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TO WHOM IT MAY CONCERN

This submission concerns the *Migration Amendment (Designated Unauthorised Arrivals) Act 2006* (the "amendments").

Australia is to be congratulated for its participation and signature to numerous international documents which ensure the recognition and protection of fundamental human rights.

However, the amendments proposed to the *Migration Act 1958* (Cth), if implemented as domestic legislation, will breach Australia's international legal obligations, flout the spirit of international cooperation and humanitarianism mandated by the Convention on the Status of Refugees (the "Refugees Convention") and may violate human rights.

I INTERNATIONAL OBLIGATIONS

Australia must give effect to its obligations and duties under international law. Australia's legal obligations exist under customary international law.

- Article 14, Universal Declaration of Human Rights: 'Everyone has the right to seek and to enjoy in other countries asylum from persecution.'

Australia also has international obligations under various international treaties.

Under the Refugees Convention:

- Article 31(1): '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, ...'

- Article 33(1): '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 on account of his race, religion, nationality, membership of a particular social group or political opinion.'

The amendments violate Article 31 of the Refugees Convention by removing all people without valid documentation or authority, arriving by boat in Australia to immigration detention in a designated place, most likely on Nauru or Manus Island, Papua New Guinea (PNG). Those who come to Australia seeking protection are not criminals, yet they are detained indefinitely while their claims for protection are processed.

Australia's current determination and removal processes avoid the Article 33(1) non-refoulement obligation, and the proposed amendments exacerbate Australia's liability. The United Nations High Commissioner for Refugees (UNHCR) has declared that Australia's offshore processing arrangements have 'jeopardised the proper functioning of the international protection regime.'[1] Whilst the Commissioner has not accused Australia of violating the principle of non-refoulement, it argues that Australia has "shirked" its international obligations.[2] The effect of the amendments will be to close Australia's borders to prevent the possibility of entry for asylum seekers. The obligation not to refoule 'exists unless, and until, a determination has been made that a claimant is in fact *not* a refugee.'[3] This interpretation of the non-refoulement obligation is adopted by European States, and at UN Conferences.[4]

The amendments propose that all processing of onshore boat arrivals be carried out in a "declared country". It is doubtful whether in fact Nauru and PNG can provide sufficient protection to asylum seekers. Nauru is not a signatory to the Refugee Convention, which means that it has no legal obligation not to violate Articles 31 and 33. Both Nauru and PNG have, in recent years, seen political and economic turmoil, such that it is perverse to declare these countries to be "safe" and capable of protecting the rights of asylum seekers during processing. In these countries, asylum seekers have no access to the Australian legal system or guaranteed access to legal advice and representation.

Due to difficulties in defining a "safe third country", Australia may engage in chain refoulement by sending refugees to Nauru. Refugees are at risk of being returned from Nauru to a place where they may face persecution.[5] The amendments may therefore violate Article 33 of the Refugees Convention.

Under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Convention Against Torture):

- Article 3: (1) No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture. (2) For the purpose of determining whether there are such

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[1] UNHCR, 'UNHCR criticises Australia for turning boat people away' (2003) UNHCR website <http://www.unhcr.org/cgi-bin/texis/vtx/news/opendoc.htm?tbl=NEWS&page=home&id=4444cb662> at 27/4/2006.
[2] Janowski, K., 'Indonesia boat people: Australia shirks international obligations' (2003) UNHCR website, <http://www.unhcr.org/cgi-bin/texis/vtx/news/opendoc.htm?tbl=NEWS&page=home&id=3bf0ec9b4> at 27/4/2006.
[3] Fonteyne, J. L., 'All Adrift in a Sea of Illegitimacy: An International Law Perspective on the Tampa Affair' (2001) December *Public Law Review*, 249 at 251.
[4] Taylor, S., 'Australia's Implementation of its Non-Refoulement Obligations under the Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment and the International Covenant on Civil and Political Rights' (1994) 17(2) *University of New South Wales Law Journal* 432.
[5] A Just Australia, 'Offshore Refugee Processing: Brief on the proposed changes' (2006).

> grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross flagrant or mass violations of human rights.

Any processing procedure which involves mandatory removal of asylum seekers to Nauru or PNG may be a violation of Article 3 of the Convention Against Torture.

Australia has international legal obligations in relation to the treaties it enters. These duties are to be found in the Vienna Convention on the Law of Treaties (the "Vienna Convention").

- Article 18: 'A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when: (a) it has signed the treaty …; or (b) it has expressed its consent to be bound by the treaty ….'

- Article 27: 'A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.'

- Article 26: 'Every treaty in force is binding upon the parties to it and must be performed by them in good faith.'

- Article 40(2): 'Any proposal to amend a multilateral treaty as between all the parties must be notified to all the contracting States ….'

The amendments may be in violation of Article 27 of the Vienna Convention:

> [I]t is not simply possible, in international law, to avoid the application of a treaty obligation by the expedient of declaring part of your territory to be beyond the bounds of the obligation … [The amendments are] tantamount … to … a geographical reservation to a multilateral treaty so as to circumscribe one's obligations.[6]

The amendments are a unilateral act by Australia to severely curtail its obligations under the Refugees Convention. The amendments may constitute a violation of the Vienna Convention in failing to adhere to the rules for amendment of international treaty obligations.

The Preamble to the Refugees Convention outlines its humanitarian spirit and purpose. The Convention envisages the expansion of the international protection regime, not its limitation, and notes the fundamental importance of international cooperation and burden sharing. The embodiment of these principles in domestic legislation is a legal obligation for Australia. Articles 18 and 26 of the Vienna Convention require that where a State has given its signature to a treaty, its terms and object must not be violated even in the absence of implementing legislation. All terms must be performed in good faith. The amendments flout the humanitarian purpose of the Refugees Convention, as well as the obligation of good faith, by mandating indefinite detention in unsafe countries for onshore refugee arrivals.

Australia should be concerned at the message these amendments will send to the international community. The amendments signal that Australia's domestic political agendas and diplomatic relations Indonesia will trump the protection obligations it owes to asylum seekers. The amendments show Australia's willingness to disregard its obligation of international cooperation. This will be of concern to the remainder of the international community. Australia expects overseas nations to take on its obligations to refugees.

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[6] Fonteyne, J. L., above n 4, 250 – 251.

II PROTECTION OF THE VULNERABLE

The amendments, in combination with existing legislation, show a profound misunderstanding in government of the plight of asylum seekers. There is an ill-founded emphasis on the criminality of the actions of people smugglers, and the domestic challenges posed by unauthorised arrivals. This is unfortunate because it means that those who are legitimately in need of asylum in Australia are more susceptible to Australia's removal procedures simply because of the means by which they arrived.

The amendments are particularly worrying in that they afford no special protection to refugee children. If the amendments are passed, children, who arrive having survived an arduous and tortuous journey to Australia without their family for support and comfort, will be placed into immigration detention. On Nauru, they will receive no emotional or legal support, hostility from the local community, and as recent cases have shown, will be exposed to an unacceptably high risk of psychological harm.

III CONCLUSION

Australia is well equipped and humanitarian minded and can offer a more humane refugee processing system then the one proposed by the Bill. This submission outlines that the amendments, in combination with existing legislation, amount to a violation of numerous international obligations which Australia has voluntarily adopted. Over and above these violations, the amendments propose a cruel regime for refugee processing. Asylum seekers are not criminals, and must not be removed from Australia to be placed in countries where their rights as human beings cannot be guaranteed. The amendments will not improve refugee processing, but will profoundly and negatively harm refugees.

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