INTERNATIONAL
COMMISSION
OF JURISTS

22 May 2006

Committee Secretary
Senate Legal and Constitutional Committee
Department of the Senate
Parliament House
Canberra ACT 2600

Fax: +61 2 6277 5794
Email: legcon.sen@aph.gov.au

Dear Committee Secretary,

Re: Inquiry into the provisions of the
Migration Amendment (Designated Unauthorised Arrivals) Bill 2006

Please find attached ICJ Australia's letters to the Prime Minister John Howard dated 13 and 26 April 2006 and which deal with the policies that have now found their way into the *Migration Amendment (Designated Unauthorised Arrivals) Bill 2006*.

We note that the letters were also copied to the five Ministers with portfolios that touch on these issues.

We would be pleased to expand upon these submissions at the hearings of this inquiry.

Yours Sincerely,
ICJ Australia


Nicholas McNally
Council Secretary & Treasurer

APPROVED AT THE LEVEL OF PRESIDENT.

The International Commission of Jurists, founded in Berlin in 1952, is an international non-governmental organisation with consultative status to the United Nations, UNESCO, the Council of Europe, and the Organisation of African Unity. Its headquarters are in Geneva, with autonomous national sections and affiliates around the world. The International Commission of Jurists (Australian Section) was founded in 1956.

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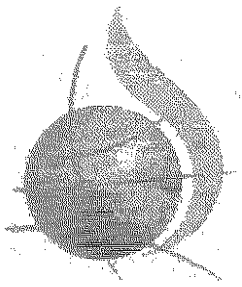
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The Hon Justice Robert Nicholson AO
Federal Court of Australia, WA



INTERNATIONAL
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13 April 2006

The Hon John Howard MP
House of Representatives
Parliament House
Canberra ACT 2600
Fax: (02) 6273 4100

Dear Prime Minister,

Re: Announced Reform of Asylum Seeker Policy

ICJ Australia recognises that every sovereign nation has the right to determine who should enter its territory and the terms on which those who enter are entitled to remain. But there is an important exception to this principle. It does not apply to persons entitled to protection as refugees in States, such as Australia, which have accepted the 1951 Convention relating to the Status of Refugees and the 1967 Protocol to that Convention.

ICJ Australia is therefore alarmed to read that a review of refugee law and procedure is being undertaken by the Commonwealth Government, with the possibility of introducing "national interest" as a relevant factor in assessing refugee claims, inviting the Republic of Indonesia, as the State of origin, to express views or to provide information about the refugee claims of West Papuans and applying special rules to refugee claimants from West Papua. Each of these possibilities is incompatible with Australia's obligations under the Refugee Convention and its Protocol.

National interest cannot be a relevant consideration for States parties to the Refugee Convention in considering claims for refugee status. It would totally undermine the purpose of ratifying the Convention, which carries clear obligations towards refugees. The limits to the protection of refugees, such as those set out in articles 32 and 33 of the Convention, are based on clearly defined procedures and principles and not on the untested discretion of Government as to national interest.

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President, Court Disputes Tribunal of NSW

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Mr Colin McDonald QC
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The Hon Justice David Garry
Supreme Court of SA

Tasmania
The Hon Justice Alan Blow OAM
Supreme Court of Tasmania

Victoria
The Hon Justice Bernard Bongiorno QC
Supreme Court of Victoria

Western Australia
The Hon Justice Robert Nicholson AO
Federal Court of Australia, WA

As to asking the State of origin for information or views, it is implicit under the Convention, and explicit in the guidelines of the High Commission for Refugees that refugees have a right to confidentiality, and to the assurance that none of the information which they reveal as part of a refugee claim will be shared with the authorities of the country of origin. To reveal any information about a claimant could put that claimant's family and community at risk. Any discussion with the country of origin about the refugee claim could lead to refugee determinations being based on the "national interests" of states which are known violators of human rights and which have military and political agendas which run contrary to human rights norms. For example, it would have been unthinkable to have asked Saddam Hussein about the refugee claims of fugitives from his regime.

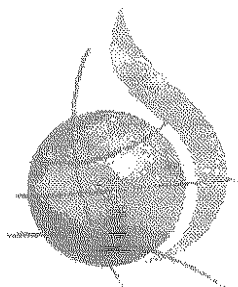
As to the possibility of applying different rules to refugees from West Papua, any such approach is excluded by Article 3, which requires the Convention to be applied without discrimination as to race, religion or country of origin.

Finally, press reports indicate that the Government may be contemplating using its armed forces to turn back boats carrying refugee claimants from West Papua. It is difficult to take this suggestion seriously. Any such action would prevent people from pursuing legitimate claims to refugee status, it would be totally incompatible with the Convention principle of non-refoulement, and it would lead inevitably to the risk of further abuse. The idea should be rejected immediately and publicly.

Yours Sincerely,
Executive Committee
ICJ Australia



- cc. - The Hon Senator Amanda Vanstone, Fax: (02) 6273 4144
- The Hon Philip Ruddock MP, Fax: (02) 6273 4102
- The Hon Alexander Downer MP, Fax (02) 6273 4112
- The Hon Dr Brendan Nelson MP, Fax (02) 6273 4118
- The Hon Senator Christopher Ellison, Fax: (02) 6273 7098



INTERNATIONAL
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26 April 2006

The Hon John Howard MP
House of Representatives
Parliament House
Canberra ACT 2600
Fax: (02) 6273 4100

Dear Prime Minister,

Re: Announced Reform of Asylum Seeker Policy

We note that since our letter to you dated 13 April 2006, your government has announced further policies in respect of asylum seekers.

ICJ Australia protests in the strongest possible terms against the announced changes, and in particular against the proposal to remove ALL asylum seekers arriving without visas on boats to offshore detention centres on Christmas Island and in Nauru and Papua New Guinea. The policy seeks to prevent, for political purposes, onshore asylum applications for people who arrive without visas, despite the undeniable reality that the very nature of flight from persecution often precludes regularisation of international travel. As you are aware, many refugees do not have the time, resources, access to information, or general wherewithal to apply for a regular offshore visa to enable lawful arrival.

ICJ Australia has long regarded the policy of creating a "migration zone" limiting access to protection visa options to be in breach of our international obligations under the *Convention Relating to the Status of Refugees* which creates protection obligations for refugees located (whether lawfully or not) anywhere in the entire land and sea territory of signatory States¹.

¹ 1967 Refugees Protocol – Article 1 - The present Protocol shall be applied by the States Parties hereto without any geographic limitation...

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The intention of the policy appears to be to deny all such asylum seekers (even those who arrived safely on the Australian mainland) access to Australia's system of administrative decision making, including merits review in the Refugee Review Tribunal, the Minister's discretionary powers under section 417 of the *Migration Act 1958*. The policy also denies practical access for such asylum seekers to independent legal advice and to judicial review in Australia's federal courts². A denial of full access to Australia's systems of decision making and review for asylum seekers (accepting, as your government does, that departmental officers are fallible) will inevitably lead to refoulement of refugees into the hands of their persecutors in breach of the Convention³ not to mention in breach of basic principles of humanity. Further, the policy clearly discriminates against asylum seekers in Australia based on their mode of flight, also in breach of Australia's obligations under the Convention⁴. Moreover, the policy will also lead to an inevitable resumption of the detention of innocent children, which the government has previously admitted to be bad policy and the wrong way to treat children in a humanitarian sense.

It also appears that it may be the Government's intention to preclude all these people from prospects of resettlement in Australia, even if their claims to asylum are recognised as well-founded. The Minister for Immigration, Senator Vanstone stated that refugees affected by this policy would be resettled in third countries other than Australia, but you and the Attorney-General have indicated that Australia may resettle some of these people if other countries could not be found for them. We call for a public written clarification of this aspect of the policy. Will refugees affected by this policy be eligible for resettlement in Australia? If so, in what circumstances would consideration for resettlement in Australia be given?

There has been no attempt to hide the fact that this policy is aimed at refugees from West Papua. They are the only group to have reached the Australian mainland in recent times, and are the most likely to do so again in the future. It must be highlighted that unlike many boat arrivals who may have traversed a number of countries to get here, it is likely that most, if not all, West Papuan asylum seekers arriving by boat land here as the first State of destination following their flight from persecution. Senator Vanstone actually said "the laws will stop people, like the group of Papuans, from using Australia to generate publicity for a political cause." This statement is an admission that the new laws are targeted against the West Papuan refugees and that they have been devised as a direct response to Indonesia's angry reaction to the recognition of their refugee status. The policy is purely political.

The claim that the new policies will result in equal treatment for all who seek to come to Australia by boat is unbelievably arrogant, when the earlier excisions of offshore islands were themselves a violation of previously accepted standards for treatment of refugees. The policy is also discriminatory, as it singles out a group of asylum seekers from all those who are actually in Australia for less favourable treatment because of their origin. The policy fails to respect the principles of the Refugees Convention. It is implicit in the Convention and its administration by the UNHCR that persons in a country like Australia who are found to be refugees will be accepted as residents in that country in accordance with the terms of the Convention.

In devising its new policy, the Government has failed to acknowledge that 42 West Papuans were actually found by Australia to have a well-founded fear of persecution in Indonesia. No doubt has been cast on this finding, except by the Indonesian Government, which has consistently refused to

² Refugees Convention - Article 16 - A refugee shall have free access to the courts of law on the territory of all Contracting States.

³ Refugees Convention - Article 33 - No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened...

⁴ Refugees Convention - Article 31 - The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence..

acknowledge the abuses suffered by the West Papuans and others under its military rule, and which was accepted as the persecuting party in relation to these 42 West Papuans.

It seems clear that the Australian Government is unwilling to face the reality that there are many more West Papuans who fear persecution at the hands of the Indonesian military and security forces. For as long as West Papuans remain subject to threats of violence and abuse from Indonesian authorities, there will be other refugees attempting to find asylum in Australia, just as there are thousands of them living in terrible conditions across the border in Papua New Guinea. Rather than accept the truth of the situation in West Papua, Australia has demonstrated that it is prepared to conspire with Indonesia to cover up the abuse and place barriers to protection for refugees from that country.

ICJ Australia urges the Australian Government to call on Indonesia to improve the situation of West Papuans as the most effective way to ensure that there will be no further flow of asylum seekers from that territory. We also call on your government to abandon its announced policies referred to above, and to accept its place in the region as the closest State for many that is signatory to the Refugees Convention, and the only realistic option for protection for many refugees in the region, including in particular, for West Papua refugees.

We would appreciate hearing from you as a matter of urgency, and we will delay publication of the contents of this letter until 2 May 2006.

Yours Sincerely,
ICJ Australia



The Hon John Dowd AO QC

- cc. -
- The Hon Senator Amanda Vanstone, Fax: (02) 6273 4144
 - The Hon Philip Ruddock MP, Fax: (02) 6273 4102
 - The Hon Alexander Downer MP, Fax (02) 6273 4112
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