MINORITY REPORT BY AUSTRALIAN GREENS

1.1 The Australian Greens strongly support the committee report, however, because we believe that the principle and policy that this bill would implement is fundamentally flawed, we can only agree with recommendation one, that the bill not proceed.

1.2 Recommendations 2 to 10 are clearly aimed at improving accountability of the offshore processing system and mitigating some of the cruelties being established by this bill and we support these aims, however, the Australian Greens do not believe a bad law in conception can be made acceptable simply by ameliorating the worst aspects of it.

1.3 The idea that Australia should try and shirk its responsibilities under international law by sophistry and deception is morally repugnant.

1.4 Mr Brian Walters SC told the inquiry 'The message is that we are being disingenuous as to our obligations. The message is that we do not care about our international obligations and we are not to be trusted on our international obligations. That is a very serious position for Australia to place itself in internationally.'

1.5 In its current form this bill lacks virtually all safeguards and checks and balances. The government is essentially saying 'trust us and the Department of Immigration to do the right thing'. The scandals of Cornelia Rau and Vivian Solon, as well as the dreadful treatment of asylum seekers in detention, both onshore and offshore, does not give The Australian Greens confidence in either the Department of Immigration or the government.

1.6 The Australian Greens concur with Mr Brian Walters SC representing Liberty Victoria and his statement to the Inquiry, 'where power is being exercised, I do not think we should ever assume that it is always being exercised in good faith. That is why we have the rule of law, because experience has shown that when people have power they will abuse it.'

1.7 The Australian Greens believe that even if adequate safeguards and checks and balances were inserted into this bill, it should be opposed because the concepts and policy it is seeking to implement are abhorrent and inflict cruel and unusual punishment on innocent people who seek our protection.

1.8 The politicisation of the refugee determination process is at the heart of what is wrong with this bill. In her submission to the inquiry, Associate Professor Mary Crock stated: 'the fact that the Refugee Convention is based on a case by case assessment of the protection needs of persons seeking asylum underscores the non-political nature of refugee protection'. The bill is a significant departure from this principle because it allows the construction of an entirely new refugee processing system in response to the criticism from another government of Australia's refugee processing system outcomes.

1.9 Offshore processing and official discrimination toward asylum seekers based on their mode and place of arrival was originally implemented for political reasons. It involved shipping asylum seekers to a small island nation that is essentially bankrupt and dependent on Australia for survival. Nauru was essentially bribed by our government to participate in a scheme designed to reap political gain for the Howard government by exploiting xenophobia, presenting asylum seekers as a threat and repelling this threat, while pretending to abide by the Refugee Convention.

1.10 Whether this policy broke only the spirit or also the letter of the Refugee Convention is still a matter for debate. What is clear is that hundreds of people suffered terribly for many years. Children lost childhoods. People lost their minds. Families were split up. Some who returned to Afghanistan lost their lives. Most were eventually found to be refugees and, ironically, many were eventually settled in Australia.

1.11 Two refugees remain on Nauru after four and a half years. One arrived when he was 21 and is now 26. The other recently turned 30. Although found to be genuine refugees, adverse ASIO security assessments keep them imprisoned on Nauru possibly indefinitely. ASIO refuses to tell these men or their lawyer the reasons for their adverse assessments.

1.12 When questioned about this practice Mr Brian Walters SC said:

> Security is, and has been in history, too frequently the excuse for overriding human rights. It was the excuse for the emergency decree and the enabling act in 1933 in Germany. It was security: it was the burning of the Reichstag, a terrorist act. Too often security questions are raised and they say, 'You can't question that.' That was the reason Dreyfus was tried in secret—so no-one could see that in fact a crime was being committed against him by the security authorities. History is replete with examples. We need to be very suspicious of claims of security, and we must have them independently assessed. Where someone has their rights interfered with on security grounds, they are entitled to know why and to have that independently checked. One of the fundamental principles of the rule of law is the principle that, if someone's liberty is violated, they are entitled to know the reason and they are entitled to have that independently assessed. That has been recognised in our system of law for over 300 years. It is a serious concern. One of the problems that we have is that all of this is happening off shore, at arms length, a long way away from our system, and people are able to say we do not have responsibility for what we have in fact caused.

1.13 These men will remain on Nauru indefinitely, despite serious mental health concerns, until another country is found that will take them.

1.14 The government's stated intention is to try and get third countries to accept for resettlement those found to be refugees. However, as several submissions noted, including A Just Australia and Dr Penelope Mathew from ANU College of Law, only 4.3% of the refugees from the original offshore processing went to countries other than Australia and New Zealand.

1.15 The Australian Greens are appalled at the prospect that genuine refugees will be left in limbo on Nauru, for years and possibly indefinitely, violating the important international requirement of finding durable protection solutions for refugees.

1.16 The Australian Greens are also opposed to the policy that Australia should seek to send refugees that it has processed to third countries rather than settle them in Australia. This policy disrupts the important concept of 'burden sharing', as noted by Australian Lawyers for Human Rights. Not only this, but The Australian Greens consider it an abrogation of international responsibilities that a wealthy capable country with a relatively tiny number of asylum seekers arriving, should try to palm off its international responsibilities to protect asylum seekers to other, often poorer countries.

Politicisation of refugee processing:

1.17 This bill represents a further politicisation of refugee processing. It is clearly a direct response to the pressure from the Indonesian government. Many submissions were critical of this aspect of the bill. The bill represents an immigration policy change to solve a foreign policy problem. It results in punishing refugees in an attempt to placate the Indonesian government. Several witnesses questioned whether this response would 'heal' the diplomatic rift between Australia and Indonesia. A Just Australia asked Senators to consider what would happen once West Papuans are granted refugee status on Nauru?

1.18 The Minister for Immigration has the power under subsection 5F to exempt individuals, including classes of persons (groups), from being designated as 'designated unauthorised arrivals' and shipped off to Nauru. This means the government can choose to discriminate between one set of arrivals and another.

1.19 The Department of Immigration confirmed that under section 198A of the Act, the Minister could exempt East Timorese asylum seekers from offshore detention while other asylum seekers such as from West Papua would go to Nauru. Mr Bob Correll, Deputy Secretary said, 'There is a discretionary removal provision in the bill; it is provision 198A. So under the provisions of the bill there is the capacity for that sort of call to be made on an individual basis.' He also said 'in relation to the conflagration that is currently being looked at, the government is looking at that from an overall policy position. It would be a matter of government policy for the way it handled it. A decision could be, as part of that policy, to handle it in the usual way. That could be a decision. Or it could be a decision to handle it differently, given the circumstances that applied in that country.'

1.20 The Law Institute of Victoria expressed concern about the repercussions of this provision in its submission:

> 'The LIV also notes that the proposed legislation provides the Minister 'an additional power to declare that specified persons or classes of persons are exempt'. The stated purpose of this power is to provide 'flexibility to avoid the regime being extended to those not intended to be covered by the changes'. This power also suggests that the Minister will have discretion as

> to whether the new measures should be imposed on certain groups of asylum seekers. This discretionary power indicates that the proposed legislation will be used to penalise some asylum seekers and not others – possibly based on their nationality and the nature of their refugee claims.
>
> The LIV suggests that if applied in this manner, the proposed legislation would give rise to discrimination of a kind that is entirely inappropriate to the legal framework for Australia's immigration and border control.'

1.21 This outright politicisation of refugee processing contravenes Article 31 of the Refugee Convention and is therefore opposed by The Australian Greens.

Human rights concerns:

1.22 Nauru is not a signatory to the Refugee Convention. Nor is it a signatory to other important conventions protecting human rights. In the past, lawyers, journalists and politicians have not been granted a visa to visit Nauru. Under this bill, neither the Ombudsman nor HREOC would be guaranteed access to monitor conditions.

1.23 The Department of Immigration could only say that visas to Nauru, including visas for lawyers, were a matter entirely for the Nauruan government. Senator Mason summed the situation up succinctly when he asked the government officials at the inquiry whether Nauru "Was Australia's Guantanamo Bay?"

1.24 The Australian Greens are opposed to processing people in a location where there are no obligations to abide by critical international conventions and where independent observers, including lawyers are actively prevented from inspecting operations. The revelations from the initial processing on Nauru, as well as from our own detention centres in Australia mean that independent inspection of such facilities is critical and the parliament would be negligent if it allowed this kind of operation to occur without independent safeguards and oversight.

Mental health concerns:

1.25 The fact that long-term immigration detention has a seriously damaging affect on a person's mental health is well established. The isolation of Nauru is likely to exacerbate this damage. The Dutch psychiatrist Dr Maarten Dormaar, who worked in Nauru in mid-2002 reported: 'I seldom or never encounter an asylum seeker who still sleeps soundly and is able to enjoy life. Mental health, or psychiatry for that matter, is basically not equipped to improve their situation in any essential respect.'

1.26 The Department of Immigration indicated that the final report on health matters in Nauru was addressed to the Minister and therefore they were not able to release it. This report is widely considered to be the reason that the 25 of the final 27 detainees on Nauru were brought to Australia.

1.27 The Australian Greens believe that to institute a policy to send more asylum seekers to Nauru, in the knowledge that those detained on Nauru are highly likely to be mentally harmed, is a culpable action and contravenes the Commonwealth's basic duty of care and moral obligations.

Cost:

1.28 The Department reported to the Committee that flights to Nauru (there is no regular service at the moment) cost between $20,000 and $100,000. Each detainee would be flown to and from Nauru at least once, possibly more times if medical evacuation is necessary. It is well documented that other costs associated with running a detention centre increase exponentially on remote islands.

1.29 The Government has not provided the parliament with a figure for the costs associated with this proposal despite repeated requests.

1.30 A Just Australia noted in its submission that $240 million had been spent on Nauru, or approximately $195,000 per asylum seeker.

1.31 The Australian Greens object to the misuse of taxpayers money on an unnecessary and politically motivated policy. This funding would be better spent on settlement services or dealing with issues that create refugees in the first place.

Impact on families:

1.32 The Australian Greens are concerned about the impact of this legislation on families in particular the ability of family members to live together and be reunited when geographically separated. The committee heard from Mr Kerry Murphy from Australian Lawyers for Human Rights about the difficulties that single men already have in trying to bring the rest of their family to Australia and how these difficulties will be exacerbated by this legislation.

> **Mr Murphy**—I want to add something about family reunion. I understand the visa the department was proposing would result from the offshore processing was the 451 secondary movement visa, which they would rename. That visa has a period of five years residence in Australia. But you cannot actually apply for any other visa once you are on that visa in Australia unless you apply for a protection visa. That protection visa cannot be decided until 54 months after you have been granted the 451 visa. The 451 visa does not provide for family reunion in terms of sponsoring family members from elsewhere. At the moment I have a number of clients in our office—Afghan and Iraqi gentlemen—who have been separated from their wives and children for six and seven years. They are now trying to bring them over in the process. They have been grinding through the temporary protection visa process. This visa is going to reinforce the stress that is caused for those people and make it even more difficult for them to resettle in the Australian community.

1.33 This legislation will mean that for families where some members of the family are already in Australia if other family members seek to be reunited with the rest of their family and arrive in Australia by boat they will not be able to be reunited with the rest of their family. They will be taken to a remote island and if they are found to be refugees the government will seek to find another country to resettle them so they may never be reunited with their other family members.

1.34 The other impact this legislation will have on families relates to the ability of family units to be housed together. The government was not able to inform the committee about how arrangements for family units to live together would be facilitated.

Impact on children:

1.35 Associate Professor Mary Crock supplied the committee with a very disturbing statistic regarding unaccompanied children. According to IOM, "32 of the 55 unaccompanied children on Nauru were returned to Afghanistan in 2002-2003. At least one of these was subsequently killed. Of 290 such children who made it to Australia, none were returned over this period.

1.36 This information should cause all parliamentarians to stop and think of the consequences of this bill on children.

Naval interceptions:

1.37 Many submissions and witnesses expressed concern about the Australian government's policy of requiring the Navy to intercept vessels carrying asylum seekers at sea, and where possible, turn these boats around.

1.38 Although not contained within this bill, The Defence Minister, Brendan Nelson MP, announced that the Australian Navy would increase patrols and actively co-operate and conduct joint patrols with the Indonesian military as part of the policy of appeasing Indonesian over the granting of refugee visas to West Papuans.

1.39 Experts in the field, such as Mr David Manne of the Refugee and Immigration Legal Centre, said it would be impossible to conduct a proper assessment on the seas as to the bone fide of the refugee claims and therefore there was a high level of danger that Australia would return refugees to persecution.

1.40 Mr Manne told the Inquiry:

> That raises the very real prospect, in the absence of guarantees, that we are looking at a situation where the Australian Navy, for example, could be put in the completely impossible position, in our view, of somehow having to determine on the face of it whether or not someone should be sent back to a situation of persecution. There are no guarantees or no proper measures that have been guaranteed to ensure that that would not occur. For example, there are no proper measures to ensure an assessment to work out whether that person needs to come to Australia to have their claims assessed.

1.41 Dr Penelope Mathew, from the ANU College of Law stated in her submission: 'Rather than returning refugees to places of persecution, the parties to the Refugee Convention have agreed to provide them with protection of their fundamental human rights. To do otherwise is to become complicit with the persecutory regimes from which refugees have fled.'

1.42 The Australian Greens are opposed to the interception and return of asylum seekers by the Navy and recommends that this policy end immediately.

Papua New Guinea:

1.43 The original basis for the policies of mandatory detention, offshore processing and naval interceptions is the idea that asylum seekers arriving without a valid visa are illegal or 'queue jumping'. Article 31 explicitly states that asylum seekers should not be penalised for arriving illegally.

1.44 Senator Bob Brown asked the Department how a West Papuan should seek protection in Australia through proper channels. The Department's answer was to either flee into Papuan New Guinea or travel to Jakarta and apply at our embassy – clearly an untenable option for West Papuans facing persecution from Indonesian authorities.

1.45 Papua New Guinea while a signatory to the Convention has made significant formal reservations on a number of provisions. As a result the Papua New Guinea Government does not accept convention obligations covering: wage-earning employment (Article 17 (1)), housing (Article 21), public education (Article 22 (1)), freedom of movement (Article 26), refugees unlawfully in the country of refuge (Article 31), expulsion (Article 32) and naturalisation (Article 34).

1.46 While UNHCR is working with the PNG government, evidence to the committee showed that UNHCR in fact have only five staff in PNG and that PNG has as many as 10,000 Papuan refugees.

1.47 There is significant evidence that West Papuan refugees in PNG are not safe from intimidation and in some cases attacks by Indonesian military and militias.

1.48 Indonesia is not a signatory to the Refugee Convention and the return of West Papuans to Indonesia to face persecution would be a significant breach of the prohibition on refoulement contained in the Convention.

1.49 Since the invasion of West Papua in 1961, the Indonesian military occupation has resulted in large numbers of deaths, injuries and significant human rights abuses.

1.50 A brief period of autonomy that seemed possible following the collapse of the Suharto dictatorship has failed and been closed off by the Indonesian military.

1.51 Some analysis has suggested that the systematic abuse of human rights amounts to genocide.

1.52 Regardless, there is no doubt that the level of conflict over West Papuans expressions of their right to self-determination is creating the conditions under which many West Papuans have little choice but to seek refuge in neighbouring countries.

1.53 While this legislation seeks to deflect Australia's responsibilities to assist those seeking refuge it will do nothing to address the underlying cause of why West Papuans are seeking to come to Australia.

1.54 In fact, the knee-jerk appeasement of Indonesia displayed in this legislation will only serve to reinforce the Indonesian military's grip on West Papua in turn increasing the flow of refugees.

The Australian Greens recommend:

1) **that the Bill should be opposed in its entirety on the basis that offshore processing of asylum seekers is fundamentally flawed, the policy contravenes the letter and spirit of the Refugee Convention and amounts to cruel and unusual punishment of innocent people, and is based on an appalling foreign policy decision designed to appease the Indonesia government;**

2) **that the government ends the policy of the Australian Navy intercepting and returning boats of asylum seekers on the open sea because of the high danger of *refoulement* (in the case of West Papuans direct *refoulement*) of refugees;**

3) **that the government acknowledge that Papua New Guinea does not have the capacity to process large numbers of asylum seekers nor offer all refugees a durable protection solution. Therefore Australia should not return asylum seekers arriving in Australia via Papua New Guinea until they have undergone a full protection visa determination process on the Australian mainland.**

4) **that the Australian Government immediately bring the two remaining refugees on Nauru to Australia and permanently close the offshore processing camps on both Nauru and Manus Island.**

Senator Bob Brown **Senator Kerry Nettle**
Australian Greens