribunal. This information was passed to the Minister as fact. They were accused of very serious immigration fraud. They had, in other words, adopted false names, and were living with a woman who is supposed to be the mother of the wife who is also lying to the DIMIA and Tribunal. (see <http://www.safecom.org.au/marion-le-sydney-institute.htm> )

## Conclusions

From the material briefly presented above we can conclude that Australia's refugee assessment processes and structures should urgently change - were it to be the only supporting material available of what has taken place in the last five to ten years. It however isn't. There are "a thousand more stories" amongst an equal number of Australians who have worked with refugees and asylum seekers especially since the Tampa incident and the 2001 election and the passing of the Tampa Bills. Australia's refugee determination system is disturbingly lacking in the following areas:

- **A well-developed attunement** to the specific refugee circumstances and the international rights, also for unannounced boat arrivals, as laid down in the UN Refugee Convention by the primary decision maker - decision makers seem to lack the determination to consider approval and seem more driven by the determination "to keep them out of Australia". This may well be entirely in line with DIMIA's core mission - to keep unlawful entrants out of Australia - but *the consideration of asylum claimants should perhaps be inverted - it should be about a desire to be inclusive and a positive determination to approve, because refugee status can often be, and also often is, about life and death matters.*
- **Diversity of viewpoints** - because the determination is controlled by one single person
- **Thoroughness of Inquiry**: the primary decision maker makes a determination based on what should be regarded as one interview, and the same is true for the RRT member. On primary level information cannot be added by the claimant at a later stage.
- **Knowledge of refugee law and practice** in other countries: an RRT member is not a refugee lawyer. An RRT member is not an expert drawn from Amnesty, Human Rights Watch or UNHCR
- **Highly developed and up-to-date country information** knowledge - neither the DIMIA officer nor the RRT member seems to be required to have advanced knowledge or skills of specific country information, unlike agencies such as Amnesty International, Human Rights Watch and UNHCR
- **Possibility of political bias** - refugee determination is not a political issue, but an internationally recognised human rights issue.
- **Entry of covert bias from other sources** - such as language determination by ethnically hostile groups and anonymous dob-ins that develop systemic validity without any basis for sustained credibility.

It is extremely likely that the long duration of refugee assessment and consequently the time spent in detention centres is entirely a result of the abysmal refugee determination failures. Conversely, it is extremely *unlikely* that the intent expressed by Mr Malcolm Turnbull, Mr Mal Washer, the Attorney-General Hon Phillip Ruddock and the Treasurer Hon Peter Costello to limit court appeals available to asylum claimants have any basis in a causal relationship to the duration of detention. Until we have a zero error rate in refugee determinations we simply cannot deny asylum seekers the right of an appeal - even if that means going all the way to the High Court.

It may well be true that people are spending an indeterminate, and in our opinion a totally unacceptable time locked away in detention centres, but if primary determination would have been without errors, professional, swift and fair, instead of seriously compromised with for example political pandering to the false notion of "illegality" we would have been able to release most people indeed 90% of the time within 90 days. And, that would save millions, possibly billions of dollars.



## Recommendations

Project SafeCom recommends that refugee assessment systems are in urgent need of change and correction. These would need to include the following elements:

- Primary determination and Refugee Review Tribunal reviews should not be controlled by one person and should not be based on one interview.
- The process of determination, since it consists of two distinct tasks, first the collection of information and second the making of the decision should reflect these two phases. No determination should be made until all information is complete, recorded and fed back to the applicant. It is not until the applicant and his/her agent or representative agrees that the information is complete, reflects what has been supplied, and is sufficient for the claim, that the next phase can start. Migration agents with specific country knowledge should at all times also be consulted in this process.
- The information collected should include independently gained country information from agencies such as Amnesty International, Human Rights Watch and UNHCR, and also the Department of Foreign Affairs.
- At all times a refugee lawyer should be present to stand by the applicant. Based on the shocking error rate of the DIMIA assessments, the claimant now also needs "*protection from the DIMIA assessment bias*". This lawyer or representative should be independent of government, and possibly should be approved in advance by a bi-partisan forum or recommended by an impartial agent.
- Great care should be taken to avoid the situation where language assessment or other country-based services are retained from an ethnically hostile population group.
- A national list be compiled and kept up-to-date of accredited and highly credited migration agents with specific country knowledge. This would enable the refugee assessment team to access people with specific knowledge of situations in countries such as Iran, Congo, Zimbabwe, Afghanistan or whatever country it may be.

## Final remarks

*Project SafeCom proposes that the Migration Act be amended after the Inquiry receives all advice relating to the above submission. It is unacceptable that Australia, a country that seeks to boast about its human rights record is in such a shocking state in terms of its treatment of refugees and asylum seekers. While we do not claim to be "experts" and while this submission may not necessarily be perfect in the views of those with more knowledge of what has happened to refugees, we are as we always have been, a fierce and independent voice for justice and fairness.*

For Project SafeCom  
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