Jesuit Refugee Service *(Australia)*
ABN: 75 692 565 034

PO Box 522, Kings Cross NSW 1340
Phone 02 9356 3888; Fax: 02 9356 3021
E-mail: jrsau@jrs.org.au
Home-page: http://www.jrs.org.au

POSITION PAPER
MIGRATION AMENDMENT (DESIGNATED UNAUTHORISED ARRIVALS) BILL 2006

1. Jesuit Refugee Service (Australia) as part of Jesuit Refugee Service International, considers that the *Migration Amendment (Designated Unauthorised Arrivals) Bill 2006 (*hereafter the *Migration Amendment Bill*), if enacted, will visit greater psychological and physical harm on asylum seekers, fails satisfactorily to safeguard their human rights and creates an unacceptably high risk of *refoulement*. Further, it creates a destructive precedent for international protection of refugees. This would be first time that, in the absence of a mass influx of asylum seekers, a signatory to the Convention relating to the Status for Refugees (1951) (hereafter the *Refugee Convention,* or *Convention*) has proposed to enact a comprehensive system of processing asylum claims extra territorially. The legislation places Australia outside the framework of customary international protection. It should therefore firmly be rejected.

2. There are four reasons for rejecting the Bill:

   2.1 One objective of the *Migration Amendment Bill* is to facilitate a better bilateral relationship with Indonesia by preventing successful claimants from Papua from mounting political protest from Australia.[1] This disregards the human rights of asylum seekers under various Treaties and Protocols and under customary International Law.

   2.2 A second objective of the *Migration Amendment Bill* is to make the treatment of asylum seekers who arrive within Australia's migration zone consistent with that of those arriving in excised off shore zones.[2] Consistency is to be achieved by making all onshore applicants subject to off shore processing. The UNHCR has strongly criticized the previous Pacific Solution.[3] It suggests that consistency should be ensured by renewing onshore processing

   2.3 Under article 35 of the *Refugee Convention*, contracting states undertake to cooperate with the UNHCR in the performance of its duties and in facilitating its role of supervising the *Convention*. According to the UNHCR, "this has always been understood that when a country is drafting legislation affecting refugees we should be consulted at an early stage."[4] Although the UNHCR has been invited to make a submission to this inquiry, this Bill is so radical in the precedents it sets that extensive consultations should already have taken place. This has not been the case.

   2.4 The Bill proposes that processing again take place on Nauru, a non-signatory to the *Refugee Convention*. Experience with the previous "Pacific Solution", so called, enacted by the Australian Government from 2001 to 2004, clearly demonstrates that many of the asylum seekers detained and processed there suffered serious harm:

[1] Senator Amanda Vanstone, *7.30 Report* 15[3h] April, 2006.
[2] Hon Andrew Robb MHR *Migration Amendment (Designated Unauthorised Arrivals) Bill 2006, Second Reading Speech* (House of Representatives: 11May 2006)
[3] Jennifer Pagonis UNHCR, Agence France-Presse English Wire May 12 2006.
[4] UNHCR Briefing 16 May 2006

- Cases were mishandled with instances of inclusion of untested, prejudicial material and the merging of material across cases.[5]
- There is evidence that asylum seekers, faced with indefinite detention, "voluntarily" returned to their original countries. From there they subsequently sought asylum elsewhere. This raises the disturbing possibility that a de facto *refoulement* has occurred in some cases.[6]
- Among the former detainees on Nauru, many continue to suffer from mental illness attributable to their detention.

2.5 The *Migration Amendment Bill* makes it likely that the practices that gave rise to these consequences will be repeated. The UNHCR has described this experience consistently as "bad" and one not to be repeated.[7] Australia's prior experience of off shore processing means that we can no longer say of the harmful effects on future asylum seekers, "we didn't know". This remains the most compelling moral argument against accepting the tabled *Migration Amendment Bill*.

3 The treatment of asylum seekers, developed over the course of the Twentieth Century, relies upon a system of international cooperation guided and governed by international Conventions, Treaties and customary International Law. These rest upon a number of core legal principles that are designed to provide protection to those who claim asylum.

3.1 The Right to Seek Asylum

3.1.1 The right to seek and enjoy asylum is guaranteed by a number of international instruments to which Australia is a party. These include the *Universal Declaration of Human Rights* (article 14), the *Vienna Declaration and Programme of Action* (which emphasises the "international solidarity and…spirit of burden-sharing" with which these instruments are to be carried out) and the *Convention Relating to the Status of Refugees*, which gave form and effect to this fundamental tenet of international law.[8]

3.1.2 Offshore processing of asylum seekers, especially in circumstances where there is no guarantee that Australia will provide protection to asylum seekers when it is recognised they enjoy refugee status, is a fundamental repudiation of her responsibilities under these instruments. If Australia is not taking responsibility, to the fullest extent, for the protection of asylum seekers that arrive on our shores, it cannot claim to uphold this most basic principle of international treaty and customary law – the right to seek and enjoy asylum.

3.2 Non-discriminatory application of the 1951 Convention

3.2.1 The purpose of article 3 of the *Refugee Convention* was not to introduce a general "non-discriminatory" element to the *Convention* but specifically to avoid the situation whereby

---

[5] Michael Gordon, "Detainees to cast off from Nauru" *The Age* October 14 2005, http://www.theage.com.au/articles/2005/10/13/1128796652052.html also Michael Gordon, *Freeing Ali: The Human Face of the Pacific Solution* Sydney: UNSW Press 2005, p109 (letter from Marion Le to Amanda Vanstone 27 May 2005, 31st May 2005)

[6] Gordon *Freeing Ali* p109 citing Marion Le letter to Amanda Vanstone: "How many of the Afghans who gave up their claims and returned to their region, only to flee again into Pakistan and Iran, were also poorly served?"

[7] See Note 3, above.

[8] Vienna Declaration and Programme of Action, as adopted by the World Conference on Human Rights on 25 June 1993, available at: http://193.194.138.190/huridocda/huridoca.nsf/(Symbol)/A.CONF.157.23.En?OpenDocument See also Convention relating to the Status of Refugees, 189 U.N.T.S. 150, *entered into force* April 22, 1954.

separate groups of refugees would be discriminated against according to the enumerated grounds, namely "race, religion or country of origin".[9]

3.2.2 Immigration Minister Hon. Senator Amanda Vanstone made comments referring to the campaign for Papuan independence as a "toxic cause" and stated that these amendments will prevent those who may wish to use Australia as "staging post" from "voicing protests".[10] It is reasonable to conclude from these comments that the legislative regime proposed in the *Migration Amendment Bill* is directed towards those seeking asylum from a particular country of origin and a particular race, namely, Melanesian Papuans from Indonesia.

3.2.3 Before commenting on the relevance of these statements to article 3, two important points must be made:

- As persecution for "political opinion" is one of the five enumerated grounds that confers refugee status under the *Convention*, it is unjust to penalise a refugee on the very ground that has brought about his or her refugee status.

- Not all West Papuan refugees are pro-Independence West Papuan activists, nor do they seek asylum in Australia. At our estimate there are between 7,500 and 9,500 displaced people living along the border of Papua New Guinea and Indonesian West Papua in East Awin District and along the Fly and Alice Rivers. 2,500 people have official protective status whilst the remainder (between 5,000 and 7,000) are regarded as "border crossers" and have elected neither to return to Indonesia nor to move to East Awin. The UNHCR regards them as having protected status if their political beliefs caused their initial movement. In 1987, the Government of Papua New Guinea and UNHCR withdrew assistance to these people. The causes of displacement and flight from West Papua are deeper and more complex than can be described under the single heading of an aspiration for political independence.

3.2.4 When read in the context of bilateral tensions that arose between Indonesia and Australia over the recognition by Australia's Department of Immigration of 42 West Papuan asylum seekers as refugees, Senator Amanda Vanstone's comments make it clear that the *Migration Amendment Bill* is directed towards Melanesian West Papuans from Indonesia and would adversely affect refugees from that racial group. This adverse result is in contravention of Article 3.

3.3 Non discrimination by Mode of Arrival

3.3.1 The *Migration Amendment Bill* also establishes a legislative regime that discriminates against refugees according to their

---

[9] *Ibid.* at Article 3.

[10] *The Weekend Australian*, 29/04/06; "Asylum seekers to be pushed offshore for processing", *PM*, 13/14/16, available at: http://www.abc.net.au/pm/content/2006/s1616160.htm

mode of arrival, in express contravention of Article 31 of the *Refugees Convention*. Article 31 is intended to prevent the discrimination between refugees for reason of illegal entry.

3.3.2 The proposed amendment contravenes Article 31. By immediately relocating asylum seekers who arrive in Australian territory by sea to an offshore location, it denies them the opportunity to "present themselves without delay to the authorities and show good cause for their illegal entry or presence".[11] Placing asylum seekers offshore in this fashion is tantamount to punishment because of the manner of arrival on Australian soil, in express breach of Article 31 (2).

3.3.3 The legislative regime under which their claims are processed is also of a standard inferior to that enjoyed by those who arrive by 'authorised' means. They are denied access to independent merits review and to judicial review, This denial constitutes a "penalty" on account of illegal entry. Finally, the long times taken to process claims on Nauru, and the uncertainty of finding a country of resettlement that operate under this scheme constitute an unnecessary restriction on the movements of refugees and contravene Article 31(2).

3.3.4 In the last year (July 1 2005 to February 28 2006), the Refugee Review Tribunal accepted 95% Afghan claimants (144 out of 151 people) who had previously had their claims rejected at the primary stage.[12] The Iraqi figure is 97% or 373 out of 383 applicants. The overall figure for all applicants in that time period is 33%. In other words, one in three cases is overturned at review, allowing the applicant refugee status. Removing this course of review, as well as appeal to higher courts, makes asylum seekers vulnerable to mishandling of cases by departmental assessors. The independence of review mechanisms in the processing of asylum claims is crucial.

3.4 International Cooperation and Responsibility / Burden-Sharing

3.4.1 To rely on developing nations to process asylum seekers that arrive in Australia, and then to approach other nations to accept the refugees recognised by this process, will not foster a climate of cooperation and burden sharing within the region.

3.4.2 Australia may not proceed, unilaterally, on a course of action that undermines the fundamental right to flee persecution and seek protection at the first point of safety. Article 35 of the *Refugees Convention* provides for monitoring that ensures that national asylum laws are drafted and implemented in accordance with international obligations. UNHCR statements, cited above demonstrate that Australia has failed to consult UNHCR regarding the tabled *Migration Amendment Bill*.

---

[11] Convention relating to the Status of Refugees, 189 U.N.T.S. 150, *entered into force* April 22, 1954
[12] http://www.rrt.gov.au/statistics.htm

3.4.3 It is proposed that Australia will approach "third countries" to accept refugees recognised by this offshore status determination process. There is no reason to expect that other states will accept the burden of resettling refugees who would, quite rightly, be seen as Australia's responsibility. This was the experience of refugees recognised through the current offshore processing measures. Australia in the end accepted the vast majority of them.

3.4.4 The principle of sharing responsibility demands that contracting states cooperate in responding to extraordinary people movements. In the previous "Pacific Solution", Australia went to great lengths to persuade other countries as far away as Brazil to resettle people from Nauru who had been classified as refugees. With the exception of New Zealand, Australia failed to persuade them. It is highly probable that people will be left on Nauru or Manus Island for lengthy periods, without resettlement. The personal and documented experience demonstrates that people who were left on Nauru were particularly vulnerable to mental illness.

3.4.5 The *Migration Amendment Bill* as proposed sets an international precedent destructive of the principle of shared responsibility. If other states acted in this way, the very integrity of the international system of refugee protection would be placed at risk, with the potential for catastrophic consequences for vulnerable human beings. Ironically, the existence of Australia's offshore humanitarian program relies upon the effective working of an international system of refugee processing and protection.

3.5 Non-r*efoulement*

3.5.1 *Non-refoulement* is the principle that asylum seekers should not be returned to the situation of persecution from which he or she has fled. On Nauru there is evidence that some asylum seekers held there for long periods of time returned to their countries of origin and soon after sought asylum in another country. The absence of provision for merits review and judicial appeal in the Migration Amendment Bill is deeply concerning. This combines with little facility to scrutinise offshore facilities and processes, the lack of availability of legal representation and increased naval patrols in northern waters to create an unacceptably high risk of irregularities in the processing of claims and, ultimately, *refoulement*.

4 In the long term, the situation in West Papua will improve only through proper economic development, assurance of the human rights of its citizens, and the removal of the conditions that motivate people to seek asylum. Australia needs to work with Indonesia to remove the conditions that force people to seek asylum.

5 The legislation represents a short-term effort to appease Indonesia and provide legislative consistency to what has been labelled a bad system of asylum processing. It will in our view not lead to a better system of processing. Rather it places Australia outside its *Refugee Convention* obligations, offer less credible protection to asylum seekers, and fail to safeguard satisfactorily their rights. The amendments also, in our view, will fail to meet the governments stated objectives that include a better bilateral relationship with the Republic of Indonesia.

6 It is important to recognise that the granting of asylum is, of itself, an apolitical act. It recognises that countries sometimes and in some situations are unable to offer their citizens adequate protection. Australia needs to continue to participate in the refugee protection system. Withdrawing from these obligations will visit immense harm on the most vulnerable of people.

(Fr.) David A Holdcroft SJ
Director
Jesuit Refugee Service (Australia)