A Just Australia

Australians for Just Refugee Programs

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Dear Senators,

Australians for Just Refugee Programs Inc. brings together over 13,000 individual supporters, 120 non-government organisations and over 70 prominent Australian patrons under the banner of *A Just Australia* (AJA).

AJA's role is to campaign for the just and compassionate treatment of refugees and asylum seekers. We believe that Australia's policies toward refugees and asylum seekers should at all times reflect respect, decency and traditional Australian generosity to those in need, while advancing Australia's international standing and national interests.

We aim to achieve just and compassionate treatment of refugees, consistent with the human rights standards which Australia has developed and endorsed.'

Please find enclosed our submission, *A Test of MPs' Values*, to the Senate Legal and Constitution References Committee Inquiry into the provisions of the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006.

We thank you for the opportunity to provide a submission.

Kate Gauthier
National Coordinator
A Just Australia

Contents

1. Introduction: *A test of MPs' values*

This proposed law fails the Australian people. It offends Australian values and breaks international standards for human rights. In doing so, it provides a test of the values and the integrity of every member of the House of Representatives and the Senate.

There has been a lot said about 'Australian values' by Australian politicians of all political persuasions, from the Prime Minister and Treasurer, Ministers and Government members, to the leaders and members of other political parties who take up their seats in Australia's parliament.

Last year the Australian Government released 'Values for Australian Schooling'; the values they want all Australians to be taught and by which they want all Australians to live. They were listed as:

Care and compassion
Doing Your Best
Fair Go
Freedom
Honesty and Trustworthiness
Integrity
Respect
Responsibility
Understanding, Tolerance and Inclusion

It is A Just Australia's view that you cannot believe in these values and support this proposed law. Each MP now has the opportunity to support and protect these values by voting against this proposed law.

We challenge every MP to explain how this proposed law supports the values by which they want Australians to live. If, like AJA, they come to the view that the legislation does not meet the test of our values, we call on them to vote against it.

Given that the consequences of this legislation includes denying asylum to genuine refugees or allowing them to face indefinite detention, returning people to persecution, and detention of children, we call on our MPs to explain the following:

1. How does sending people back to face persecution, denying genuine refugees asylum, indefinite detention or putting children in detention, meet the test of care and compassion?

2. How does doing these things meet the test of 'doing your best', that is, accomplishing something worthy and admirable?

3. How does denying those asylum seekers who arrive by boat from our north access to information, advice and support provided to others claiming asylum meet the test of a 'fair go'?

4. How does acquiescence with or turning a blind eye to human rights abuses meet the test of a 'fair go'? How does punishing innocent and vulnerable men, women and children for the sake of appeasing another country meet the test of a 'fair go'?

5. How do the statements made by the Prime Minister and the Minister for Immigration about the reasons for this legislation withstand the test of 'honesty and trustworthiness'?

6. How do the proposed changes demonstrate respect? What respect are we showing ourselves when we are prepared to change our laws not because we believe they are wrong but because another country believes they are wrong?

7. How do the numerous breaches of not only our moral but legal duties that this new law represent meet the test of responsibility?

8. How does the new law support the calls for understanding, tolerance and inclusion?

9. How can the passage of such a law demonstrate integrity, that is, the willingness to act in accordance with these values?

10. Where do you draw the line and say that you can no longer defend the erosion of these values and make a stand for what is the right and principled thing to do?

The simple fact is the Australian Government found that 42 West Papuans were entitled to refugee status because of a genuine fear of persecution. Now, under pressure from the Indonesian Government, it seeks to change the law not only so that it can turn its back on those who are being persecuted but so that it can further punish them by condemning them to a second-rate and unfair decision-making process coupled with the possibility of indefinite detention as there will be no realistic resettlement options.

The passage of such a law that offends basic Australians values will leave those who support it with no claim to integrity; it will render the 'values for Australian Schooling' empty and our Parliament and nation diminished.

2. Executive Summary

There are a number of tests for what makes 'good law' and this proposed legislation fails them. The tests include (but are not limited to):

Values:
Our laws should seek to put our shared values into practice. They should be guided by and support these values. In this way, our laws have integrity. This proposed law offends basic Australian values and the rights and freedoms we have fought for. It diminishes parliamentarians, our Federal Parliament and our country. It has no integrity.

Motive:
Australian law should be changed for the right reasons. The law is being changed not because Australia and Australians think it is wrong for us but because the government of another country thinks it is wrong for them.

Impact:
The law should seek to be beneficial, not harmful or destructive. The effects of this proposed law are cruel. People will be sent back to face the persecution from which they are fleeing; offshore processing will mean that many genuine refugees will be sent back to danger; and offshore detention has done and will continue to do serious physical and psychological damage to men, women and children.

Cost effectiveness:
Our laws and actions should seek to balance the intent and outcomes with the cost of doing so. This proposed law ('Pacific Solution II') comes at an extremely high cost to taxpayers and a high human cost to all concerned.

The proposed law fails the basic tests for good law:

- It offends Australian values;
- It will break our moral obligations to assist vulnerable people when it is clearly in our power to do so;
- It will detain children, possibly indefinitely;
- It will detain proven refugees, possibly indefinitely;
- It will send genuine refugees and asylum seekers back to the persecution they are fleeing;
- It will break international law;
- It is economically irresponsible;
- It does not allow for the proper oversight of government actions as required in an open and accountable democracy, a basic right of the Australian taxpayer;
- It will break the blood-debt owed by Australia to the relatives of the 'Fuzzy-Wuzzy Angels'; those 'Angels' saved the lives of many Australian servicemen in World War II - Australia should equally protect any Papuan who asks us for protection;
- It will not stop or diminish the movement for justice against human rights abuses in West Papua; it may arguably have the opposite effect by inflaming separatist agitation in West Papua due to the closing off of avenues for persecuted people to flee, and it will not achieve the objective of appeasing the Indonesian Government.

In the wake of the Tampa crisis in 2001, Prime Minister John Howard promised to prevent those on that ship from entering Australia, saying: "We will decide who comes here and the manner in which they come". Unfortunately it now appears that Indonesia is making this decision for us.

This issue is not about West Papuan independence, nor Indonesian sovereignty; it is about basic human rights. Australia does not have to trade away its regard for basic human rights. In supporting Indonesian sovereignty the Australian Government can insist that human rights be respected, and if not, stand ready to provide asylum for those who have no choice but to flee.

3. Recommendations

Recommendation 1
This proposed legislation SHOULD NOT BE PASSED.

If the Federal Parliament decides to support this proposed law despite the issues raised, the following recommendations are put forward as the minimum conditions which must be met if there is to be any hope of mitigating the enormous damage that the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006 will inflict on vulnerable people who seek the protection of Australia:

Recommendation 2

All forms of immigration detention must include independent monitoring by human rights bodies for welfare conditions of detention. The role of the Commonwealth Ombudsman to monitor the visa decision-making process for long-term detained asylum seekers, with the ability to make recommendations to the Minister for Immigration and Multicultural Affairs, must extend to any offshore processing conducted on behalf of the Australian people.

Recommendation 3

Children should be detained (by, or on behalf of, the Australian Government) as a measure of last resort. Children and their families must be able to access the same residence determination programs that exist in Australia. Such programs have already been set up on Christmas Island and could be utilised immediately. Such programs have no hope of working on Nauru due to its geographical location, socio-economic condition and the extremely limited presence of welfare agencies or other NGOs.

Recommendation 4

The Australian Navy must not, under any circumstances, be asked to be, or be involved in breaching Australia's protection obligations to vulnerable people, by removing them before their refugee status is determined. The Navy must have clear rules of engagement that require them to bring any person suspected of being an asylum seeker to the attention of an Immigration Officer who can conduct a screening interview to determine their status.

Under no circumstances should the Australian Navy or coastguard be party to a process that will see asylums seekers forced to return to face the persecution from which they are fleeing.

Recommendation 5

Decisions made by, or on behalf of, the Australian Government, should have the same quality of merits review regardless of geographic location. At minimum, there should be a review mechanism equal to the procedural independence and the level of investigation by the Refugee Review Tribunal.

Recommendation 6

90 day deadlines for decisions should be for all DIMA protection visa cases, not just those on the mainland.

Recommendation 7

Australia has obligations to resettle refugees under the jurisdiction or control of the Australian Government. All asylum seekers found to be refugees must be allowed to immediately resettle in Australia.

[However, A Just Australia is aware that a large part of this current proposal is to ensure that West Papuans do not ever have a chance to settle in Australia and the Government will seek 'third country' options. Recommendation 8 addresses this issue.]

Recommendation 8

Proven refugees must not be detained indefinitely by, or on behalf of, the Australian Government. A deadline for resettlement in Australia for asylum seekers processed under this arrangement, where other resettlement options cannot be found, must be written into law. A Just Australia contends that a three-month period grants enough time to find alternatives if at all possible, given that resettlement options can also be investigated during the status determination process.

Recommendation 9

The Australian taxpayer should not bear the financial burden of detaining asylum seekers for the benefit of the Indonesian Government. Although A Just Australia does not agree with any detention that is not recommended by an individual security assessment, clearly mainland detention is a far more sensible economic option.

Recommendation 10

If the much more expensive option of Nauru is used, the entire cost over and above mainland detention options should be borne by the Indonesian Government, for whose appeasement this legislation is being proposed.

Recommendation 11

If there is to be offshore processing, it should not occur on Nauru. Christmas Island is far preferable in terms of addressing welfare concerns, monitoring of conditions and overall cost.

Recommendation 12

Detention centres/camps should be managed by the Commonwealth Government, with no divestment of responsibility to private firms.

4. Protecting Australia's special relationship with Indonesia

In the wake of the Tampa crisis in 2001, Prime Minister John Howard promised to prevent those on that ship from entering Australia, saying: "We will decide who comes to this country and the manner in which they come". Unfortunately it now appears that Indonesia is making this decision for us.

It has become increasingly clear that the expansion of the so-called "Pacific Solution" is not being canvassed as a response to a sudden influx of large numbers of asylum-seekers. Rather the overarching aim of the policy is to appease the Indonesian Government which has expressed concern that Australia accorded refugee status and protection to a very small number of West Papuan boat arrivals.

Acknowledgement by the Minister for Immigration and Multicultural Affairs, Senator Amanda Vanstone, of the political sensitivities involved in recognising the persecution suffered by the 42 West Papuans by the Indonesian state, as well as reports of the Indonesian Government praising this policy change and noting that it will now return its ambassador to Australia[1], provide further indication of the political pressure brought to bear on the Australian Government to privilege the views of the Indonesian government over upholding respected principles of international law and human decency.

However, any perceived reinforcement of the relationship between Indonesia and Australia that this policy change will have is arguably very limited for the following reasons:

(a) A major criticism of the Indonesian government was that findings of persecution by Indonesia were made by Australian departmental officers and thus implied broader statements by the Australian government about the inadequacies of human rights' protection in West Papua. However, if asylum-seekers are processed in Nauru by DIMA officials (given the reluctance of UNHCR to participate in this activity) then this concern is not removed. In fact, it is possibly heightened because asylum-seekers whose claims are processed off-shore will not have access to independent judicial review of their claims, leading to an even closer link being perceived between the findings of persecution by Australian public service officers and the views of the Australian government.

(b) Repeated links have been drawn between the views of the West Papuan independence movement and their sympathisers in Australia who have been accused of everything from encouraging these individuals to seek asylum in Australia to providing remote support for the independence struggle. The presumption is that the mere processing of asylum claims by West Papuans in Australia will not only add succour to the independence movement but "allow Australia to be used as a staging point for protest"[2] should these individuals be granted refugee status and allowed to live in Australia. However, if Australia is unwilling to be the preferred processing and resettlement country, then asylum-seekers who are determined to be

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[1] Forbes, Mark (2006) "Indonesians back stand on Papuans", *The Age*, 16 May 2006, available from http://www.theage.com.au/news/national/indonesians-back-stand-on-papuans/2006/05/15/1147545267271.html Accessed: 22 May 2006

[2] *ABC 7.30 Report*, "Vanstone denies immigration laws aimed at Papuans", Interview with Senator Amanda Vanstone, Broadcast 13 April 2006, available from: http://www.abc.net.au/7.30/content/2006/s1616260.htm Accessed 22 May 2006

refugees will be forced to live in other countries. Consequently, rather than isolating support for the independence movement in Australia, this policy has the potential to spread sympathy for this cause throughout the Asia-Pacific region and beyond.

(c) Many Government MPs have expressed the view that it is necessary to take all possible steps (including those that may breach international obligations or operate discriminatorily) to appease the Indonesian government over this matter because to do otherwise would help to undermine the present moderate Indonesian leadership, lead to an upsurge in terrorism in the region and ultimately result in the dismantling of the Indonesian archipelago.[3] That adherence to the most basic of Australia's responsibilities under international law with respect to the human rights of a very small number of individuals could be considered in such melodramatic terms at best fails to appreciate the complexities of domestic Indonesian politics and at worst amounts to delusions of grandeur.

If Indonesia wishes to retain control of the West Papuan province, it can only do so by not engaging in any human rights abuses. History shows us that such forms of control over a population are never successful in the long-term, as people will never submit to such conditions. Any moves by Australia that seeks to acquiesce with or turn a blind eye to such human rights violations will undoubtedly work to further legitimise the quest for independence for West Papua.

5. Diplomatic consequences for Australia beyond Indonesia

It is our view that any perceived diplomatic gains that could be made by Australia in its relationship with Indonesia through the implementation of this policy are significantly outweighed by the reduction in Australia's broader international standing on human rights. The UNHCR has already expressed concern that the expanded "Pacific Solution" will exacerbate the potential for human rights abuses that already apply under the existing island excision and off-shore processing regime.[4] Australia's refugee policies over the last five years have been condemned by respected international human rights watchdogs such as Amnesty International and Human Rights Watch.[5]

Promotion of off-shore processing of asylum-seekers by a country like Australia which only receives a tiny proportion of refugee movements around the world, works to undermine the international protection regime established over the past 50 years to secure the human rights of these vulnerable people by encouraging other countries to also shirk their international responsibilities. Already countries such as the UK, Italy and Canada have moved to follow the "Australian model" and reverse

[3] Personal correspondence with Government MPs, May 2006.
[4] UNHCR Geneva, *Australia - Measures to Deal with New Boat Arrivals*, Briefing notes, Media release issued 18 April 2006.
[5] Human Rights Watch (2002) *By Invitation Only: Australian Asylum Policy*, Human Rights Watch. Available: http://extras.hrw.org/reports/australia1202.pdf ; Amnesty International (2002) *Australia-Pacific: Offending Human Dignity: The Pacific Solution*, Amnesty International. Available: http://web.amnesty.org/library/Index/ENGASA120092002?open&of=ENG-AUS

their commitment to respect the spirit and tenet of international refugee law.[6] Further attempts by Australia to renege on its responsibilities in this area will bolster international efforts to compromise the effectiveness of international refugee protections, resulting in serious adverse consequences for people seeking safety from persecution.

6. Domestic Issues

6.1 Reneging on Palmer Inquiry Detention reforms

While much has been made by the Government of the reforms introduced to satisfy recommendations made by the Palmer Inquiry, unauthorised asylum seekers will simply no longer be detained in Australia and under Australian law. This in itself gives rise to questions as to detention standards as well as the length and accountability of detention and renders much of the reforms meaningless.

This bill imposes a reporting requirement on the Secretary of the Department to report to the Minister annually, on matters such as "arrangements for assessing such person's claims for refugee status and for operational matters such as their accommodation, health care and education. The report is also to include information regarding numbers of asylum claims assessed and numbers of such persons found to be refugees."[7] This reporting requirement is unacceptable due to the fundamental lack of independence of the examination, and the infrequency of the reporting requirements.

The Australian taxpayer has a fundamental right to have independent monitoring of Government activities. This is a basic premise of an open and accountable democratic government.

> Recommendation 2
> All forms of immigration detention must include independent monitoring by human rights bodies for welfare conditions of detention. The role of the Commonwealth Ombudsman to monitor the visa decision making process for long-term detained asylum seekers, with the ability to make recommendations to the Immigration Minister, must extend to any offshore processing conducted on behalf of the Australian people.

6.2 Children in detention

Despite codifying within the *Migration Act* the principle that "children shall be detained as a measure of last resort" this proposal will see all boat arrival children detained in far worse conditions than have previously existed in Australia, with little hope of a speedy resolution to that detention.

A principle is about actions, not geographic location. The Australian people have clearly spoken - they do not wish children to be detained on their behalf. Removing children to

[6] See, for example, Hayes, Ben (2004) *Statewatch Analysis: Killing me softly? "Improving access to durable solutions": doublespeak and the dismantling of refugee protection in the EU*. Statewatch, Available: http://www.statewatch.org

[7] Migration Amendment (Designated Unauthorised Arrivals) Bill 2006: Explanatory Memorandum para 15.

Nauru does not absolve the Government of the responsibility for ensuring this principle is upheld.

There have been statements made by Senator Vanstone that children will not be detained because they are allowed out during the day: "[T]he immigration processing centre in Nauru is open on a daily basis - people can come in and out - it is obviously locked at night but not during the day."[8] At Baxter Immigration Detention Centre, children were allowed out during the day to attend school, yet the Minister did not deny that they were being detained. Additionally, in a location such as Nauru, the day release of children does not constitute freedom of movement as the tiny island itself becomes a form of detention.

Recent reforms within DIMA to create the residence determination program, run in partnership with welfare agencies such as Australian Red Cross, have been very successful in removing families from detention in ways which uphold their dignity and welfare, whilst addressing security concerns. A Just Australia welcomes the proactive steps DIMA has taken in this program and we look forward to this being expanded to other vulnerable detained people.

This program shows that there is acceptance within the Government of the principle that where there are no security concerns, families should not be detained. Additionally, the Government has accepted the principle that welfare agencies have a vital role to play in programs for release from detention. There is simply no welfare or NGO presence in Nauru to ensure these programs can be replicated there.

Australia has additional obligations to children under the *International Convention of the Rights of the Child 1989*, Article 3(1) to ensure that in all administrative decisions, the best interests of the child forms a primary consideration (see section 7.1.2). Australia has returned unaccompanied child asylum-seekers to Afghanistan from Nauru at time when asylum-seekers were not being returned from mainland Australia due to the increasingly unstable security situation. It is difficult to see how it is in the best interests of an unaccompanied child to return them to an area described in security reports at the time as having an absence of the rule of law.

No. returned	Period in Nauru
3	Less than 1 year (Nov 2001-Nov2002)
29	1-2 years (Nov2002-Nov2003)
6	2-3 years (Nov2003-Nov2004)
4	3+ years (Nov2004-onwards)

Unaccompanied Minors: Statistics provided by International Organisation for Migration

Given the lack of monitoring in the previous use of Nauru for processing, and the lack of monitoring in place for future use, it is all too possible for similar incidents to occur again.

> Recommendation 3
> Children should be detained (by, or on behalf of, the Australian Government) as a measure of last resort. Children and their families must be able to access the same residence determination programs that exist in Australia. Such programs have already been set up on Christmas Island and could be utilised immediately. Such programs have no hope of working on Nauru due to its geographical location, socio-economic condition and the lack of welfare agencies or any NGO presence.

[8] ABC News Online, 3 May 2006, http://www.abc.net.au/news/newsitems/200605/s1629331.htm

6.3 Naval interdiction and return to persecution

The Australian Navy will be instructed to intercept asylum seekers who arrive in our territorial waters and transfer them to Nauru. If the Navy also assists Indonesian forces, either directly or by providing intelligence, information or identifying Papuan boats for the Indonesians, then this will breach the 1951 Refugee Convention (see section 6.1 below). As with 'Children Overboard' and the use of the military during the Tampa crisis, our naval personnel will again be placed in extremely difficult moral and legal situations — with the same potential for morale problems as has occurred previously.

The process of 'encouraging' the return of asylum seeker boats was described during the Senate Inquiry, *A Certain Maritime Incident*, in relation to HMAS Adelaide intercepting a Suspected Illegal Entry Vessel (SIEV-4). Descriptions include the warship making a close pass alongside the boat, the cannons being shot 3 times as well as 23 rounds of machine guns. This occurred at night with low visibility, so the passengers on board the SIEV were unable to be sure the guns were not pointed at them. There was then "positive and assertive boarding."[9] Considering that many asylum seekers come from countries where lethal military force has been used against civilians, the firing of guns in the dark would be a terrifying experience.

In providing evidence to the Senate Inquiry into these operations, Rear Admiral Smith, the Commander of Operation Relex stated:

> "Our policy then was to reinforce the warning and turn the vessel around and either steam it out of our contiguous zone ourselves under its own power or - as had happened on a number of occasions - if the engine had been sabotaged in our process or boarding, we would then tow the vessel outside our contiguous zone into international waters. At that point, our boarding party withdrew as we had no jurisdiction in international waters."[10]

Presumably it was also considered not relevant to operations that a boat with a 'sabotaged' engine would not have working bilge pumps and would inevitably flounder and be unable to make the trip to another port. When a Government policy requires our armed forces to place the outcome of reducing asylum entrants over the very safety of human life, the balancing act between state sovereignty versus individual rights has been lost.

When asked about the handling of refugee claims by those on board Smith stated:

> "It had no relevance for us. Our mission was clear - that is, to intercept and then to carry out whatever direction we were given subsequent to that. The status of these people was irrelevant to us ... Claims from the UAs [unauthorised arrivals] were not factors to be taken into account in terms of how we conducted that mission."[11]

This evidence shows that the Australian Navy is not acting in accordance with international human rights law, and by following orders, is instrumental in breaking our obligations under the Refugee Convention.

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[9] Sidoti, Chris (2003) "One year after Tampa: Refugees, Deportees and TPVs" in Leach, Michael and Mansouri, Fethi (eds) *Critical Perspectives on Refugee Policy in Australia: Proceedings of the Refugee Rights Symposium*, hosted by the Institute for Citizenship and Globalisation Faculty of Arts, Deakin University, December 5, 2002, p.24-25.

[10] Senate Select Committee (2002) *A Certain Maritime Incident,* Majority report of the Senate Select Committee, Australian Parliament, Canberra, para 2.66

[11] Ibid. para 2.68.

Earlier this month, three West Papuan asylum seekers who landed on a Torres Strait island were sent back to PNG without any processing of their need for protection. This is in direct contravention of the major protection of the Refugee Convention to ensure people are not sent back to persecution – how can we be sure they are not in need of protection if we do not investigate that need?

DIMIA has stated a number of times that their primary responsibility is on the removal from Australia, not the arrival to another location.[12] Clearly, current Government practice shows issues of refoulement are not of concern.

> Recommendation 4
> The Australian Navy must not, under any circumstances, be asked to be, or be involved in breaching Australia's protection obligations to vulnerable people, by removing them before their refugee status is determined. The Navy must have clear rules of engagement that require them to bring any person suspected of being an asylum seeker to the attention of an Immigration Officer who can conduct a screening interview to determine their status.
>
> Under no circumstances should the Australian Navy or coastguard be party to a process that will see asylums seekers forced to return to face the persecution from which they are fleeing.

6.4 Processing arrangements

Whether or not a person is subject to refoulement begins with the refugee determination process. If this fails to properly identify those people in need of protection, they can face removal back to a country of danger or a third country where they risk removal to danger.

The explanatory memorandum for this bill states "in the past, person's taken to declared countries for processing of refugee claims have had these assessed by either the United Nations High Commissioner for Refugees (UNHCR) or by trained Australian officers…"[13]

This statement implies that UNHCR may have input into subsequent processing. However, this is absolutely not the case. UNHCR were involved in the processing of refugees from the Tampa and Aceng boats, but declined to do the processing of subsequent arrivals as it did not wish to tacitly encourage the 'Pacific Solution' policy.[14]

In relation to this latest offshore proposal, UNHCR has stated that they would not be involved in further processing of refugee claims under such a program because "UNHCR would not normally substitute for a well-established national procedure such as Australia's."[15]

The 2000 Senate Inquiry *A Sanctuary Under Review,* received much evidence from various organisations arguing that the refugee status determination process is flawed, citing instances of poor or biased decision making, as well as inadequate country

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[12] Senate Legal and Constitutional Committee (2000) *A Sanctuary Under Review: An Examination of Australia's Refugee and Humanitarian Determination Processes*, Report of the Senate Legal and Constitutional Committee, Australian Parliament, Canberra, para 10.41.
[13] Migration Amendment (Designated Unauthorised Arrivals) Bill 2006: Explanatory Memorandum para 6.
[14] Human Rights Watch (2002) *By Invitation Only: Australian Asylum Policy*, Human Rights Watch. Available: http://extras.hrw.org/reports/australia1202.pdf
[15] UNHCR Geneva, *Australia - Measures to Deal with New Boat Arrivals*, Briefing notes, Media release issued 18 April 2006.

information. In the recent 2005 Senate Inquiry into the operation of the Migration Act[16], similar allegations were made by many non-government organisations working in this field.

Allegations and evidence were submitted to support claims of:

- a high turnover rate of department refusals by the Refugee Review Tribunal indicated a systemic failure to properly identify refugees during the RSD process;
- lack of transparency and arbitrary nature of decision-making leading to inconsistent RSDs;
- reforms to allow RSDs to be made 'on the papers' led to decision makers not interviewing applicants, despite many coming from non-English-speaking backgrounds and providing only cursory written answers as they had received no assistance with the application; many decisions were also made despite applications indicating further submissions were being prepared;
- use of inadequate or inappropriate interpreting services leading to RSD failures;
- lack of appropriate knowledge or training in protection matters for decision makers;
- inadequate and inconsistent country information being used for decision making;
- negative and adversarial departmental culture towards asylum seekers resulting in to higher numbers of rejections;

Given the above issues in relation to refugee status determination decisions made on the Australian mainland where there is oversight by lawyers and advocates as well as proper merits and judicial review, conducting determinations in offshore locations outside the jurisdiction of these safety mechanisms is of great concern.

6.5 Merits review of decisions

There have been statements that offshore processing includes merits review. This is not the case. Rather, this "review" simply amounts to the decision-makers' superior reviewing his or her decision, and does not involve the level of review conducted by the Refugee Review Tribunal (RRT), considered to constitute merits review on the Australian mainland. To date, A Just Australia is unaware of any protection visa refusals that were overturned by this individual internal merits review process on Nauru or Manus Island.

In contrast, the RRT, which provides merits review in Australia, overturned 33% of visa refusals in the 2004-05 period.[17] This figure was for all appeals from all nationalities, however, it should be noted that boat arrivals have traditionally had a much higher rate of overturn of protection refusals. For some countries in the recent past, the RRT found that 89% of first instance visa refusals by DIMA were incorrect.[18] The evidence shows that the RRT is a necessary part of the asylum-seeking determination process. Denying this level of review means many refugees will be denied the protection they need.

UNHCR stated: "This is even more worrying in the absence of any clear indications as to what might be the nature of the envisaged off-shore processing arrangement. If it is not one that meets the same high standards Australia sets for its own processes, this could be tantamount to penalising for illegal entry."[19] The imposition of such penalties violates Article 31 of the Refugees Convention.

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[16] Senate Legal and Constitutional Committee (2006) *Administration and Operation of the Migration Act 1958,* Report of the Senate Legal and Constitutional Committee, Australian Parliament, Canberra, p. 15-66.
[17] Refugee Review Tribunal (2005) *Annual Report 2004-05*.
[18] This is the rate for Afghan asylum seekers in 03-04 period, A Just Australia Submission to the Migration Act Inquiry.
[19] UNHCR Geneva, *Australia - Measures to Deal with New Boat Arrivals*, Briefing notes, Media release issued 18 April 2006.

Recommendation 5
Decisions made by, or on behalf of, the Australian Government, should have the same quality of merits review regardless of geographic location. At minimum, there should be a review mechanism equal to the procedural independence and the level of investigation by the Refugee Review Tribunal.

6.6 Allows for prolonged processing and detention

DIMA has developed 90-day deadlines for protection visa processing in Australia. These deadlines will not be adhered to in offshore centres, leading to prolonged detention.

Recommendation 6
90 day deadlines for decisions should be for *all* DIMA protection visa cases, not just those on the mainland.

6.7 Resettlement options

Under this proposal, Australia will accept no obligations towards any refugees other than to see whether a 'third' country will take them. The Indonesian Government has stated the Australian Government has provided assurances that in relation to West Papuan asylum seekers "even if they would be classified as refugees they would not be accepted into Australia. This is positive for us in the future."[20]

Under the present incarnation of the Pacific Solution, of the 1063 refugees eventually resettled only 46 (4.3%)[21] were accepted into countries other than Australia and New Zealand, and these cases were generally family reunions. Even for those granted refugee status, there were significant delays in finding a resettlement country due to other countries being reluctant to 'legitimise' the Pacific Solution by being involved.[22]

UNHCR found that Australia's obligations under the Refugee Convention to the asylum seekers on Nauru "continue to be engaged until a durable solution is found."[23] The Australian stance at the time response was to say: "We're under no obligation to find resettlement places in a particular timeframe".[24]

There is genuine concern that other countries are unlikely to accept any resettlements from the Pacific Solution Mk II. This will lead to indefinite detention while refugees wait for a place to call home.

Recommendation 7
Australia has obligations to resettle refugees under the jurisdiction or control of the Australian Government. All asylum seekers found to be refugees must be allowed to immediately resettle in Australia.

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[20] Forbes, Mark (2006) "Indonesia declares issue of 42 Papuans solved" *Sydney Morning Herald*, 16 May 2006, Available: http://www.smh.com.au/text/articles/2006/05/15/1147545269517.html
[21] Statistics provided by IOM.
[22] Oxfam Community Aid Abroad (2002) *Still Drifting. Australia's Pacific Solution becomes a Pacific Nightmare*, Oxfam CAA, p4.
[23] UNHCR cited in Frank Brennan (2003) *Tampering with Asylum,* UQP, Kings Cross, p.111.
[24] Then Immigration Minister, Phillip Ruddock cited in Oxfam (2002), *Still Drifting. Australia's Pacific Solution becomes a Pacific Nightmare*, Oxfam CAA, p.20.

However, A Just Australia is aware that a large part of this current proposal is to ensure that West Papuans do not ever have a chance to settle in Australia, and the Government will seek 'third country' options. We therefore add this following recommendation:

> Recommendation 8
> Proven refugees must not be detained indefinitely by, or on behalf of, the Australian Government. A deadline for resettlement in Australia for asylum seekers processed under this arrangement, where other resettlement options cannot be found, must be written into law. A Just Australia contends that a three-month period grants enough time to find alternatives if at all possible, given that resettlement options can also be investigated during the status determination process.

6.8 Costs

Federal government estimates indicate that $240 million has so far been spent Nauru, or approximately $195,000 per asylum seeker housed on Nauru. This figure does not take into account all costs, and as such the real numbers are far higher. The cost per person per year for detention in Baxter, the highest mainland cost, is in the region of $38,000 per year.

> Recommendation 9
> The Australian taxpayer should not bear the financial burden of detaining asylum seekers for the benefit of the Indonesian Government. Although A Just Australia does not agree with any detention that is not recommended by an individual security assessment, clearly mainland detention is a far more sensible economic option.

However,

> Recommendation 10
> If the much more expensive option of Nauru is used, the entire cost over and above mainland detention options should be borne by the Indonesian Government, for whose appeasement this legislation is being proposed.

6.9 Conditions of detention on Nauru

> "Nauru is by far the worst of the detention centres; it is hot. Both camps are built on areas that have been extensively mined, many years ago, and the facilities are just not as good as they are in Australia."
> - Immigration Detention Advisory Group member, per Hodges [25]

DIMIA states:

> "IOM are internationally renowned for the high level of care that they deliver to centre residents." and "programs include a wide range of sporting and leisure activities

[25] Ibid., p.15.

(including satellite television, videos and reading materials) and education programs"[26]

There is little impartial evidence of the conditions within the camps, due to the lack of outside organisations being permitted to access camps. Most evidence comes from letters from asylum seekers themselves:

> "The Australian government …are keeping us like prisoners and we are living in a very bad and sad situation. We don't have any means to contact our relatives and families and we are deprived of all our human rights."[27]

It has also been noted that "it is not the camp regime that is repressive, but the combination of the harsh environment, the remoteness, the loneliness and the indefinite nature of the detention".[28] Indeed, the indefinite nature of immigration detention has been cited in a number of research projects to cause or exacerbate mental distress – this 'limbo' is a major contributing factor for inhuman conditions of immigration detention, not just the physical conditions. Dr Dormaar, IOM psychologist in 2002 on Nauru, concluded that the "practice of psychology on Nauru … was as futile as the practice of medicine in the filthy hospitals of early nineteenth century Vienna."

One of the major problems with conditions in the camps has been the lack of fresh water for sanitation and drinking, with reports of stinking toilets with mosquitoes breeding causing dengue fever and desalinated drinking water causing kidney problems. Conditions for children are also of concern, with Oxfam noting that children do not have access to the kinds of educational and welfare facilities available to those on the mainland.[29]

The Australian Government now claims that people on Nauru are not detained. Clearly, the detention issue is proved by the fact that asylum-seekers who have attempted to leave – or escape – the camps were arrested and placed in Nauruan police cells.[30]

The detention itself is arbitrary in nature by the principles of the United Nations Working Group on Arbitrary Detention and as such breaks article 9 of the *International Convention on Civil and Political Rights* (see section 7.1.4 below). It disregards the fundamental human rights principle of family unity. The severe restrictions on freedom of movement is in breach of Article 26 and 31(2) of the Refugee Convention and is in breach of Article 12 of the ICCPR as well as the Convention on the Rights of the Child.

One major reason why the human rights breaches are continuing is the issue whereby private citizens, human rights organisations, lawyers and religious groups have all been denied access to visit asylum seekers in the camps. Asylum-seekers who asked for access to lawyers claim they were denied this by IOM.[31] With no outside organisation to monitor rights and provide advocacy where breaches occur, the situation of substandard human rights will continue.

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[26] DIMIA (2005) *Fact Sheet 76. Offshore Processing Arrangements,* p.1.
[27] Human Rights Watch (2002) *By Invitation Only: Australian Asylum Policy*, Human Rights Watch. Available: http://extras.hrw.org/reports/australia1202.pdf
[28] Gordon, Michael (2005) "This is not detention, this is hell", *Sydney Morning Herald*, 15 April 2005
[29] Oxfam Community Aid Abroad (2002) *Adrift in the Pacific: The Implications of Australia's Pacific Refugee Solution*, Oxfam CAA, p.16.
[30] Human Rights Watch (2002) *By Invitation Only: Australian Asylum Policy*, Human Rights Watch. Available: http://extras.hrw.org/reports/australia1202.pdf, p.67.
[31] Ibid, p.72

Recommendation 11
If there is to be offshore processing, it should not occur on Nauru. Christmas Island is far preferable in terms of addressing welfare concerns, monitoring of conditions and overall cost.

6.10 Private corporations blurring lines of responsibility

Under this bill, security and detention contracts may be given to private corporations, creating concerns over transparency and accountability, particularly given the remote location of the detention centres. This will make it difficult for NGOs and Churches to monitor detention conditions and processing standards even if access to the centres is granted.

IOM, the organisation who previously managed the camp in Nauru, is a private organisation not bound by any international human rights treaties. Nauru itself is not a signatory to the Refugee Convention, although it has signed a Memorandum of Understanding with Australia with a *non-refoulement* style clause.

Recommendation 12
Detention centres/camps should be managed by the Commonwealth Government, with no divestment of responsibility to private firms.

7. International law

7.1 Breaching Australia's obligations under international law

Our view, which is shared by a number of international human rights and refugee law experts as well as the United Nations High Commissioner for Refugees, is that aspects of this bill breach Australia's obligations under a number of international law instruments which Australia has ratified and the principles of which have arguable become part of customary international law.

7.1.1 *Convention Relating to the Status of Refugees 1951* (Refugee Convention)

Australia ratified the Refugee Convention in 1954 which imposes certain obligations on Australia in relation to its treatment of people seeking asylum in Australia. The provisions of this agreement apply to Australia and its territorial waters, regardless of whether or not these areas of Australia's territory form part of Australia's migration zone. Below are the key provisions of the Convention of which Australia could be considered to be in breach should the provisions of this bill come into force:

Refugee Convention, Article 31(1): "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…enter or are present in their territory without authorisation, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence."

Forcing all asylum-seeking boat-arrivals into off-shore processing facilities arguably amounts to the imposition of a penalty on these individuals because:

(a) differential processing regimes will be accessible by asylum-seekers depending on the mode of their arrival in Australia;
(b) asylum-seekers who are minors arriving by boat in Australia will be placed in detention centres off-shore while their claims are being processed, while their plane-arriving counterparts will be housed in community detention facilities;
(c) one of the express intentions of the legislation is to discourage asylum-seekers to travel by boat to Australia by promising that should they enter Australian territory they will be forcibly transferred off-shore, thereby rendering the off-shore processing a form of "punishment" for failure to be effectively discouraged;
(d) the Indonesian government considers the removal of asylum-seekers from Australia for off-shore housing and processing as a de facto form of punishment because it prohibits West Papuan asylum-seekers from accessing the full extent of the Australian claims processing system within Australia; and
(e) reports of researchers, medical professionals, and refugees who have been detained in off-shore facilities, indicates that these facilities and the welfare services accessible by asylum-seekers are superlatively inferior to those available on the Australian mainland.

Refugee Convention, Article 32(1): "States shall not expel a refugee lawfully in their territory, save on grounds of national security or public order."

The forcible removal from Australia of all asylum-seekers who arrive by boat amounts to expulsion of potential refugees. Small boat-loads of asylum-seekers cannot credibly be considered to amount to a real threat to Australia's national security or public order. Even when boat arrivals in Australia were at their peak they still amounted to a very small proportion of all migration movements to Australia and pale in comparison to the refugee flows experienced by countries in areas like the Middle East and Africa.

In fact, the Australian government has not indicated that this legislation is required because the integrity of Australia's borders is under serious threat, but rather it is being promoted in response to political considerations arising from the nature of the relationship the Australian government is seeking to cultivate with the Indonesian government.

Refugee Convention, Article 33(1): "No…State shall expel or return…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 principle of non-refoulement is a cornerstone of the international protection regime for refugees.[32] Undermining this principle is arguably akin to denunciation of

[32] The principle of non-refoulement has also been enshrined in the 1967 *United National Declaration on Territorial Asylum* under article 3(1): "No person [seeking asylum] shall be subjected to measures such as rejection at the frontier"; and in the 1984 *UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* under article 3(1): "No

the Refugee Convention. Consequently, the "border security" measures announced alongside these legislative amendments, including naval interdiction of boats that may carry asylum-seekers heading towards Australian waters are cause of grave concern. The use of the Australian military to repel boats that may be conveying refugees to Australia clearly contravenes the spirit, if not the tenet of the international law on non-refoulement.

Although Article 33 applies to a 'refugee', the convention does not refer to a refugee as a person who has been *formally recognised* as having a well founded fear of persecution, but simply someone who does have that fear. As outlined by Bethlehem and Lauterpact to deny protection in the absence of a review of individual circumstances would be inconsistent with the prohibition on refoulement, as one cannot be certain that refoulement is not occurring.[33] Certainly this interpretation is in line with Canada's approach, which deems that non-refoulement obligations require a determination of each individual's risk upon return.[34]

7.1.2 *International Convention on the Rights of the Child 1989* (CROC)

Australia ratified the CROC in 1991. The distinct possibility that minors who are claiming asylum will be detained in off-shore facilities under the proposed legislation breaches a number of CROC provisions.

CROC, Article 2: Non-discrimination against children on account of their race, national, ethnic or social origin or other status, or that of their parents.

The proposed off-shore processing regime will only affect children that arrive in Australia by boat and as such operates in a discriminatory manner. Children who arrive in Australia by plane and lodge asylum claims will have access to the full extent of Australian refugee processing law.[35]

CROC, Article 3(1): The best interests of the child shall be a primary consideration in all actions concerning children; adequate care and protection is to be afforded to children for their well-being; Article 22: States shall take appropriate measures to ensure that asylum-seeking children shall receive appropriate protection and humanitarian assistance; Article 24: Children have a right to the enjoyment of the highest attainable standard of health and access to facilities for the treatment of illness.

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." Also, the Australian Senate's Legal and Constitutional Committee has held that under the *International Covenant on Civil and Political Rights*, Australia has an obligation not to remove a person to another state which might either inflict harm or further remove them to a third state which might inflict harm (see Senate Select Committee, *Inquiry into Ministerial Discretion in Migration Matters - March 2004,* para 8.11).

[33] Lauterpacht, E. and Bethlehem, D. (2001) *The Scope and Content of the Principle of Non-Refoulement,* UNHCR.

[34] Citizenship and Immigration Canada, *P3 - Departmental guideline for PPRA Officers,* supplied via email from CIC in January 2006.

[35] See also, the *International Convention on the Elimination of All Forms of Racial Discrimination 1965*.

This principle has been recognised by Australian courts as an important consideration in Australian administrative and judicial decision-making.[36] Given the numerous reports from human rights, medical, mental health and legal professionals, and welfare organisations that indicate that the best interests of children are not served by indefinite detention in immigration detention centres, and in fact exacerbate or cause severe mental and physical trauma, especially in off-shore detention centres, this policy breaches these aspects of the Convention.[37] The recognition by the Australian government that asylum-seeking children or the children of asylum-seeking parents do not belong in detention centres on the mainland adds further weight to this proposition.

CROC, Article 37: The detention of a child shall be only used as a measure of last resort and for the shortest appropriate period of time.

Under these proposals, detention of children who arrive in Australia and are classified as "unauthorised" will be a measure of first resort. The lack of limits on processing time of asylum claims and the possibility that failure to obtain agreement from other countries to resettle refugees means that children may be detained for unacceptably long periods of time and possibly indefinitely.[38]

7.1.3 *Universal Declaration of Human Rights 1948*

Article 14(1): Everyone has the right to seek and enjoy asylum from persecution in another country

Military interdiction exercises that seek to prevent asylum-seekers from reaching Australia arguably breach this aspect of the Declaration. Treating asylum-seekers who manage to reach the mainland by boat differently from those who arrive by air also undermines this principle.

7.1.4 *International Covenant on Civil and Political Rights 1966* (ICCPR)

Australia ratified this convention in 1990.

ICCPR, Article 2: Non-discrimination against individuals in a state's territory; Article 26: Non-discrimination before the law.

Again the differential treatment for boat-arriving as opposed to plane-arriving asylum seekers runs counter to Article 2. The removal of judicial review for asylum-seeker claims processed off-shore also amounts to discrimination on the basis of Article 26 of the covenant.

ICCPR, Article 9: No person shall be subject to arbitrary arrest or detention.

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[36] *Minister of State for Immigration and Ethnic Affairs v Ah Hin Teoh* (1995) 128 ALR 353.
[37] See more generally, the *UN General Assembly Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care 1991.*
[38] See also article 9 of the *International Covenant on Civil and Political Rights 1966* relating to prohibition on arbitrary detention.

The proposed legislation provides for the immediate detention of all asylum-seekers arriving by boat in Australia in off-shore facilities merely by virtue of their mode of arrival in Australia. Consequently, these people could be considered to be arbitrarily detained by Australia.[39] The failure of these proposals to guarantee processing times for asylum claims or the immediate resettlement of asylum-seekers who are found to be refugees, means that these people may potentially be detained indefinitely in off-shore processing facilities.

7.2 Secondary movements of asylum-seekers and refugees

In recent years, the Australian government has been a leading critic of countries that permit secondary movements of asylum-seekers and has sought agreement from other countries that they will make every effort to prevent asylum-seekers from "forum shopping". This view has been conveyed by representatives of the Australian government in international fora. For instance, in December 2001 at a meeting of state parties to the Refugee Convention, immediately following the TAMPA crisis, Australia suggested that other nations should adopt a much tougher approach to prohibiting secondary movements. This message was again promoted by Australia at the UNHCR's Executive Committee meeting in October 2002.[40] In an effort to realise these policies domestically, Australia has also tightened its migration processing regime to provide for the rejection of asylum claims by individuals who fail to lodge asylum claims when passing through another country in which they could made such a claim before reaching Australia.

However, should these proposed legislative amendments be implemented, Australia would be contravening its own stance on secondary movements in two ways. In the first instance, by providing for the compulsory transfer of all asylum-seekers who reach Australia to another country, the law will effectively render Australia a secondary movement country because these individuals will be prevented from lodging an asylum claim in Australia, despite Australia being the first territory in which such individuals could make such a claim. Secondly, should these transferred asylum-seekers be found to be refugees for a Convention reason, the Australian government has indicated that these individuals will need to be transferred to other countries for resettlement. Whether or not these resettlement countries include Australia, the government will clearly be promoting the "off-loading" of refugees to third countries making both Australia and Nauru responsible for promoting secondary movements of asylum-seekers.

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[39] See also, UN Commission on Human Rights (2004) *Report of the Working Group on Arbitrary Detention: Visit to Australia*, addendum to report tabled 24 October 2002 as part of the 59th session, Civil and Political Rights, including the Question of Torture and Detention. Available from: http://www.users.bigpond.com/burnside/UNreport.htm

[40] Statement by Mr. Ruud Lubbers, UN High Commissioner for Refugees, at an informal meeting of the European Union Justice and Home Affairs Council, Copenhagen, September 13, 2002, cited in Human Rights Watch (2002) *Not for Export: Why the International Community should Reject Australia's Refugee Policies: A Human Rights Watch Briefing Paper*, Human Rights Watch. Available: http://www.hrw.org/press/2002/09/ausbrf0926.htm