MEMORANDUM ON PROPOSED CHANGES TO THE MIGRATION ACT
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The Migration Amendment (Designated Unauthorised Arrivals) Bill 2006 is one of the most significant pieces of legislation affecting refugees and asylum seekers to be introduced into the Australian Parliament since September 2001 at the height of the *Tampa* Affair. It seeks legislative backing for significant changes in government policy relating to processing refugee claims by non-citizens who come to Australia by boat without authorisation. The processing of boat people "offshore" in places like Nauru is to become normalised, with the result that these asylum seekers will undergo an inferior assessment process and those found to be refugees will have no automatic right to refugee protection in Australia.

The proposed changes are without precedent in Australia or internationally. They place Australia at grave danger of breaching fundamental obligations it has assumed under international law. Most importantly, the changes will impact directly on the ability of people in need who are legally entitled to protection (and deserving of compassion) to gain immediate and long term protection.

The following opinion addresses the impact of the changes at the level of both *principle* and *practice*.

Offshore Processing

The Bill provides that future unauthorised boat arrivals will not be eligible to apply for any visa within Australia. This is so, whether they are intercepted before reaching the Australian mainland or whether they reach Australia. The Minister will have a non-compellable, non-reviewable power to admit boat people to the refugee determination system on mainland Australia.

The underlying policy is to transship all unauthorised boat arrivals to offshore centres to have their claims for refugee status assessed. Statements by Minister Vanstone suggest that her first preference is for Nauru or PNG's Manus Island to be the preferred locations, with Christmas Island also an option. It is noted that the government has committed many millions of dollars to building a new detention centre on this island.

The immediate effect of the change is that refugee status decisions will be made offshore by Australian government officials, presumably officers of the Department of Immigration and Multicultural Affairs. There are rumours that IOM is also being approached to do *processing* – this I think would be a "first" – and extremely concerning. There will be no access to merits review by an independent review authority such as the Refugee Review Tribunal (RRT). Claimants will have no right to government funded legal advice although they will have access to interpreters employed by the Australian government.

Those assessed as having protection needs will be eligible for "resettlement" in third countries. UNHCR may be approached to facilitate this process, although in theory

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these people could also be considered for a range of "offshore" humanitarian visas, some of which are broader in their decisional criteria than onshore protection visas.

1 International Principles

Non-refoulement

International law recognises a right in individuals to seek and enjoy asylum from persecution. More importantly, with respect to persons on its territory and under its control, Australia has a fundamental legal duty to ensure that no person is "refouled" or sent back to face persecution. This duty is based on a long-standing principle of international treaty law and custom, is entrenched in domestic law, and cannot simply be abandoned for political or diplomatic reasons.

Any action by Australia that could expose asylum seekers to persecution, torture, or inhuman or degrading treatment or punishment is in breach of its obligations under the 1951 Refugee Convention, the International Covenant on Civil and Political Rights (ICCPR) and the UN Convention against Torture.

Australia's new laws offend these basic principles because they pose serious threats to the ability to ensure that refugees are not returned to countries where they face persecution. While Australia may not be relinquishing total responsibility for the asylum seekers affected, the asylum seekers are to be consigned to a degraded processing system. This in turn is likely to lead to a failure to recognise genuine refugees.

The only exceptions to the principle of *non-refoulement* of genuine refugees is where there are reasonable grounds for regarding the refugee as a danger to the country or where the refugee has been convicted in Australia to s particularly serious crime and so constitutes a danger to the Australian community. This recognizes the preeminence of the states' rights to protect their territorial and societal integrity. Again, these exceptions are designed to operate on a case by case basis. The Convention does not permit states to make blanket assertions about state security that have no basis in fact.

State sovereignty and the politics of refugee protection

It is a basic principle of state sovereignty that every state has the right to admit individuals in distress, and indeed in some cases this can extend to a duty. Other states have a corresponding duty to respect this right to grant asylum. Asylum is a peaceful, humanitarian and non-political act.

Indeed, the fact that the Refugee Convention is based on a case by case assessment of the protection needs of persons seeking asylum underscores the *non-political* nature of refugee protection. So too does the fact that refugee status is given to only a small percentage of persons facing serious personal harm: it is not enough to face persecution alone, persecution must be feared for one of five reasons (race, religion, nationality, membership of a particular social group or political opinion). Any laws that have the effect of opening refugee protection to the vagaries of political or diplomatic pressures undermine the most fundamental premises of the Convention.

Allowing the politics of diplomatic relations to play any role in the determination of protection claims completely undermines the international institution of asylum and goes against the very humanitarian principles on which it is based.

Non-discrimination and the prohibition on penalizing asylum seekers

Another fundamental premise enshrined in the Refugee Convention is that states must not discriminate between refugees on the basis of race, religion or country of origin (Article 3 of the Refugee Convention). The fact that the refugees affected by these changes are coming from particular countries in Australia's immediate vicinity may place Australia in violation of this principle. This principle is also enshrined in the ICCPR and other human rights instruments. Parenthetically, non-discrimination on the basis of race is a principle that is central to Australia's domestic immigration laws.

Article 31 of the Refugee Convention states plainly that states should not penalize refugees for entering their territory illegally where they have come directly from a country in which they face persecution. The proviso is added that the refugees must present themselves to authorities without delay and show good cause for their illegal entry or presence. Again, this is a fundamental aspect of the Convention as it underscores the right of people in distress to seek protection, even if their actions constitute a breach of the domestic laws of a country of asylum. Article recognizes that the circumstances compelling flight commonly force refugees to travel without proper documentation. Irregular movement and lack of documentation does not say anything about the credibility of a protection claim.

The proposed laws would apply to asylum seekers coming directly from the country of claimed persecution. Because they establish a second determination regime that is markedly inferior to that operating on mainland Australia, the laws could be regarded as punitive in breach of Article 31.

Durable Solutions and state responsibility

The new policies are designed to group refugees recognized through processes conducted offshore together with those recognized by UNHCR in the course of its fieldwork operations. Attempts will be made accordingly to have the Australian refugees "resettled" through the auspices of UNHCR.

In this respect the laws are fundamentally at odds with the principle that states signatory to the Refugee Convention should assume full responsibility for refugees on their own territory unless there are serious reasons for alternative arrangements to be made. In most instances, UNHCR processing is conducted in countries that have either not become parties to the Refugee Convention (Indonesia is a regional example in point) or which are unable to cope with the sheer scale of human movement on their territory (Kenya is an example in point). In either case, UNHCR comes in at the invitation of the government in question as a gesture of humanitarian aid and in response to perceived need.

There are currently approximately 9 million Convention refugees "on the books" of UNHCR. Less than one percent can expect to achieve resettlement in third countries. For Australia to purport to add its tiny number of refugees (tiny in absolute as well as relative terms) to UNHCR's burden is unconscionable.

The Tampa is No Precedent

As a postscript to this discussion of the role played by UNHCR, it is false to see the involvement of UNHCR and IOM in the resolution of the standoff generated by the

Tampa affair as a precedent for these laws. On that occasion, UNHCR intervened in a situation of humanitarian crisis, operating as a broker to negotiate a solution for the asylum seekers rescued at sea from a vessel in distress. It agreed to assist in the processing of asylum seekers taken from the *Acheng*, because these people were collected and delivered to Nauru at the same time as the *Tampa* rescuees. UNHCR declined involvement in the processing of asylum seekers intercepted and deflected to Nauru after this time.

There are other factors that make this period very different to the scenario now envisioned by the Australian government. As well as being a situation of crisis, the individuals were intercepted before reaching Australian soil. Moreover, according to rhetoric of the time, many were characterized as "secondary movement" refugees, or in crude terms, refugees who had passed through safe countries and who were looking for "immigration outcomes" rather than simple protection. Deflecting responsibility for asylum seekers fleeing directly to Australia and who land on Australian territory is a dramatically different proposition. This has particular relevance for asylum seekers from West Papua who come directly to Australia without passing through any other states. Australia is one of the nearest countries and an obvious country of refuge.

2 The Practical Impact of the New Laws

The central issue is that the regime will deny protection outcomes to individuals who would gain recognition and protection as refugees if their claims were processed on mainland Australia.

These are not matters of pure conjecture. Prior experience of the assessment regimes established on Nauru is that the system as a whole produced fewer successful claims. The percentage of unaccompanied and separated children whose claims were rejected on Nauru was dramatically higher than in Australia. IOM statistics suggest that 32 of 55 unaccompanied children were returned to Afghanistan in 2002-2003. At least one of these was subsequently killed. Of 290 such children who made it to Australia, none were returned over this period.

A related problem with the proposed regime is that children will be returned to immigration detention, and that children and vulnerable adults will be placed in a processing regime that involves infringements of their basic human rights. Children and vulnerable adults will be at particular risk.

Asylum claims processed by Australian immigration officials, but not under the Migration Act

The chief problem with deflecting all boat people to offshore processing centres is that all mechanisms for ensuring accountability and quality in processing are removed.

While asylum seekers will continue to have access to interpreters, they will be denied legal representation or application assistance that is provided as of right to onshore applicants. They will have no access to RRT review. Access to judicial review by the High Court cannot be removed, although the arrangements could make this option futile or at best frustrating: see box below.

Appellate review by an independent tribunal such as the RRT is not an optional extra. Between 1 July 1993 and 28 February 2006, the RRT overturned 7,885 primary decisions by DIMA. Without a right of review to the RRT, 7,885 individuals (and in some cases their families) who sought protection from persecution may have been removed to situations where they face serious harm and even death.

Judicial review does not involve a re-hearing of the *facts* of the case, that is, a re-examination of the factual basis under which people are seeking asylum. Judicial review is limited to narrow grounds of law.

While attempts are being made to involve UNHCR in processing, there are no proposals to involve the federal ombudsman in overseeing detention and processing arrangements. Mechanisms for ensuring accountability at the most basic levels will again be absent. The experience of processing on Nauru was that it became almost impossible to get any information at all about what was going on. Even now, the statistical and other data that has been released is contradictory and unreliable.

The human impact of isolating claimants, decision makers and enforcement officials from public scrutiny is of great concern. The damage done by the Nauru regime is very well known. Again, the removal of oversight of public officials can result in disturbing abuses of power.

One way in which the off-shore processing changes may be defended by the government is on the basis that the visa classes for offshore humanitarian entry are much broader than the criteria that have to be met for refugee protection visas onshore. In effect, what the government is doing is separating out the process for recognising Convention refugees from the grant of visas. Within Australia, the two processes are done together. What this means is that the government can prioritise the *visa* processing of refugees and asylum seekers who it wants to help. These may be people who meet the definition of refugee straight away. However, it also allows for games to be played with those who "co-operate" and those who do not. So, let's say that a failed asylum seeker manages (against the odds) to get Julian Burnside (for example) to bring an action in the High Court – seeking a "declaration" that the person is really a refugee. The government could respond by saying "Fine, make my day. However, your application for a *visa* will now be consigned to the bottom of the pile." Even if a person somehow manages to get someone to acknowledge that they are a refugee, the new regime creates no obligation on the government to ensure that that person is resettled in Australia or anywhere else for that matter.

The system could well lead to Australia "warehousing" refugees and persons of concern in circumstances where Australia is falling far short of meeting its Convention obligations in matters such as basic housing, education, etc.

International Relations Issues

One point that seems to have been missed by many people is that Indonesia's vocal concerns about Australia's refugee protection regime have a very practical (financial) base. In February of this year, Indonesia became a party to the ICCPR and is required now to report within one year on its human rights record. An adverse report can have ramifications for the grant of foreign aid under regional ASEAN arrangements. Australia's actions therefore have potential financial ramifications for the country. Professor Shearer (Australia's representative on the UN Human Rights Committee) has suggested that this is a reason for the furore caused by the West Papuan defectors.

With respect, the proposed laws will do little to address these concerns. Indeed, the involvement of other countries in the region in the messy business of refugee processing may only make matters worse. Asylum (again) is a non-political act.

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The following additional points have been made by A Just Australia in their Offshore Refugee Process: ***Brief on the Proposed Changes***, 27 April 2006:

Harms Australia's International Reputation
This proposal creates the impression that we are seeking to dump our 'problems' on small less-developed and/or dependent nations. This makes Australia look like an unwelcoming country instead of a tolerant, compassionate, multicultural society.

During the Tampa stand-off, the impression expressed by Australia's church partners in the Pacific and internationally was one of Australia lacking compassion and violating international law. Such perceptions could undermine Australia's efforts to promote human rights, good governance and the rule of law abroad.

Appears as if Australia has caved in to pressure from Indonesia
This proposal sends a clear signal to foreign powers that Australia is willing to change the laws governing its refugee protection system. It is vital to our national interest and our ethical values as a democratic country that we do not bow to external pressure to compromise our commitment to protecting human rights. As an international citizen, Australia will not be respected for repudiating those values.

> What if China objected to Australia taking refugees from Tibet prior to signing off on a bilateral free trade agreement? What if Russia object to Australia taking refugees from Chechnya?

We should be making it known to Indonesia that we consider it vital to peace and stability in the region that the human rights and welfare of all Indonesians be fully protected and differences resolved peacefully.

Sets a Poor Precedent for Other Countries
After Australia introduced the Pacific Solution, several European countries were encouraged to follow suit, including the UK and Italy, and develop their own versions of the Pacific Solution. Pakistan, who then hosted over two million refugees, cited Australia's response to minor numbers of asylum seekers as justification for closing its borders to Afghan refugees.

In signalling a further withdrawal from the international system of protection, the proposal sets a negative precedent that could encourage other developed countries to abrogate their responsibilities.

> UNHCR stated: "If this were to happen, it would be an unfortunate precedent, being for the first time, to our knowledge, that a country with a fully functioning and credible asylum system, in the absence of anything approximating a mass influx, decides to transfer elsewhere the responsibility to handle claims made actually on the territory of the state." [2]

Inducements Cause Distortions

Under the Pacific Solution, there were serious concerns about the use of aid as a lever to extract concessions from smaller aid-dependent countries. In particular, the impact that large offers of conditional development aid had on the domestic politics of PNG and Nauru, particularly on the freedom of the media in these countries.

Encourages the use of arbitrary detention

Under the Pacific Solution, Nauru was encouraged to detain asylum seekers on Australia's behalf even though its constitution prohibited arbitrary detention. Mandatory, indefinite and non-reviewable forms of detention, which are practiced in Australia were essentially exported to Nauru.

[2] UNHCR media release 18th April 2006 issued by Media Relations & Public Information, Geneva.