22 March 2002

Mr Brenton Holmes
Secretary
Senate Select Committee on a Certain Maritime Incident
Room S1.57
Parliament House
Canberra ACT 2600

By e-mail: maritime.incident@aph.gov.au

Dear Mr Holmes

Submission to the Inquiry

Australian Lawyers for Human Rights (ALHR) is a network of Australian lawyers committed to promoting awareness of and adherence to human rights in Australia.

We welcome the opportunity to make a submission to the Select Committee on A Certain Maritime Incident, in relation to its inquiry into both the "children thrown overboard" claims by the Government during the election campaign, and the wider issue of the Government's paying Pacific countries to take asylum seekers intercepted in Australian waters.

Migration Legislative Amendment (Transitional Movement) Bill

We would first like to express our disappointment in the strongest of terms that on the eve of the closing date for this inquiry, a majority of Senators passed the *Migration Legislative Amendment (Transitional Movement) Bill*. The Bill bars detainees on Manus, Nauru, Christmas and Cocos Islands from making refugee claims if they are brought temporarily to the mainland for, among other reasons, medical treatment or in transit.

Much of the Bill is objectionable on human rights grounds, particularly the provisions which relate to those detainees who are left on the mainland for more than six months. The Bill provides that people in that position can apply to have their visa decision reviewed by the Refugee Review Tribunal, but that the review can be halted by the Department if someone is deemed “uncooperative”. This measure is an unprecedented interference in the review of administrative decisions.

We are particularly concerned that such a Bill was passed by the Senate for the second time in six months without public consultation.

The ‘Children Overboard’ Incident

Term of reference (a): the so-called ‘children overboard’ incident, where an Indonesian vessel was intercepted by HMAS Adelaide within Australian waters reportedly 120 nautical miles off Christmas Island, on or about 6 October 2001

Comments in public discussion concerning the incident have referred in particular to Afghani and Iraqi asylum seekers, some suggesting that these people could be terrorists. These comments, many of them, we regret, made by members of

Parliament, might be defamatory of the people referred to, and might amount to racial vilification of members of those communities already in Australia.

These consequences of the incident highlight the urgent need for all Parliamentarians to sign the Federal Parliamentary Code of Race Ethics (attached), to be monitored by an independent body such as the Human Rights and Equal Opportunity Commission. It would further assist if all Parliamentarians were formally briefed on the outcomes of the World Conference Against Racism last year, where Australia agreed to a Program of Action that states that the Conference:

> underlines the key role that politicians and political parties can play in combating racism, racial discrimination, xenophobia and related intolerance and encourages political parties to take concrete steps to promote equality, solidarity and non-discrimination in society, *inter alia* by developing voluntary codes of conduct which include disciplinary measures for violations thereof, so that their members refrain from public statement and actions that encourage or incite racism, racial discrimination, xenophobia and related intolerance. (cl 115)

The Pacific Solution

Term of reference (c): in respect of the agreements between the Australian Government and the Governments of Nauru and Papua New Guinea regarding the detention within those countries of persons intercepted while travelling to Australia, publicly known as the 'Pacific Solution':

1. the nature of negotiations leading to those agreements,
2. the nature of the agreements reached,
3. the operation of those arrangements, and
4. the current and projected cost of those arrangements.

We submit to the Committee that the 'Pacific Solution' is a policy which is incompatible with Australia's obligations under international law. Any interception and dealing with asylum seekers must be in accordance with customary international law, law of the sea, and humanitarian and human rights obligations.

1. After the Tampa incident in 2001, Australia attempted to avoid its obligations under the UN Convention on the Status of Refugees to hear asylum claims for new arrivals by boat. Boats were intercepted and asylum seekers taken to Nauru and Papua New Guinea. This violated key tenets of the law of the sea and international human rights law, and is contrary to the spirit of the Refugee Convention. Additionally, provision for the welfare and processing of the asylum seekers in detention centres in PNG and Nauru fail international legal obligations in the same manner as do Australia's immigration detention centres.
2. Issues concerning the welfare and processing of the asylum seekers include lack of transparency of process for, and of access to, asylum seekers in Nauru and PNG. Access to the processing is subject to the sovereign laws of those countries, and has been consistently refused NGOs and journalists. It should be made clear that Australian statutory agencies such as the Human Rights and Equal

Opportunity Commission and the Commonwealth Ombudsman have a mandate to operate outside of Australia when there is the deployment of Australian immigration officials, an Australian subcontractor running the detention centres on funds provided by Australia, and general Australian expenditure on the asylum seekers held, by arrangement with Australia, in foreign States.

3. The package of 'Border Protection' legislation passed in September 2001 raises the question of whether Australia's conduct complies with the Refugee Convention and UNHCR Guidelines. The question is whether interception of boats and off-shore processing of asylum-seekers is in breach of international law if the asylum seekers are then found to fit the definition of a refugee and are offered protection. Both the wording of the treaty as a whole and state practice since the Convention came into force suggest that this is contrary to the spirit and purpose of the Convention. In short, the Convention obligations are broader than merely ensuring non-refoulement of refugees: States must take responsibility for on-shore arrivals. The *Migration Legislative Amendment (Transitional Movement) Bill* 2002 compounds Australia's breach of international law which began with the Boarder Protection package.

4. Australians, including officers discharging the functions of the Australian government and its agencies, are bound by international human rights standards. Customary international law recognises the general human right to seek asylum and the right to access to legal counsel. The right to freedom of expression is in the International Covenant on Civil and Political Rights. Rights to adequate shelter, health and sanitation are guaranteed under the International Convention on Economic Social and Cultural Rights, and there are rights relating to women and children under Convention to Eliminate Discrimination Against Women, and the Convention on the Rights of the Child. Real questions of Australia's compliance with these standards are raised by the conduct of Australian officials in dealing with asylum seekers, particularly in relation to the forced removal of people from the *HMAS Manoora*.

5. Humane and lawful management of asylum seekers has been clouded by persistent reference to the real but distinct issue of people smugglers. There is a need to further understand and communicate reasons for people's irregular movement, and unauthorised entry in the context of contemporary international refugee flows. Action should be undertaken to coordinate transparent research through a standing working group comprised of relevant organizations and experts from affected countries (for example within the Asia Pacific region) to investigate such issues. The security and criminal concerns associated with people-smuggling must not obscure the imperative to act humanely and lawfully in relation to victims of the people smugglers.

6. Australia is responsible for detention of asylum seekers in Nauru. Dr John Pace, on a monitoring visit to Nauru for Amnesty International in early November 2001, reported that the asylum-seekers have clearly been traumatised by events:

> "The asylum seekers are traumatised by the events and many show clear signs of vulnerability. It is often difficult to interview them. It could be discussed whether it is appropriate to perform RSD in such situations, when the symptoms of Post Traumatic Stress Disorder (PTSD) are evident and seriously affect the eligibility process.

> "The asylum seekers have gone through several months of being exposed to stress, some of them have left Afghanistan one year ago. Many of them had had several unsuccessful attempts to reach Australia by boat before being rescued by the Tampa. After that, the insecurity regarding admission to Australia, the arrival in a detention camp, the start of the air bombardments in Afghanistan and lately, the news about a boat that sank with 300 refugees on board have left serious marks in they physical and psychological well-being."[1]

7. Dr Pace concludes that the agreement with Nauru is not intended to promote sustainable development:

> "[T]his agreement is not, as it is held up to be, of a humanitarian nature. If anything, it is an agreement done in great haste, and after persuasion of the Nauru authorities by holding out financial and material reward. It is clear that the international and regional geo-political implications of this arrangement were not thought through, or if they were, the medium and long-term implications for the island States were not a priority. Least of all was there any heed to the welfare of the asylum seekers and the inherent and underlying principles of the Refugee Convention which seeks to extend protection to those who do not have it – not to mention the solemn obligation of States Parties to international conventions to honour their treaty obligations in good faith."

8. The Pacific Solution has created extremely complex legal issues surrounding sovereignty, territoriality, jurisdiction, liability of private sector contractors and the Nauruan Constitution. The asylum seekers are being detained in apparent breach of Nauru's Constitution, which provides that there shall be no detention without trial except on the basis of public health concerns, unlawful entry into Nauru and for deportation, and allows for the right to be informed of reason for detention and of choice of a legal representative. Any incident which takes place in Nauru or Manus, such as the death of an asylum-seeker through negligence, for example, would be fraught with controversy and difficulty.

Recommendations

In light of the above issues, ALHR respectfully submits that the Committee consider adopting the following recommendations:

1. That all Parliamentarians be encouraged to sign the Federal Parliamentary Code of Race Ethics, and be informed of the outcomes of the World Conference Against Racism.
2. That the Australian and Nauruan and PNG Governments give priority to facilitating independent monitoring of the camps.
3. That the "Pacific Solution" be the subject of an inquiry to determine the legality of all aspects of the policy its implementation and effect.
4. That safeguards be put in place to ensure that policies relating the management of asylum seekers comply with international human rights obligations and standards.

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1 *Report Of Mission To The Republic Of Nauru* John Pace for Amnesty International December 2001

5. That all amendments to the Migration Act since July 2001 be repealed, and re-introduced for proper public consultation and for assessment as to compliance with international human rights obligations and standards.