

REFUGEE COUNCIL OF AUSTRALIA

INCORPORATED IN A.C.T. - ABN 87 956 673 083

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24th July 2002

Mr. Peter Hallahan
Secretary
The Senate Legal and Constitutional References Committee
Suite S1.108
Parliament House
Canberra
ACT 2600

Re: Inquiry into Migration Zone Excision

Dear Mr. Hallahan,

While the Refugee Council of Australia has been invited to make a detailed submission with regard to Migration Legislation Amendment (Further Border Protection Measures) Bill 2002, the Council notes that the significant legal implications of this legislation amendment will be covered comprehensively in the submission by the Refugee and Immigration Legal Centre (RILC). The Refugee Council of Australia therefore endorses the submission by RILC as one of the Council's member agencies.

As the peak, national non-government agency concerned with the promotion of flexible, constructive and humane policies toward refugees, the Refugee Council of Australia does wish to make some brief further comments with regard to Migration Legislation Amendment (Further Border Protection Measures) Bill 2002.

The Refugee Council of Australia acknowledges the Government's requirement to address issues of people smuggling and irregular movement, however this legislation does little to address the root causes of people smuggling and secondary movement. One of the key issues affecting secondary movement are conditions in countries of first asylum where durable and effective protection may be elusive. Any attempts to control secondary movement must respond to the complex factors that drive this process and address the lack of effective protection in countries of first asylum. For the Council's position on secondary movement please refer to the attached Appendix A.

The Refugee Council of Australia is also concerned that this legislation amendment may prolong the implementation of the 'Pacific Solution' in order to house asylum seekers intercepted within the proposed excised offshore places. It is widely recognised that the 'Pacific Solution' is unsustainable and the Refugee Council of Australia is concerned that any extension of this policy will further damage Australia's reputation amongst our Pacific neighbours and internationally. The position of the Council regarding the 'Pacific Solution' is well known and is included in Appendix B. It is the Council's strong view that the further closure of borders to persons seeking asylum is a continuing breach of our obligations under the 1951 Convention Relating to the Status of Refugees to provide

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refugees with effective protection. Australian domestic law must not override our international obligations in these matters.

As a signatory to the 1951 Refugee Convention, Australia is obligated to provide protection to those seeking asylum regardless of mode of entry. The Refugee Council of Australia is further concerned that this proposed legislation will have serious implications for those who may in the future seek effective protection in Australian territory as a country of first asylum. This will place Australia in a position of explicit contravention of international agreements to which we are a party.

Yours Sincerely

Ms. Jacki Dillon
Victorian Research and Policy Officer, Refugee Council of Australia

On behalf of
Mr. David Bitel
President, Refugee Council of Australia

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Appendix A

An extract from *Australia's Refugee and Special Humanitarian Program: Current Issues and Future Directions – Views from the Community Sector, Refugee Council of Australia, 2001.*

Position on Secondary Movement

It is acknowledged that the majority of those seeking to come to Australia through unauthorised channels at this time are people who have spent time in a country of first asylum before moving on, and sometimes have also transited in one or more countries in South East Asia for a period of time.

The Refugee Council argues that any efforts to control secondary movement of asylum seekers must first address the question of why people are moving onwards. More specifically: why have we seen a sudden increase in the number of asylum seekers coming from this region in the last two years when there was no appreciable change in the countries of origin?¹

Thus far, the bulk of the Government's efforts to stem the flow have focused on removing the "pull factor", i.e. taking away those things that were considered to make Australia the preferred destination for asylum seekers: "permanent protection and family reunion."² The package of legislation passed in late September is the latest in a long line of legislative disincentives which began with the introduction of mandatory detention in 1992 and also included the introduction of the Temporary Protection Visa (TPV) regime in 1999.

It is the contention of the Refugee Council that this response is based on a flawed assessment of the situation. People working closely with the new arrivals have reported to RCOA that:

- a significant proportion had little idea where they were going until they actually got on the boat to come to Australia;
- if Australia was a selected destination, it was often chosen on the basis of cost (i.e. passage to Australia is cheaper than passage to Europe³) rather than entitlements post-arrival;
- where "family links" have been a major motivation, these have determined the direction of movement rather than the decision to move *per se*. More recently too we have seen the wives and children of TPV holders having to avail themselves of smugglers because other avenues of reuniting the family have been denied them by the restrictions imposed by the Temporary Protection Visa regime;
- visions of the country they sought to come to are expressed in terms of "freedom", "democracy" and "safety", not financial advancement. Even the much-used term "better life" is rarely measured in purely fiscal terms.

¹ This leaves aside the events of 11th September and the subsequent actions in Afghanistan which occurred after most of the asylum seekers set out on their journey.

² As suggested in the briefing from DIMA to NASREF, 14th November 2001.

³ For example, according to IRAC, the NGO umbrella body in Iran, passage from Iran to Europe will cost in the order of \$US6,000, whereas it costs only \$US2,000 to get to Australia.

In other words, it is hard to find evidence that people are being drawn to Australia by the benefits they are offered. Further, there is no evidence that the removal of “incentives” has had any substantial impact on reducing the number of people seeking to come to Australia (in fact, almost the opposite can be argued⁴).

It is also important not to lose sight of the fact that Australia is not the only destination for this cohort of asylum seekers. In the third quarter of 2001, Europe saw a 20% increase in the number of asylum seekers as compared to the previous quarter – a jump from 80,200 to 95,800 in EU countries excluding the UK⁵ - with the largest single group being from Afghanistan. Europe also experienced a 34% increase in the number of Iraqi asylum seekers in the same period. This trend parallels the increase in numbers headed to Australia.

If the pull factors are not the cause, do we then need to look at the push factors?

It is the opinion of the Refugee Council that the issue of secondary movement has at its core the conditions in the countries of first asylum, i.e. it is our contention that the push factors are far more important than the pull factors.

In most refugee situations traditionally there has been the expectation that refugees cross a border into a neighbouring state where they will receive protection until such time as they can return voluntarily to their country of origin. There has also been the expectation that any especially vulnerable refugees amongst the much larger caseload will be identified and assisted by resettlement. This ideal scenario depends on a number of factors including:

- the willingness of the host country to provide ongoing sanctuary;
- the adequacy of assistance provided by the international community to the host country and when the time comes for repatriation;
- the resources given to UNHCR to identify and process vulnerable individuals;
- the willingness of resettlement countries to offer places;
- the fairness and expedition of resettlement processing;
- the level of confidence that refugees have that their basic rights will be met and they will not be forced back to their country of origin.

The problem is that we do not live in an ideal world and rarely do things go according to predetermined models. Where one or more of these ingredients is missing, the groundwork is laid for secondary movement.

Before looking at how these factors have played out in the countries from which the current major groups of asylum seekers are moving, however, there is value in introducing the question that seems central to the current debate: “what responsibility should Australia have for people who had or could seek effective protection somewhere else?”

The Refugee Council suggests that this question can only be answered if first there is a clear understanding of what constitutes “effective protection”. It is our contention that in this context, reference must be made not only to a person’s rights under the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol (the Refugee Convention) but also to other relevant international human rights instruments, in particular the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the Convention on the Rights of the Child (CROC).

While both protection from refoulement and/or access to status determination procedures are core refugee rights, they do not, by themselves, constitute full and effective protection. They must be accompanied by other fundamental human rights such as:

- the right to work (ICESCR Article 6)
- the right to fair wages and safe working conditions (ICESCR Article 7)
- the right to an adequate standard of living (ICESCR Article 11, CROC Article 27)
- the right to medical care (ICESCR Article 12, CROC Article 24)
- the right to education (ICESCR Article 13, CROC Article 28).

⁴ As the September 2001 legislation was introduced in response to the increased number of people heading to Australia.

⁵ Figures from UNHCR.

Further, when we examine “effective protection”, consideration must be given to the durability of the protection offered. Is it sustainable? Does it enable the refugee to enjoy their rights without fear of involuntary return and/or removal of rights? Does it allow a refugee to live without fear of discrimination, harassment or arbitrary arrest? And once status is bestowed, does it also allow the refugee to exercise other rights, in particular that to family reunion (as set out in Article 10 of ICESCR and Article 10 of CROC)?

To what extent do the countries from which and through which the current groups of refugees coming to this country offer effective protection?

Until the events of 11th September, **Pakistan** was a staunch supporter of the Taliban “regime” in Afghanistan. Not only is the systematic persecution by the Taliban of ethnic and religious minorities in Afghanistan (in particular the Hazaras, but also other groups such as the Tajiks) well documented, so too is the ill-treatment these minority groups can expect in Pakistan. Their chances for consideration for resettlement were until recently greatly reduced by the comparatively small number of Afghans minorities amongst the Afghan diaspora⁶ and have been further affected by the closure of the Australian High Commission in Islamabad. It is therefore of little surprise that we are seeing these groups looking to smugglers to help them to travel to countries where they can seek effective protection.

Since 1998 refugees in **Iran** have been denied access to most forms of legal employment. The passage of Article 48 legislation⁷ early in 2001 further increases the precariousness of the conditions for Iran’s 2.3 million Afghan refugees, over 95% of whom live in urban centres and receive little or no welfare support. Whereas previously most were able to sustain themselves, their options are now limited and precarious. The most common source of income is in the construction industry, but as their employment comes at a substantial risk to the employer, they are typically given the most dangerous jobs and are often exploited in terms of wages and conditions. Begging and drug smuggling are the only other real opportunities for Afghan refugees to earn money. Meanwhile, they still have to pay the Iranian landlords,⁸ find money for food, health care and their children’s education. For many, this is a downward spiral into debt, underpinned by the fear that they will be compelled to return.

CASE STUDY: Afghan family with four children living in a slum area in southern Tehran. The man was an academic in Kabul, his wife a lawyer. They have been in Iran for 8 years and for most of the time, the man has been able to work and support his family. The new laws have meant that he can only get occasional “black” work and it is always a struggle to find the money for the rent. Most days the family lives on bread and black tea. A couple of days a week they might be able to afford vegetables and meat is an occasional luxury. Their home consists of two small rooms, one in which the family live and sleep, the other which serves as kitchen and bathroom. There are holes in the roof and the electrical wiring in the walls has been exposed by crumbling plaster. They would like to be resettled but the fact that their two eldest daughters (aged 11 and 13) both have cancer means that they are unlikely to be approved. They despair for their future, seeing no way out of their dilemma and knowing that there is no way they can pay for the treatment their children need. They are prime targets for an offer from enterprising smugglers.

The Government of Iran has been appealing to the international community for many years for assistance⁹, arguing that they are unable to cope alone. It costs the Iranian Government something in the order of \$US1.3 billion each year¹⁰ to have the refugees in the country. This does not include any welfare support. Meanwhile they receive less than \$US30 million in aid funding. They are therefore not well disposed to arguments that they should “do more” for the refugees, or even that they should prevent them from leaving in search of a more secure future elsewhere.

⁶ As compared to the majority Pashtuns.

⁷ This involved registration of all refugees in Iran and was intended as a precursor to possible removal.

⁸ Afghans are not allowed to own property in Iran and Iranian landlords are infamous for charging high rents for squalid properties and taking strong action if rents are overdue.

⁹ This appeal has been made, inter alia, at the annual meeting of the UNHCR Executive Committee.

¹⁰ According to the Government of Iran, this is the cost of subsidies for basic commodities such as electricity, fuel and bread.

It is the view of the Refugee Council that the current “refugee crisis” cannot ignore the very potent push factors in the countries from which the refugees are setting off – not just the widely acknowledged persecution in the countries of origin but the equally real problems they are experiencing in the main countries of first asylum. If refugees are not protected from abuse or threat to their physical safety, and if refugees are unable to sustain themselves and their families, it cannot be argued that the protection they are offered is “effective”.

In his opening address to the NGOs at the recent UNHCR Consultation with NGOs¹¹, the High Commissioner for Refugees, Ruud Lubbers, argued that the international community has fallen into the trap of settling for “non-durable solutions”. By leaving people in limbo for too long, and not allowing them to become productive members of the community in which they are living “you are doing a bad job with protection” he argued. Such people then become “fuel for criminal networks” and as well as being easy targets for receiving States who can argue that they are “phoney” and have no right to protection.

Australia should heed the High Commissioner’s words. The flow of people will continue until such time as the refugees believe that they have found a solution. Refugees, almost by definition, will risk all in search of protection. All we are seeing in the movement to Australia is a group of people who believe that they have to look beyond the horizon to find it. And for so long as their compulsion remains, there will be other people, some of whom are unscrupulous, who will be prepared to provide the means for them to get there.

It is no longer possible to argue that we are seeing a flow of people who “want” rather than “need” resettlement. For as long as countries of first asylum are unable to provide effective protection, there will be vastly more people in need of help than any managed resettlement program can accommodate. It is only through donor states rethinking priorities and ensuring that the countries that are bearing the bulk of the burden receive sufficient assistance that the incidence of secondary movement will be minimised (though it is unrealistic to think that it will cease entirely). And if donor states do make a fairer and more equitable contribution, another of the issues that so vexes the Government will be addressed. If the refugee population at large is receiving sufficient support, the number of people in need of third country options will be much smaller and there will be more chance that their needs can be met through orderly resettlement programs.

Before moving on, reference must be made to the events of the 11th September and the subsequent “War Against Terror” in Afghanistan. This has added an increased level of complexity to an already difficult situation. While it will inevitably bring more aid money into the region, the numbers of vulnerable aid recipients is increasing daily, as are the difficulties in getting aid to those who need it. There is also the very real chance that the pre-existing refugee population will see little of the West’s new-found largesse and will become further marginalised in the communities in which they are living. What these events will mean for the new refugees is of course pure conjecture as, at the time of writing, events are changing day to day. This will be taken up in the section of the report that deals with regional composition.

Then we come to the issue of the countries through which asylum seekers travel. Here too the issue of “effective protection” is relevant and we begin by turning to the words of the Director of the UNHCR Division of International Protection, Erika Feller¹²:

Notions such as “effective protection elsewhere” are increasingly entering asylum systems, in effect substituting for the internationally agreed refugee definition. Whether or not an individual has found, or even could have found, protection in countries through which that person has passed is rarely easily or reliably assessed. In any case, the indicators of “protection” are too imprecise.

If the notion is to have any currency, its applicability should be determined on an individual basis, not on a country basis, and certainly not in the case of persons who have passed through countries of “mere transit”. Any decision to return an asylum seeker to a safe third country should be accompanied by assurances that the person will be readmitted to that country, will enjoy there effective protection against refoulement, will have the possibility to

¹¹ UNHCR-NGO Consultation. 24 September 2001.

¹² In “The Convention at 50: the way ahead for refugee protection”. Forced Migration Review. April 2001.

seek and enjoy asylum and will be treated in accordance with accepted international standards.

Much attention has been given in the current debate to the responsibility of **Indonesia** to curb the movement to Australia. Little attention is given, however, to the following:

- Indonesia, like all of the countries through which the asylum seekers are transiting, is not a signatory to the Refugee Convention. As a non-signatory State, the only obligation¹³ on Indonesia is to refrain from forcing refugees to return against their will to their country of origin;
- while there the possibility exists for asylum seekers to approach UNHCR and apply for refugee status, UNHCR is very under-resourced to perform this task and it is not possible to include the same procedural safeguards as exist in status determination in Australia;
- refugees granted refugee status in Indonesia are not permitted to remain in the country. The agreement with the Indonesian Government is that resettlement places will be found for them. This, however, is proving problematic. In just over 2 years since the screening began, less than 20 of the almost 500 people who have been granted refugee status have been resettled. The apparent lack of any “durable solution” from Indonesia is compelling many to either bi-pass the status determination processes or, if they have been successfully through it, to move on in the hope of finding an “end” to their journey.

In the meantime, it must not be forgotten that Indonesia:

- has some 1.3 million internally displaced people of its own;
- is trying to deal with two major separatist movements (in Aceh and Papua);
- is confronting serious ethnic violence in many provinces including Kalimantan , Sulawesi and the Moluccas;
- has massive economic and other infrastructural problems;
- has (according to DFAT) little centralised control over the police and military.

It has to be acknowledged that it is not in Indonesia’s interests to do anything other than allow asylum seekers en route to Australia to continue their journey. They are not legally obliged to halt their passage and, in so much as they have been attempting to do so at the request of Australia, they have been creating problems for themselves. Having large numbers of foreigners awaiting determination living in (often outlying) parts of the archipelago can exacerbate ethnic tensions and can divert attention from the more pressing social issues. Further, as we have already seen with the disturbances in Jakarta, having increasing numbers of recognised refugees caught in limbo is a recipe for unrest.

The Refugee Council therefore argues that while it is important to work closely with Indonesia in controlling the flow of asylum seekers and ensuring the protection of those who are being smuggled, it is both unreasonable and unrealistic to expect that they take the prime responsibility. Australia, as a signatory state, with sophisticated status determination procedures, a sound economy and social stability, is far better placed to take the responsibility for ensuring that the flow of people through the region is addressed in a way that protects the rights of all people and provides necessary protection to refugees.

Further, we reiterate that if the Australian Government believes that the flow from the Middle East must be checked, it must do so in a way that actually addresses the root causes of the flow rather than simply seeking to check it mid-stream. To this end, and as will be discussed in the conclusions to this section, attention must be directed to the countries from which these people are fleeing.

¹³ As imposed by International Customary Law.

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Appendix B

The "Pacific Solution"

While the "Pacific Solution" which sees asylum seekers en route to Australia sent to Pacific Islands to be processed might have had value as a way out of an impasse that was acceptable to the Australian Government at the time, it cannot be argued that it is sustainable.

For a start, it is an enormously expensive exercise. Not only are there the costs of processing, which according to DIMIA sources are five times the cost of determination in Australia, but there are also the costs of the incentives that have been given to the Pacific states in order to gain agreement to establish the processing camps.

Expense need not only be measured in dollar terms. We also have to factor in the cost to Australia's reputation:

- amongst our Pacific neighbours, especially if (as will be discussed below) the asylum seekers remain beyond the agreed period;
- in the international community, with Australia's efforts to exclude asylum seekers being condemned by many countries, both developing and developed, and being used by Pakistan as an excuse for closing its border to fleeing Afghans.
- The Council questions too how achievable the Australian vision for the Pacific camps is. There are two possible outcomes when people are processed to determine refugee status. Either:
- they are found not to be refugees, in which case there is an expectation that they will be returned to their country of origin. But in the case of the current caseload, the majority are from countries to which involuntary return is not possible;
- they are determined to be refugees and resettlement places will need to be found. ... but the Australian Government has said that they will not all come here and other countries have demonstrated with the Indonesian caseload that they are unwilling to provide resettlement places.

It would thus appear that the likely outcome is that irrespective of the results of their status determination, the majority of those being sent to the Pacific camps will remain long after their status is determined ... doubtless much to the chagrin of their hosts ... that is unless the Australian Government changes its policy and allows entry to Australia.

It is the view of the Refugee Council that Australia has a particular responsibility towards its smaller neighbours. We have already seen in both Papua New Guinea (within the Parliament) and the South Pacific Forum that the issue has caused dissent, and the issue is still new. What will happen as the months unfold, and as countries like Nauru face further economic crises, and as the asylum seekers are not moved elsewhere? Australia cannot afford to destabilise its immediate region.

The Refugee Council argues that the "Pacific Solution" is a solution in name only and cannot be sustained. Now that the election is over, access to the Australian territory for status determination must be resumed. The effective closure of borders to persons seeking asylum, albeit by illegal entry means, is per se a breach of the heavy obligations imposed under the Refugee Convention to afford refugees effective protection.

The Refugee Council examined this and other issues relating to unauthorised arrivals in a submission to the Minister for Immigration and Multicultural and Indigenous Affairs in November 2001. This examination led to the Council concluding that the "Pacific Solution" should not be looked at in isolation but should be examined in the context of a much larger picture of secondary movement of certain groups of asylum seekers from countries of first asylum where protection has either broken down or has not been offered.

RCOA represents some 120 organisations and individuals working with and for refugees in Australia and around the world.

From the Council's perspective:

- push factors are stronger than pull factors in the current movement of unauthorised arrivals;
- there are clearly defined factors in countries of first asylum that indicate a significant breakdown of effective protection;
- blocking the movement in mid-stream (through interception arrangements) is unlikely to resolve the problem;
- fostering a "solution" that sees large numbers of people from the Middle East remaining in Indonesia for extended periods will only exacerbate the existing ethnic tensions in the archipelago and take resources away from dealing with the much more pressing internal problems;
- burden shifting to Australia's Pacific neighbours is not a sustainable solution. It is excessively costly, will damage Australia's relations with its neighbours, is bringing Australia into disrepute internationally and will almost inevitably have exactly the same net result as if the asylum seekers were not intercepted – i.e. they will come to Australia;
- the TPV regime has done nothing to deter entry, in fact, it can be argued that it has in fact encouraged more people (spouses and children of TPV holders) to come through smuggling routes. Further, it has caused incalculable suffering and may well cause major social problems that will take considerable time and resources to heal.

The Council therefore argues that the way ahead must involve a philosophical re-examination of the "problem" such that:

- protection is placed at the core of any solution in accordance with our Convention obligations;
- the emphasis is on cooperation rather than "burden shifting"; - resources are redirected to target the root causes of the irregular movement; and
- the community is helped to understand that refugees and asylum seekers do not pose a threat when there is a well managed program. The Refugee Council favours a multilateral rather than bilateral approach to finding a solution to the current "problems" and argues that the dialogue must engage all relevant players, not just governments but also UNHCR, IOM, NGOs ... and ideally representatives of the effected refugee communities. In this regard we acknowledge the Bali Conference initiative as a start to the process.

The Council further argues that any coordinated response must include, *inter alia*:

- a significant increase in Australian aid to assist those responsible for the protection and support of refugees in countries of first asylum;
- an increase in the numbers of resettlement places offered and the resources directed at processing resettlement referrals and applications;
- assisting transit countries to ensure that the rights of asylum seekers are protected;
- preserving the right to seek asylum and ensuring that the rights of asylum seekers are respected;
- rethinking the value of the "deterrent measures" that are currently in place. This would include an analysis of the true costs – financial, social and political – of the current policy;
- devising alternatives that address the Government's concerns, are cost-effective and, most importantly, ensure that Australia is able to meet its protection obligations in a comprehensive and responsible fashion; and
- helping the Australian public to understand the importance of such a coordinated response and the role they can play in assisting refugees.