



ASYLUM SEEKER RESOURCE CENTRE

SUBMISSION TO SENATE LEGAL AND
CONSTITUTIONAL REFERENCES COMMITTEE ON
MIGRATION AMENDMENT (DESIGNATED
UNAUTHORISED ARRIVALS) BILL 2006

ASRC's SUBMISSION AND POSITION

The Asylum Seeker Resource Centre (ASRC) strongly opposes the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006 in its entirety as well as the introduction of any measures to prevent asylum seekers arriving by boat in Australia from being able to have their asylum claims determined in Australia, under Australian law and pursuant to Australian legal protections.

We have developed our submission in accordance with the following five themes:

- 1. Australia's international obligations pursuant to the Refugee Convention**
- 2. Standards of refugee determination and processing in Nauru and PNG**
- 3. Structure and content of proposed legislation**
- 4. Past experience of 'Pacific Solution Mark I'**
- 5. Broader human rights implications of the proposed changes**

Many of the issues pertinent to this legislation are set out in the October 2002 report of the *Senate Legal and Constitutional References Committee on Migration Zone Excision (2002 Senate Migration Excision Zone Report)*. The majority recommendations of the Senate Committee in that report were not implemented by the Government.

Whilst the same legal and ethical difficulties apply to the legislation presently under review, the new legislation raises the following additional issues of concern:

- The decision to deny all asylum seekers arriving by boat in Australia access to Australia's refugee determination process indicates a fundamental downgrade of Australia's attitude to the Refugee Convention.
- The legislation is a disturbing example of where an acknowledged 'persecutory regime (in this case Indonesia) is permitted to directly influence the protection afforded to victims of the persecution (in this case by having them sent to a third country).
- The proposed legislation indicates an unwillingness to learn from past policy mistakes (namely the 'Pacific Solution Mark I').

SUMMARY

The ASRC considers the Government's decision to prevent boat arrivals from seeking asylum in Australia to be a clear and blatant abrogation of Australia's international obligations under the *Refugee Convention*. The policy is unprincipled, unethical, impractical and undermines the purpose of the international refugee protection framework, which is that asylum should be provided to refugees in the country of arrival unless they can access effective protection elsewhere. The so-called 'Pacific Solution' fails this standard.

The *Migration Amendment (Designated Unauthorised Arrivals) Bill 2006* is objectionable for a number of reasons:

- The concept of offshore processing centres in third countries (such as Papua New Guinea and Nauru) is incompatible with the intent of the *Refugee Convention* and is a technical mechanism by receiving states to attempt to circumvent *Convention* obligations.
- The Pacific Solution has been, by any objective standard, a policy failure. The decision to revisit it is alarming and regressive.
- The Pacific Solution sends the international community the clear message that countries such as Australia consider it permissible to manipulate the *Refugee Convention* to suit domestic political agendas.
- The Government's policy sets an appalling example for countries looking to Australia and other developed countries for guidance on acceptable human rights practices.
- Countries with problematic human rights records, including Indonesia, will feel emboldened to place pressure on Australia to amend laws that do not suit them.

- The policy is in clear violation of Article 31 of the *Refugee Convention* which effectively prohibits State signatories from discriminating against refugees on the basis of mode of arrival. Unauthorised air arrivals continue to be permitted to apply for asylum in Australia, whilst boat arrivals are to be sent to third countries where they will receive a lesser standard of treatment.
- It is a cornerstone of the Refugee Convention that countries of first asylum should admit refugees from neighbouring countries regardless of the political relationship between the two countries. Once political considerations intrude, the integrity of the system is compromised and the concept of refugee protection placed at risk.
- The Government's justification for the 'Pacific Solution Mark I' was to deter 'secondary movement' - ie those refugees who had bypassed other countries where they could have sought and obtained effective protection. The proposed legislation directly targets direct refugee arrivals who are unable to access protection elsewhere, as well as secondary arrivals.
- The use of the Australian navy to intercede vessels carrying asylum seekers for the purposes of trying to divert them from Australia is dangerous, compromises the role of the navy and may breach Australia's' obligations under the Refugee Convention not to refool refugees by returning them to a situation of persecution. Any co-operation between Australian and Indonesian navies in relation to asylum seekers fleeing Indonesia (including from West Papua) would be an appalling breach of the obligation to offer protection to refugees.

1. AUSTRALIA'S INTERNATIONAL OBLIGATIONS PURSUANT TO THE REFUGEE CONVENTION

1.1 Pacific Solution an abdication of Australia's responsibilities to refugees.

The Australian Government justifies the Pacific Solution's compatibility with the Refugee Convention on the basis that Australia is not breaching the fundamental principle of non-refoulement under Article 33 of the Refugee Convention by transferring asylum seekers arriving in Australia to safe third countries, namely Nauru and Papua New Guinea (PNG) where their claims will be processed¹. The concept of non-refoulement requires that no refugee be returned to a place in which they are at risk of persecution.

The ASRC maintains that this justification is fundamentally flawed and incompatible with the intent and efficacy of the *Refugee Convention*.

The right to seek asylum is enshrined in the Universal Declaration of Human Rights². The right can only exist in substance if State parties permit asylum seekers to exercise the right to seek asylum within their territory.

Persons who have effective protection in a safe third country, including the right to enter in and reside in a third country, may be excluded from the scope of refugee protection. In our view this concept presupposes some linkage to the safe third country or a level of protection more than that of a transitory nature.³ The designation of countries such as Nauru and Papua New Guinea as 'safe third countries' for asylum seekers who have arrived in Australia is an abuse of the concept. Nauru and PNG are no more than transit camps to which asylum seekers have no connection and which have no capacity to accommodate refugees on an ongoing basis or provide a durable solution.

Both Nauru and PNG are close to being 'failed states'. Both countries have significant problems with corruption. Papua New Guinea has endemic problems with violence, including criminal and tribal violence. The maintenance of law and order is so weak in PNG that the Australian government has developed an intensive law and order capacity building program to assist. It is perverse to consider both countries as 'safe third countries' for asylum seekers.

Whilst Australia has significant leverage over both Nauru and PNG through bilateral aid programs, both countries are sovereign, unpredictable and desperate for funding. There is no ultimate guarantee that either country would abide by any non-refoulement agreement with Australia if another powerful neighbour made them an attractive offer for the return of asylum seekers (eg Indonesia or China). Australia remains

¹ Senate Legal and Constitutional References Committee, 'Migration Zone Excision', October 2002, paras 4.18-4.20

² Universal Declaration of Human Rights, Article 14

³ See UNHCR submission to Senate Legal and Constitutional Committee on Migration Legislation Amendment (Further Border Protection) Bill 2002, <http://www.unhcr.org.au/pdfs/amendprotectbill.pdf>

responsible (and liable) for the protection and treatment of refugees in ‘safe third countries’ until they are provided with a durable solution.⁴

Agreements between Australia, PNG and Nauru in relation to the treatment of asylum seekers transferred to those countries⁵ are an unsatisfactory substitute for the implementation of a statutory (and legally enforceable) regime in Australia’s domestic law guaranteeing a certain standard of fair treatment in relation to the assessment of claims of asylum seekers arriving in Australia.

If all Convention signatories devolved their asylum seekers problems to ‘safe third countries’, the Refugee Convention would become meaningless as no receiving state would be required to process the claims of asylum seekers arriving within their territory.

1.2 Mixing politics and asylum

The effectiveness of the international system of refugee protection is predicated upon State parties assessing asylum claims in a fair and impartial manner in which political considerations (including issues of political relationships with neighbouring countries) play no part.

It was on the basis of such an impartial assessment that 42 of the West Papuan asylum seekers were deemed to be refugees.

The Government’s decision to drastically downgrade the system of refugee protection in Australia for asylum seekers arriving by boat following intense diplomatic pressure from Indonesia in relation to West Papuan asylum seekers undermines a cornerstone of international refugee policy and cannot be justified on public policy or national interest grounds. Countries with far greater numbers of asylum seekers arriving from neighbouring countries (including Pakistan, Iran and Kenya) have taken more independent and principled positions than Australia in relation to refugee protection, despite intense political pressure upon them from neighbouring ‘refugee producing countries’.

We note with irony the references by Government Senators in the 2002 *Senate Migration Excision Zone Report* in relation to the inappropriateness of interference in the domestic affairs of other nations. Senators quoted from the 2000 *Senate Sanctuary Under Review* report as follows:

*The Committee is also concerned about the diplomatic ramifications if Australia were seen to be interfering in the domestic affairs of other nations.*⁶

⁴ See UNHCR submission to Senate Legal and Constitutional Committee on Migration Legislation Amendment (Further Border Protection) Bill 2002, para 22, <http://www.unhcr.org.au/pdfs/amendprotectbill.pdf>

⁵ See DIMA submissions in 2002 Senate Report on Migration Excision Zone, para 14 of Dissenting Report by Government Senators

⁶ See DIMA submissions in 2002 Senate Report on Migration Excision Zone, para 17 of Dissenting Report by Government Senators

It is unfortunate that the same standard is not applied to third countries attempting to influence Australia's domestic asylum policies.

The extension of Australia's policy on a global scale would have alarming consequences that would decimate refugee protection worldwide. What would prevent Pakistan and Iran from attempting to transfer thousands of Afghan asylum seekers to a third country or Chad compromising standards of protection in relation to refugees from Dafur following pressure by Sudanese authorities?

1.3 Discriminating on basis of mode of arrival

No provision of the *Refugee Convention* permits a state to discriminate against an asylum seeker on the basis of their mode of arrival. This reflects the reality that asylum seekers are often forced to flee their countries at short notice, without any documentation and by any means possible. This is demonstrated by the circumstances of the West Papuan asylum seekers.

Article 31 of the *Convention* allows for the imposition of penalties only on persons who have not directly fled from a territory where their life or freedom was threatened. Direct or secondary movement from threats to life or freedom are the differentiating elements – not mode of arrival.

The measures proposed by the Government discriminate directly on the basis of an asylum seeker's mode of arrival in Australia. Boat arrivals are to be transferred to offshore processing centres whilst air arrivals are permitted to apply for asylum in Australia.

UNHCR consider that denial of access to a domestic refugee determination process and transfer overseas to be subjected to a lesser standard of refugee determination and the vagaries of whether or not a 'resettlement place' is made available if a claimant is successful merely on the basis of mode of arrival introduces an undesirable and impermissible level of discrimination into the refugee determination process:

The introduction of different systems for determination of refugee status for different asylum seekers depending on their location in Australia raises concerns. Having two different determination systems is discriminatory and in UNHCR's view undesirable. If lesser standards relating to procedures or lesser status accorded under these procedures are envisaged due to the nature of arrival of asylum seekers, this would not be in accord with international protection obligations.⁷

Coming in the 55th anniversary year of the *Refugee Convention*, the discriminatory application of different standards of *Convention* protection on the basis of mode of arrival signals the willingness of the Australian Government to sacrifice key human rights protections to suit domestic political agendas.

⁷ UNHCR submission to 2002 *Senate Migration Excision Zone Report*, p 4

1.4 Direct arrivals v secondary arrivals

The Government's previously stated policy justification for excising offshore islands from Australia's migration zone was to deter secondary arrivals (ie those asylum seekers who had passed through other countries en route to Australia in which they may have been able to apply for protection).⁸

The decision to prevent all boat arrivals, including direct flight arrivals, from applying for protection in Australia makes it clear that the government's border protection agenda was always intended to trump rights owed under the *Refugee Convention*.

Direct flight refugees should be accorded the highest possible priority and standards of treatment through any domestic refugee assessment process on account of their inability to apply for protection elsewhere.

Australia has previously insisted that countries of first asylum must continue to host direct flight refugee populations and that it is the role of countries such as Australia to accept limited numbers of those refugees for whom no durable solution can be found in the country of first asylum under refugee resettlement programs. This forms the core basis of Australia's refugee and humanitarian program.⁹ In their Fact Sheet on Australia's Refugee and Humanitarian Program DIMA state:

First asylum is normally provided by the closest safe country to which the refugee has fled. This then allows for the UN's preferred 'durable solution' of return to the home country in safety and dignity as soon as possible.

The proposed policy of transference of direct flight asylum seekers is shamelessly hypocritical and will severely erode Australia's ability to be taken seriously in the international refugee protection debate.

2. STANDARDS OF REFUGEE DETERMINATION AND PROCESSING ON NAURU AND PNG

2.1 Denying access to Australia's refugee determination process

The proposed legislation is a direct attempt by the Government to circumvent the rights of asylum seekers to have their claims assessed independently and in a manner that meets minimum standards of procedural fairness and natural justice. Under the new changes, all asylum seekers arriving by boat will have their claims assessed by a DIMA officer at an offshore processing centre. They will not have access to legal representation. If they receive a negative decision from DIMA they are entitled to a review of the decision by another DIMA officer. They have no other legal avenue of

⁸ See DIMA Fact Sheet 71, 'New Measures to Strengthen Border Control'

⁹ See DIMA Fact Sheet 60, 'Australia's Refugee and Humanitarian Program' and Fact Sheet 71, 'New Measures to Strengthen Border Control'

review nor do they have an entitlement to seek intervention by the Minister on humanitarian grounds.

Whilst we note UNHCR's minimum standards on refugee determination processes do not necessarily require independent review of primary decisions¹⁰, there are good reasons why independent scrutiny of claims is necessary within the context of 'Pacific Solution' claimants. The decision to transfer asylum seekers to offshore processing centres is inherently political (particularly in light of the pressure placed by Indonesia on Australia in the context of West Papuan asylum seekers). Claimants may perceive Government decision makers to be less than independent on account of the Government decision to refuse them access to Australia's refugee determination system for foreign policy considerations. Existence of an independent mechanism for review would be an important guarantor of due process in assessment of such claims.

We consider that there are a number of key issues of serious concern in the manner in which asylum claims will be processed including:

- **No access to legal representation.** As it currently stands, persons deemed to be unauthorized arrivals who are placed in immigration detention on-shore are provided with access to legal representation under the IAAAS scheme. It should be noted that the asylum seekers previously on Nauru were only granted access to a migration advisor due to an apparent private agreement reached between migration agent, Marion Le and Phillip Ruddock, the then Minister for Immigration.

We consider it is a fundamental breach of human rights to deny an asylum seeker access to legal representation in presenting their claim. It is misguided for the Government to suggest that an asylum seeker is sufficiently able to articulately argue how their experiences of persecution would satisfy the definition of a refugee under the Refugee Convention. It is our experience that claims for protection are often highly complex and difficult and require a detailed understanding and knowledge of refugee law. Many hours are spent by legal representatives in drafting statements and legal submissions which contain the most relevant and current country information as well as documenting in great detail the experiences of our clients in their country of origin. It is only with this level of detail and information that an accurate assessment of refugee claims can be made.

- **No right of review to the Refugee Review Tribunal or other independent external agency.** We consider it a breach of procedural fairness to deny asylum seekers who arrive by boat the right to appeal to the Refugee Review Tribunal (RRT). The RRT is an independent tribunal that conducts an inquisitorial style hearing to determine whether an asylum seeker is a genuine refugee. The RRT is an important mechanism of review in Australia's refugee determination process due to its independence, the qualifications and expertise of Tribunal Members and the more formal consideration process involved.

¹⁰ 2002 Senate Migration Excision Zone Report, para 5.40

Under the proposed changes, DIMA officers have the first and final say as to whether an asylum seeker is a genuine refugee. We have serious concerns about the lack of independence of DIMA officers. We would, in particular, draw the Committee's attention to the experience of Iraqi TPV holders between the period of 2004 and June 2005. Of those Iraqis who applied for further protection during this period of time, a significant proportion of them received negative decisions from DIMA. We note that, of the cases that were refused by the Department, over 97% of those cases considered by the RRT were approved. The enormous inconsistency in the decision making between the DIMA and the RRT and the "about-face" makes a mockery of the independence of the Department's determination process.

It is very clear that should determination of asylum claims be left solely to DIMA, that there is very little guarantee that claims will be assessed independently and free of political influence. Furthermore, it denies asylum seekers the right to independent review by a specialized Tribunal that holds expertise in refugee law and is bound by principles of procedural fairness and natural justice.

- **No right to judicial review.** Administrative decision making by Commonwealth Tribunals are bound by principles of procedural fairness and natural justice. As such, denial of such principles in decision-making can form the basis of an application to the Federal Magistrates Court or Federal Court of Australia. The right of access judicial review is non-existent for offshore asylum seekers which undermines the accountability and fairness of the decision making process.

2.2 Detention of families, particularly children

The government has attempted to circumvent criticism of their new legislation by stating that women and children will be allowed to "roam free" on Nauru during the day and be returned to a detention facility at night. However the humidity and tropical environment of Nauru, the lack of access to services, particularly appropriate medical care and the isolation and seclusion of the island makes it oppressive and unsuitable for people to be detained on. It is inconsistent to consider sending persons to Nauru at a time when the Government is looking for an exit strategy for Nauruans as the country becomes gradually uninhabitable and unsustainable. Such an environment is particularly damaging to children, who have no ability to obtain an education of any proper standard, nor any ability to integrate into a community, socialize with other children or participate in activities that any other child would have the right to.

It is also, on any reasonable assessment, not in the best interests of a child to be separated from their father. There is an argument by the Government that women and children may be provided with a more flexible detention arrangement whilst fathers must endure ongoing confinement. We would submit that it is in the best interests of the child to be with both their mother and father as a family unit. Separation of women and children from the father only intensifies the anguish and distress for families and is an destroys the fabric of the family unit.

We believe that the treatment of unauthorized asylum seekers onshore has improved with the policy adopted by the DIMA that now ensures that no families with children remain in detention. There was a sense in the public and media, that this development was recognition by the Government of the significant emotional and psychological damage the detention environment had on children and their families. The new proposed legislation, however, suggests that the Government has not learnt any lessons from its past policies nor does it hold any concern for the long- term damage detaining children will have on them. We consider that the Government has now sacrificed the emotional and physical health of asylum seeker children for the politics of appeasement.

3. **STRUCTURE AND CONTENT OF PROPOSED LEGISLATION**

As we oppose the *Migration Amendment (Designated Unauthorised Arrivals)* legislation in its entirety, we offer no substantive comment on the details of the legislation.

However we maintain that a piece of legislation which deals with asylum seekers merely by prohibiting their making a valid application for asylum in Australia¹¹ and without spelling out by statute how their asylum claims are to be processed is fundamentally flawed and deprives asylum seekers of any system of checks and balances in relation to fair determination of asylum claims.

We share the views of the 2002 Senate Committee in the *Migration Zone Excision Report* in relation to the desirability of statutory recognition of the standards to be applied in relation to asylum seekers the subject of offshore processing regimes.

4. **PAST EXPERIENCE OF 'PACIFIC SOLUTION MARK I'**

4.1 **Pacific Solution a costly policy failure**

By any objective standard, the Pacific Solution must be considered a failure. The intention of the Pacific Solution was to deter asylum seekers and to resettle genuine refugees in countries other than Australia.

The overwhelming majority of asylum seekers on Nauru and in PNG were found to be refugees. Many of the asylum seekers not initially found to be refugees were subsequently found to be refugees following further case review.

Most of the Pacific Solution refugees were eventually resettled in Australia on account of the refusal of most other countries to resettle refugees perceived to be Australia's responsibility.¹²

¹¹ see s 10 of Migration Amendment (Designated Unauthorised Arrivals) Bill 2006, amending subsection 46A(1) of Migration Act

¹² 'Boats Policy Hopes Sink', J. Macken, Australian Financial Review, 8 May 2006. Of the 1509 asylum seekers 'resettled from Nauru' 586 came to Australia whilst New Zealand took 360, Sweden 19, Canada 10, Norway 4, and 482 were repatriated.

The Pacific Solution was a costly experiment in human lives which resulted in the unnecessary and prolonged detention of many thousands of genuine refugees.¹³ The Australian government bears direct responsibility for the physical and psychological health consequences of the policy on the refugees affected by it.

The Pacific Solution should never be revisited on any basis.

In their Dissenting Report to the *2002 Senate Migration Excision Zone Report*, Government Senators advised that:

The Government has already taken steps for the establishment of a detention centre on Christmas Island, which may well make it unnecessary for the claims of refugee status of offshore entry persons to be assessed in other countries.

The Government's repudiation of such previous sentiment indicates an alarming degree of arbitrary and ad-hoc policy on the run which is incompatible with concepts of consistent and principled policy making in this sensitive and critical area.

Whilst some countries (eg New Zealand) may have viewed the 'Pacific Solution' refugees as a one-off case load, it is difficult to imagine that third countries will be so receptive to future cases if they appear to be a part of an ongoing Australian government policy to outsource asylum seekers. This is especially so for categories of asylum seekers considered too politically sensitive for Australia to accept. Why would any other country offer resettlement places thus jeopardising their own relationship with the alleged persecutory regime?

4.2 An environment of 'legal limbo'

The emotional and psychological impact of detaining asylum seekers offshore is documented by the experience of the largely Afghan and Iraqi asylum seekers that were previously detained on Nauru. Many of those 'resettled to Australia' continue to have long standing issues with both their mental and physical health.

In 2005, DIMA sent a team of mental health specialists to Nauru who reported that the residual asylum seekers were in extremely poor mental and physical health. It was after this report that DIMA moved to grant residency to all but two of the asylum seekers on Nauru. DIMA is well aware of the impact that detention on Nauru has had on previous boat arrivals. Yet this has made no difference to Government moves to ensure that all asylum seekers are detained offshore under the proposed legislation.

One of the arguments made by the Government, that asylum seekers will be processed quickly and efficiently and will not remain on offshore processing centres for an extended period of time, is simply a fallacy. Asylum seekers previously on Nauru were detained for up to six years. There are any number of reasons why asylum seekers may be forced to remain on offshore processing centres for extended periods of time including:

¹³ See for example, Oxfam Community Aid Abroad, 'Adrift in the Pacific', February 2002

- Statelessness;
- Their country of origin may be too dangerous for them to be returned to;
- Their country of origin may refuse to accept them;
- No third country is willing to accept them;
- There is a delay in their claims being processed by DIMA

In their Dissenting Report to the *2002 Migration Excision Zone Report*, Government Senators recommended a review of the operation of sections of section 46A of the *Migration Act* if asylum seekers were found to have been left in limbo. Senators stated:

Government Senators would expect processes to be in place to ensure that individuals are not left in a position which witnesses have described as 'legal limbo' and that cases must be dealt with in an appropriate timeframe. If experience shows this not to be the case, Government Senators would support a review of the operation of section 46A.

Experience indicates that the Pacific Solution Mark I left many hundreds of refugees and asylum seekers in 'legal limbo'. The decision to revisit such a scenario without learning from past policy failings is profoundly disappointing.

Due to the positive developments in 2005, onshore asylum seekers now have a right to review of their long-term detention by the Ombudsman. The Ombudsman is able to make recommendations for their release, together with reviewing any complaints about conditions and treatment in detention. The recommendations made by the Ombudsman in cases have resulted in the release of asylum seekers into the community. An independent and objective review of detention has been an important element in ensuring that asylum seekers who are mentally or physically unwell are not forgotten and alternatives to detention are considered. There are now options for asylum seekers to be released into the community on residence determinations, which accommodates the need for asylum seekers to be treated for the physical and mental illnesses in a less restrictive setting. None of these options are available to asylum seekers who are processed offshore. This means that their mental and physical illnesses will go undiagnosed and untreated for an extended period of time, compounding their illness and making their long-term recovery even more difficult.

5. BROADER HUMAN RIGHTS IMPLICATIONS OF THE PROPOSED CHANGES

5.1 Setting a human rights standard

Australia's overall national and strategic interest is best served by acting as a human rights exemplar, not a human rights vandal, within the international community. Australia has a strong interest in promoting human rights and democracy within the Asia Pacific region as a means of achieving regional stability and prosperity. The impartiality of the refugee assessment process is fundamental to this goal. It provides protection to persons fleeing persecution through a process free from political

interference. It also results in greater attention being focused on the resolution of human rights problems within the region in order to minimize refugee outflows.

It is in both Australia and Indonesia's national interests that Indonesia maintain minimum human rights standards and protect its nationals from harm. Only through such measures will Indonesia be able to maintain social cohesion. It is in Indonesia's best interests to work to resolve any systematic human rights abuses in West Papua. It is in Australia's national interest to raise these issues with Indonesia in good faith.

By implementing the Pacific Solution Mark II, Australia sends a clear message to the international community that it is permissible to manipulate the *Refugees Convention* to suit domestic political ends. This lowering of standards will have a devastating effect on developing countries dealing with refugee inflows who will begin to question why they should permit asylum applications to be lodged within their own territories where developed countries exempt themselves from fundamental protections. Such measures retard the development of human rights standards globally.

5.2 Right to free expression in Australia

Immigration Minister Vanstone's criticism of asylum seekers attempting to use Australia as a 'staging post' for their political activities¹⁴ shows scant regard for fundamental principles of free expression and democracy. Freedom of political expression is a core human right and a cornerstone of democracy in Australia. Anyone arriving in Australia is entitled to voice their opinion freely and within the boundaries of the law. The right is of particular importance to persons fleeing political persecution.

It is the fundamental right of the West Papuan refugees to express their political opinions in Australia freely (including their desire for independence for West Papua) without any political interference or pressure.

5.3 Use of Australian navy to prevent asylum seeker boats from reaching Australia

Australia's past practice during the 2001 election campaign of using naval vessels to intercede and deter asylum seeker boats through Operation Relex was dangerous, an abuse of the role of the navy and ultimately ineffective.

The vast majority of the boat arrivees could not be returned to Indonesia. The overwhelming majority of the asylum seekers intercepted were found to be refugees and ultimately resettled in Australia.

Any suggestion of a renewed role for the navy in intercepting boats of asylum seekers is alarming and shows a failure to learn from past experience. The heavy handed and

¹⁴ ABC Radio, PM, 'Asylum Seekers to be pushed offshore for processing', 13 April 2006

aggressive treatment of asylum seekers on the high seas is a recipe for disaster and could well have life-threatening consequences.¹⁵

Any co-operation between Australian and Indonesian navies in intercepting boats of asylum seekers fleeing Indonesia would be a gross violation of the right to seek protection from persecution.

5.4 West Papuan context

The debate around the visas granted to the 42 West Papuan refugees has overshadowed the larger issue of the 8,000 West Papuans living as refugees and asylum seekers in PNG. Some of these refugees have been living in PNG for over 20 years.

The fury of the Indonesian government at the treatment of the 42 West Papuans granted visas in Australia must be viewed within a global context. PNG authorities assess the claims of asylum seekers within the country under the direct supervision of the UNHCR. They have found over 7, 627 persons (the vast majority of whom are West Papuans) to be refugees.¹⁶ PNG arguably has more at stake in its relationship with Indonesia than does Australia, bearing in mind the relative power dynamics between PNG and Indonesia, the porous nature of the border and the vastly greater numbers of refugees crossing the border to PNG. The role of UNHCR in acting as an independent monitoring body is critical in providing an impartial, non-political perspective on the merits of the claims and in ensuring that persons recognized as refugees are provided with suitable protection.

The Australian Government must re-focus the West Papuan debate on the reasons for the flight of many West Papuan refugees into PNG and Australia in an attempt to address the root causes.

For further comment, contact Pamela Curr, ASRC Campaign Coordinator on 0417517075 or Kon Karapanagiotidis, ASRC Coordinator on (03) 9326 6066.

¹⁵ See D.Marr and M.Wilkinson, 'Dark Victory', 2003

¹⁶ Australian Policy Online, 'West Papua's forgotten asylum seekers', Nic Maclellan, Institute for Social Research, Swinburne University of Technology, 13 April 2006