AUSTRALIAN
LAWYERS
FOR
HUMAN RIGHTS™

22 May 2006

Committee Secretary
Senate Legal and Constitutional Committee
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

By e-mail: legcon.sen@aph.gov.au

Dear Committee Secretary

Submission to Inquiry into the provisions of the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006

Please find **enclosed** Australian Lawyers' for Human Rights' submission to the Inquiry into the provisions of the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006.

Our members are happy to appear before the Committee in relation to our submission in Sydney, Canberra, Melbourne or Brisbane.

Please don't hesitate to contact our President, Simeon Beckett, on 0412 008 039 or at President@alhr.asn.au, or myself on 0409 644 001 or at Secretary@alhr.asn.au.

Yours faithfully

Carla Klease
National Secretary
Australian Lawyers for Human Rights

Australian Lawyers for Human Rights

Submission for the Inquiry into the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006

1 Executive Summary

1.1 Australian Lawyers for Human Rights (ALHR) is concerned that the *Migration Amendment (Designated Unauthorised Arrivals) Bill 2006* ("the bill") focuses on political concerns in a manner detrimental to Australia's international protection obligations as enshrined in the *1951 Convention relating to the Status of Refugees* (the Refugees Convention) as well as fundamental human rights standards contained in other human rights conventions to which Australia is a signatory.

1.2 The bill also fails to protect and ensure best practice for administrative decision makers. As such ALHR is particularly concerned that persons affected by this bill will be unable to access basic standards of human rights and that there will be no oversight of the status determination process or of their treatment.

1.3 The legislation, if passed, will therefore not only fail to protect the fundamental rights of individuals to whom Australia has protection obligations, but is also likely to severely undermine Australia's credibility as an international actor in a regime that depends heavily on the good faith assumption by states of their responsibility to protect refugees.

1.4 This submission examines a number of ALHR's specific concerns with the bill. These include:

- **Lack of access to the Australian protection regime**: The bill is effectively 'self-excision' of Australia from the international protection map for all unauthorised boat arrivals, meaning they are unable to apply for protection in Australia.
- **Continued mandatory detention of men women and children**: From a human rights perspective, the bill is a backward step with regards to the Australian mandatory detention policy. Recently, the Government has been appearing to remove some of the sharper edges to its approach by recognising the detrimental affects of mandatory detention on children. However, the proposed bill will once more remove men, women and children to non-reviewable, indefinite detention.
- **Heightened risk of *refoulement* of refugees:** The central obligation on states under refugee law is to ensure no person is *refouled* to a territory where they will face persecution. The bill does not include adequate procedural checks to ensure this will not occur. In particular, there are inadequate assurances that a "declared country" (likely to include Nauru) will not *refoule* a person, nor does the refugee status determination system contain sufficient procedural guarantees to prevent *refoulement*.
- **Penalising asylum seekers in contravention of the Refugee Convention:** The bill creates a discriminatory regime whereby unauthorised arrivals, including those arriving directly from their country of origin, are penalised due to their mode of arrival, in contravention of Article 31 of the Refugee Convention.
- **Inadequate protection by a "declared country":** There are inadequate substantive and procedural checks in place regarding the identification of "declared countries" to which asylum seekers may be sent for processing, including the absence of any requirement that the state be a signatory to the Refugee Convention.

- **Inadequacies of the proposed refugee status determination system:** The proposed system does not appear to meet Australian or international standards of procedural fairness. It compares poorly to the Australian system and does not meet basic standards of due process for refugee status determination as required under international law and by UNHCR procedural standards.
- **Lack of judicial review of decisions**: Extra-territorial processing effectively authorises Australian government officials to make unlawful decisions, since the persons subject to those decisions are denied de facto access to Australian courts. This breaches a fundamental rule of Australian law, and is wholly unacceptable where the outcome of a wrong decision may be *refoulement* to face persecution.
- **Lack of assurance of basic human rights standards in the offshore facility:** ALHR is opposed in principle to offshore processing of asylum claims as it denies asylum seekers access to humane conditions, independent legal advice when making their claims for asylum or independent merits review of decisions made by the Department of Immigration.
- **Lack of monitoring and oversight**: No provision has been made for media or civil society access to monitor conditions and welfare of detainees or for oversight by the Commonwealth Ombudsman. Without oversight and accountability, the Government cannot ensure that asylum seekers' claims will be processed fairly, swiftly and without political interference. Recent reports regarding processes and treatment in detention facilities in Australia highlight the importance of such oversight mechanisms.
- **Absence of durable solutions**: The Government does not commit under this bill to grant protection to recognized refugees in Australia, nor is their any requirement that the "declared country" agree that they settle there. As such persons may be detained indefinitely without a durable solution as Australia unsuccessfully seeks another willing resettlement country.
- **Retrospective Application**: Retrospective application of legislation is inherently undesirable and contrary to international legal standards.
- **Financial implications:** the proposed regime is not the most financially viable way of processing asylum applicants. The considerable human costs of the proposal have been ignored.
- **Impact on the international protection regime:** ALHR is concerned that Australia is reneging on its obligations under the Refugee Convention as well as being unwilling to carry its share of all aspects of the protection responsibility. The proposed bill does nothing to enhance refugee protection in the region or globally. Instead it provides a bad example to other countries suggesting that it is acceptable to put political considerations ahead of legally binding human rights and refugee protection obligations. It is extremely damaging to the international protection regime.

1.5 ALHR's recommendations are that:

i. **The legislation should be rejected in its entirety;** In view of the fact that object and purpose of the Bill is to abrogate Australia's obligations under international human rights and refugee law, the Bill should be withdrawn;

ii. **Australia must address root causes;** The Australian Government should take immediate steps to explore, in collaboration with UNHCR and other states, measures which will assist Indonesia to address the root causes of the movement of West Papuan asylum-seekers and which are consistent in every way with international human rights and refugee law standards;

iii. **Australia is accountable for extra-territorial action;** The Australian Government should take steps to ensure that all extraterritorial actions undertaken by it, or by its agents, are consistent with international human rights and refugee law standards, including by ensuring the availability of adequate safeguards and effective remedies that are legally enforceable, including judicial scrutiny of extraterritorial actions;

iv. **Principles of burden- and responsibility-sharing must be upheld;** In order to preserve the integrity of the international protection regime, the Australian Government should ensure that all actions taken by it in relation to the protection of refugees are consistent with the principle of burden and responsibility sharing.

2 Overview

2.1 Australian Lawyers for Human Rights ("ALHR") is a national network of Australian lawyers active in furthering awareness, understanding and recognition of human rights in Australia. It was established in 1993, and incorporated as an association in NSW in 1998.

2.2 ALHR has approximately 1,200 members nationally a large majority of whom are practising lawyers. Membership also includes judicial officers, academics, policy makers and law students. ALHR is comprised of a National Committee with State and Territory committees.

2.3 ALHR promotes the practice of human rights law in Australia through training, publications and drawing attention to human rights standards. We work with Australian and international human rights organisations to achieve these aims. It is a member of the Australian Forum of Human Rights Organisations and is regularly consulted by government including through the Attorney-General and Minister for Foreign Affairs NGO forums.

2.4 ALHR has played an active role in advocating for the protection of human rights with respect to refugee legislation passed in recent years. It has made written and oral submissions to the Senate Committee on Legal and Constitutional Committee on such legislation.

2.5 The *Migration Amendment (Designated Unauthorised Arrivals) Bill 2006* ("the bill") marks another step in Australia's systematic abrogation of the principles and obligations enshrined in the *1951 Convention relating to the Status of Refugees* (the Refugees Convention). This measure demonstrates Australia's willingness to permit external political considerations to take precedence in a manner detrimental to its refugee protection obligations and to humanitarian and human rights considerations.

2.6 Although there have long been problem areas in the refugee protection system in Australia, the response to the arrival in Australia of the *MV Tampa* in 2001 marked the beginning of a sharp deterioration in Australia's refugee protection practices. Since that time the Government has introduced a series of legislative and policy measures that have systematically eroded the capacity of individuals to seek protection in Australia. In just five years, domestic law has moved from a position where persons reaching Australian territory could lodge an application for protection regardless of mode of arrival and, within that context, have a right to due process. The current proposal effectively removes this possibility for persons arriving in Australia by boat. It is an affront to the international protection regime established by the Refugee Convention.

2.7 The bill entrenches the adverse effects of the Australian mandatory detention policy. While the Government has been appearing to remove some of the sharper edges to its approach by recognising the detrimental affects of mandatory detention on children, the proposed bill will once more remove men, women and children to non-reviewable detention. One of the most insidious parts of this is the lack of media or civil society access to monitor conditions and welfare of detainees.

2.8 It is not possible to examine the text of this Bill without an appreciation of its political context. It is well understood, in this regard, that this Bill is calculated to alleviate diplomatic reverberations between Australia and Indonesia regarding the

recent grant of protection visas to 42 West Papuan refugees from a group of 43 asylum seekers who arrived in Australia by boat. By closing Australia's borders to all unauthorised boat arrivals, its purpose, and indeed its effect, is to create a mechanism that will prevent West Papuan asylum seekers from claiming Australia's protection and, worse, deter them from attempting to flee human rights abuses to which they may be subject. This is so despite the fact that the Bill is couched in the language of general application and the Explanatory Memorandum avoids any mention of the West Papuan context.

2.9 An additional contextual element to this bill is the proposal for the Royal Australian Navy, Air Force and Coast-watch to coordinate *joint patrols in cooperation with the Indonesian navy.*[1] The objective is to halt further boats travelling from Merauke and other southern ports to Australian shores. The combined "deterrent" effect of the bill,[2] and the surveillance measures being mooted,[3] are clearly designed to ensure that West Papuans stay where they are and do not attempt to leave their country to seek asylum. This shows that although purporting to create a scheme whereby West Papuans could seek asylum (just not in Australia), the inescapable conclusion is that Australia in fact considers it preferable that persons subject to gross violations of their human rights remain where they are if to do otherwise will cause it diplomatic discomfort.

2.10 The character of this Bill is different to those that have gone before it in a number of respects. It is not framed or justified in terms of border protection or national security, though it is described as seeking to "further strengthen border control measures".[4] It does not purport to address the problem of 'irregular' or 'secondary' movement, elements of which are internationally acknowledged to be problematic. It does not even pretend that these measures are for the purposes of 'national security or public order' or designed to preserve the 'integrity' of Australia's protection regime.

2.11 The clear political motives for this legislation illustrate why international human rights and refugee protection standards are so critical. These standards are designed to ensure that the imperative of protecting and preserving an individual's fundamental rights is not simply abandoned in favour of political expediency. ALHR wishes to reiterate that the grant of asylum is a neutral, humanitarian non-political act.[5] This does not, of course, mean that political consequences will not from time to time ensue. However, it underscores the fact that justice cannot be abandoned for the sake of political expediency. Indeed, as UNHCR has observed "[t]he non-political character of the Convention is

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[1] See, for example, Nic Maclellan, *West Papua's forgotten asylum seekers,* Australian Policy Online, http://www.apo.org.au/webboard/results.chtml?filename_num=73553 .

[2] Described at paragraph 21 of the Explanatory Memorandum as "a disincentive to people who arrived on the mainland unauthorised by boat to defeat the existing excision provisions".

[3] Tony Jones, "Friday Forum" *Lateline,* ABC TV Broadcast 07 April 2006 http://www.abc.net.au/lateline/content/2006/s1611579.htm; Ian McPhedran "Military to patrol northern coast" *Courier Mail* 13 April 2006 http://www.couriermail.news.com.au/story/0,20797,18802351-952,00.html; Peter Mares, "Australia on Papua" *the national interest,* ABC Radio 9 April 2006, http://www.abc.net.au/rn/nationalinterest/stories/2006/1610904.htm#

[4] Migration Amendment (Designated Unauthorised Arrivals) Bill 2006, Explanatory Memorandum, para 1.

[5] Statute of the Office of the High Commissioner for Refugees G.A. res. 428 (V), annex, 5 U.N. GAOR Supp. (No. 20) at 46, U.N. Doc. A/1775 (1950)

instrumental in enabling it to operate in today's often highly politicized contexts."[6]

2.12 This submission identifies a number of ALHR's specific concerns with the bill. It does so under the following broad headings:

- The 'self-excision' of Australia from the international protection map for all unauthorised boat arrivals;
- Breaches of international refugee law obligations;
- The exercise of ministerial discretion (in particular identifying "declared countries");
- The lack of access to legal remedies;
- The legal deficiencies in the offshore refugee status determination (RSD) system;
- The human rights deficiencies in Australia's practice of offshore detention;
- Other domestic policy concerns with the bill; and
- long term/and international ramifications.

3 Self-excision of Australia from the protection map – Unauthorised boat arrivals no longer able to seek and obtain asylum in Australia

<u>The obligation to act in accordance with the objects and spirit of the refugee convention</u>

3.1 Although ALHR is under no illusion that there are poor asylum practices in other parts of the world, no other State party to the Refugee Convention has enacted such a similarly comprehensive "self-excision".

3.2 Australia was one of the first countries to ratify the Refugee Convention and, along with other state parties, reaffirmed its commitment to the Refugee Convention in December 2001.[7]

3.3 Australia, through its ratification of various human rights treaties and other instruments for the protection of refugees, has agreed to adhere to the standards contained therein. International law, like all cooperative structures, depends upon each participating State complying with its obligations in good faith.[8] States cannot simply opt in or out as they see fit as if the terms of the Convention were choices on a menu.

3.4 Australia is now however, effectively closing its sea borders, denying persons arriving by sea access to the asylum seeker determination system in Australia. The effect of this is that persons arriving at Australian sea borders, be they coming directly from their countries of origin, or as secondary movers, are unable to seek and obtain asylum in Australia.

3.5 The assertion in the Explanatory Memorandum[9] that this legislation will not impact on Australia's implementation of its refugee protection obligations is clearly wrong. Australia's removal of its territory *in toto* for all unauthorised boat arrivals is a *de facto* withdrawal from its international obligations under refugee

[6] UNHCR, Note on International Protection, A/AC.96/951, 13 September 2001, para. 5.

law. The bill also calls into questions Australia's obligations under other international instruments to which it is party.

3.6 Although it is technically correct to say that there is no right to seek asylum articulated in a binding international instrument, the right to seek and enjoy asylum is clearly expressed in Article 14 of the Universal Declaration of Human Rights (UDHR), which "embodies the moral code, political consensus and legal synthesis of human rights" [10]. There is also significant State practice of accepting the *UDHR* as law[11] and some publicists argue substantial parts or all of the *UDHR* may be considered custom. [12]

3.7 The right to seek asylum is also considered by UNHCR to be implicit in the Refugee Convention.[13] A minimalist view of Australia's obligations denying the existence of the right to seek asylum would also be contrary to the purpose and spirit of the Refugee Convention.

Australia's flawed policy rationale – mixing politics and humanitarian protection

3.8 As noted above, the rationale for the Pacific Solution has been principally the notion that people affected were engaged in "secondary" or "irregular" movement. That is, although this does not accord with accepted international understandings of these terms,[14] the rationale was that they had allegedly left a safe country of first asylum, and were forum shopping in Australia. The other justification was the imperative of combating people smuggling. The merits or otherwise of these arguments remain highly contentious.

3.9 Nevertheless, no question of "secondary" movement arises in relation to the West Papuan population that these provisions are designed to target. All of the West Papuans granted protection visas earlier this year came directly from their home territory to Australia. There is also no evidence of internationally organised crime or people smuggling activities.

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[7] See *Declaration of States Parties to the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, HCR/MMSP/2001/09, adopted 13 December 2001.

[8] Article 26 of the *Vienna Convention on the Law of Treaties* provides that "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith." Article 31 further requires that "[a] treaty shall be interpreted in good faith… and in the light of its object and purpose".

[9] See paragraph 20 at pp.4-5

[10] *The Responsibility to Protect*, Report of the International Commission on Intervention and State Sovereignty, December 2001, para. 2.16.

[11] Schachter, *International Law implications of US human rights policies* 24 NYL Sch L Rev 63, 68 (1978)

[12] Lillich, "Civil Rights" in Meron (ed) *Human Rights in International Law: Legal and Policy* Issues, Vol 1 Clarendon Press: Oxford 1984, 116; Sohn *The New International Law: Protection of the Rights of individuals rather than states* 32 AM UL Rev 1, 17 (1982)

[13] According to the UNHCR Handbook for parliamentarians (*Refugee Protection: A guide to International Refugee Law, 2001*) p44 "The right to seek and enjoy asylum is recognized in international human rights law and is critical for protecting refugees. In 1992, the UNHCR Executive Committee stated that "the institution of asylum, which derives directly from the right to seek and enjoy asylum set out in Article 14(1) 1 of the Universal Declaration of Human Rights, is among the most basic mechanisms for the international protection of refugees" (Conclusion N° 28(c))." EXCOM has also referred to the right to seek asylum in the following Conclusions No. 52 (XXXIX) - 1988; No. 71 (XLIV) - 1993; No. 75 (XLV) - 1994; No. 77 (XLVI) - 1995; No. 85 (XLIX) - 1998; No. 94 (LIII) – 2002.

[14] Cf. for example, No. 58 (XL) – 1989 – Problem of Refugees and Asylum-Seekers Who Move in an Irregular Manner From a Country in Which They Had Already Found Protection.

3.10 As noted above, the grant of asylum is a neutral, humanitarian non-political act.[15] This does not, of course, mean that political consequences will not from time to time ensue. However, it underscores the fact that justice cannot be abandoned for the sake of political expediency. The proposed bill however is making a politically expedient sacrifice of Australia's protection obligations and the key role that it plays as a participant in an international protection regime that depends heavily on good faith and cooperation between states.

Burden and responsibility sharing and Australia's role within an effective international protection regime

3.11 The international protection regime depends heavily on states providing protection in countries of asylum, the vast majority of which are developing countries. Although protection in many such countries falls well short of effective protection, these countries disproportionately bear the burden of refugee movements globally, given that only 1% of the world's refugees are able to access the durable solution of resettlement and a small percentage,[16] are able to find protection in the industrialised world.

3.12 Although Australia has a solid reputation in resettling refugees under its resettlement program, this should not be seen as offsetting Australia's obligation to accept refugees who spontaneously seek this country's protection onshore. The resettlement and onshore components of Australia's refugee protection program are both vital to the effectiveness of the international protection regime, but they derive from different obligations.

3.13 By the Government's own admission, "in view of Australia's position as an island far from most current refugee source countries, few asylum seekers arrive in direct flight from their country of origin."[17] It is, therefore, disingenuous in the extreme to be adopting harsh measures such as those provided for in this bill based on the arrival of a handful of asylum-seekers from a neighbouring state. Such measures compromise the international refugee protection regime far beyond the individuals and states directly affected by them.

3.14 The bill reflects Australia's historical reluctance to recognise its responsibilities as a country of first asylum, even when such a role is geographically at its most appropriate. However the assumption of such responsibilities is essential for the effective running of the international protection system. The regime depends heavily on all states pulling their weight by admitting to safety those who seek to enter their sovereign territories, whether authorised or not.

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[15] Statute of the Office of the High Commissioner for Refugees G.A. res. 428 (V), annex, 5 U.N. GAOR Supp. (No. 20) at 46, U.N. Doc. A/1775 (1950)

[16] "The number of asylum-seekers in Europe and in the non-European industrialized countries analysed in this report continued to decline sharply in 2005. In the 50 countries included in [the analysis, including Australia], 336,100 applications for refugee status were submitted in 2005, 15 per cent fewer than in 2004 (394,600)." UNHCR, *Asylum Levels and Trends in Industrialized Countries, 2005: Overview of Asylum Applications Lodged in Europe and Non-European Industrialized Countries in 2005*, 17 March 2006. Even if all these claimants were found to be refugees, they would still only constitute an estimated 3.7% of the world's refugee population currently considered to number around 9 million.

[17] *Interpreting the Refugees Convention – an Australian contribution*, Department of Immigration and Multicultural and Indigenous Affairs, 2002, p. 135. This publication was the Australian Government contribution to UNHCR's Global Consultations on International Protection expert roundtable discussions which took place in 2001.

3.15 According to Amnesty International, "[a]ll measures of international cooperation in the field of refugee protection … must have as their principal aim the furtherance of the human rights of refugees. If they do not, such measures would be contrary to the purpose and spirit of the [Refugee Convention] and the regime of refugee protection upon which it is founded."[18]

3.16 First and foremost in the international refugee protection regime is the responsibility of individual states to accord protection to refugees who seek it within their territory. Although no less important, a separate obligation is the notion of burden- and responsibility-sharing which calls upon states to help states that bear the heaviest refugee burden to share in the delivery of the international protection responsibility.[19] Indeed, the starting point is necessarily that states are already pulling their weight with 'onshore' or 'in-country' asylum applications, and that the principle of burden and responsibility sharing is only triggered in situations where states are overwhelmed and unreasonably burdened by their responsibility as an asylum state.

Australia's failure to protect future West Papuan Asylum Seekers

3.17 In a recent media report[20], Indonesian Foreign Minister Hassan Wirajuda is quoted as saying that Australia had committed to processing any future West Papuan asylum seekers in the Pacific and:

> "even if they would be classified as refugees they would not be accepted in Australia. This is positive for us for the future".

3.18 The Indonesian Foreign Minister is further reported as saying that the new policy would help persuade would-be refugees from Papua to abandon plans to seek asylum in Australia.

3.19 According to a Media Alert put out on 18 May 2006 by the Australian chapter of the International Commission of Jurists, two West Papuans were shot dead by police at a demonstration outside the courthouse in Wamena, West Papua on 15 May 2006. Up to five more demonstrators were reportedly taken to hospital following the incident. Details of the incident remain somewhat unclear. However, an estimated 140 persons were arrested (127 men and 14 women). Whatever the circumstances relating to the demonstration, it would seem clear that there was excessive use of force by the police with reinforcement from the Indonesian military.

3.20 It is clear that the human rights situation in West Papua is crying out for international attention. Amnesty International has described impunity for the security forces as entrenched and justice for victims as coming slowly and

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[18] Amnesty International, *UNHCR's Forum & Executive Committee, Basic human rights principles applicable to responsibility- and burden-sharing arrangements*, AI Index: IOR 42/007/2004, 1 March 2004.

[19] Amnesty International argues persuasively that there are a set of legal principles that attach to burden and responsibility-sharing arrangements. However, the source of the obligation is less clearly defined having been elaborated from the language of the Preamble to the Refugee Convention. Amnesty International has set out seven basic human rights principles on the basis that "the international refugee protection regime is intended primarily to uphold the individual human rights of refugees it follows that any agreement designed to improve refugee protection worldwide and to facilitate the resolution of refugee problems must be premised explicitly on international human rights and refugee law, and, as applicable, international humanitarian law." Ibid.

[20] *Indonesia declares issue of 42 Papuans solved*, M. Forbes, The Sydney Morning Herald, 16 May 2006.

rarely.[21] Access to the province from outside is understood to be extremely difficult. As a robust neighbour, it is clear that Australia could take a leading role in drawing attention to the problems as well as spearheading identification of solutions. Instead, Australia stands as a silent witness, choosing instead to serve its own interests and to appease those of its neighbouring government, ignoring the fact that its decision to grant asylum to the 42 West Papuans earlier this year reflects an acceptance on its part that human rights violations are occurring, and that State protection (from Indonesia) is not necessarily available.

4 Breaches of Australia's obligations under the Refugee Convention

The Obligation to ensure *non-refoulement*

4.1 The prohibition on *refoulement* is a principle of customary international law that is safeguarded in Article 33 of the Refugee Convention, and is the *sine qua non* of refugee protection.[22] On the basis that Article 33 prohibits *refoulement* **in any manner whatsoever**, it is well recognised that measures that include 'border closure' and rejection at the frontier, as with the current proposal to close Australia's sea borders and the proposal to coordinate joint patrols in cooperation with the Indonesian navy, violate the principle of *non-refoulement.*[23]

4.2 ALHR believes that inadequate steps have been taken to prevent *refoulement*, and given the Bill itself and the political context from which it has emerged there are clear indications that *refoulement* will be the consequence if it is passed.

4.3 It is not possible to determine whether a person may be a refugee at risk of *refoulement* until the refugee status of a person claiming asylum has been assessed. As such, any person presenting themselves and claiming asylum must be given the benefit of the protection against *refoulement* unless or until found not to be in need of international protection. The *non-refoulement* obligation may be considered breached if a person is returned to their country of origin or blocked from entering the putative country of asylum without being given an adequate

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[21] *Indonesia: On the fourth anniversary of the Abepura raids, impunity remains entrenched in Papua* AI Index: ASA 21/052/2004 (Public), News Service No: 315, 6 December 2004. See also J. Wing with P. King, *Genocide in West Papua?: the role of the Indonesian state apparatus and a current needs assessment of the Papuan people,* report from West Papua Project of University of Sydney, Centre for Peace and Conflict Studies, August 2005.
http://www.arts.usyd.edu.au/centres/cpacs/WestPapuaGenocideRpt.05.pdf

[22] The wide recognition of the right not to be subjected to cruel, inhuman or degrading treatment or punishment (and the necessity of non-refoulement to protect it) the existence of substantial domestic legislation (at least 125 States have codified some form of non-refoulement obligation into domestic law), and the numerous treaties including non-refoulement have lead a number of authors to consider this obligation to be custom. The UNHCR executive committee and various publicists have gone as far as to recognize the norm as *jus cogens*, a status recognized in international agreements such as the *Cartagena Declaration on Refugees* ("*Cartagena Declaration*). For further discussion see Bethlehem, D. & Lauterpacht, E., *The Scope and Content of the Principle of Non-refoulement*, in *Refugee Protection in International Law*, Feller, E., Türk, V., and Nicholosn, F. (eds) p. 111.

[23] EXCOM Conclusion No. 6 (XXVIII) 1977 para C, the Executive Committee reaffirmed 'the fundamental importance of the observance of the principle of *non-refoulement* – both *at the border* and within the territory of a State' See also Bethlehem and Lauterpacht *ibid* p.113; Mathew, P. "Australian Refugee Protection in the wake of the Tampa" American Journal of International Law 2002, Vol.96, p.661; Goodwin-Gill, "The Principle of Non-Refoulement: Its Standing and Scope in International Law", A Study prepared for the Division of International Protection Office of the United Nations High Commissioner for Refugees, July 1993 p.2.

opportunity to present his or her case. [24] This is why measures such as 'border closure' and rejection at the frontier pose such a danger to the integrity of the international protection regime.

Imposing penalties on unauthorised arrivals in contravention of the Refugee Convention

4.4 It is ALHR's submission that the bill is a clear breach of Article 31 of the Refugee Convention, which prohibits the imposition of penalties on asylum-seekers who enter a state illegally if they have come directly from a territory where their life or freedom was threatened.

4.5 The proposed measures constitute a 'penalty' being imposed on refugees on account of their 'illegal entry or presence' in Australia notwithstanding the fact that they will have 'come directly' to Australia. This places the legislation in clear breach of Article 31 of the Refugee Convention. The breach is not, however, confined to West Papuans though they are the intended targets of these measures. In addition, it will affect asylum seekers from any of Australia's immediate neighbours – e.g. East Timor, Indonesia, Solomon Islands – who may have no option but to flee to Australia.

4.6 The only contentious element of Article 31 as regards the present legislation and the affected population is the question of whether transfer to an offshore detention centre for processing of asylum claims may be considered to constitute a penalty. Although 'penalty' is not defined in the Convention, it would seem appropriate that it should be given its ordinary meaning. UNHCR, charged with the weighty responsibility of supervising implementation of the Refugee Convention,[25] has responsibility for providing interpretative guidance on application of its provisions. According to UNHCR, the term 'penalties' includes, *but is not necessarily limited to,* prosecution, fine and imprisonment.[26] Indeed, UNHCR considers a punitive measure that is an "unnecessary limitation to the full enjoyment of rights granted to refugees under international law" as arguably constituting a penalty.[27]

4.7 Manfred Nowak, currently UN Special Rapporteur on Torture, has argued that 'every sanction that has not only a a preventive but also a retributive and/or deterrent character is … to be termed a penalty regardless of severity or the

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[24] Plender and Mole, "Beyond the *Geneva Convention*: constructing a *de facto* right of asylum from international human rights instruments" Nicholson and Twomey (eds) *Refugee rights and realities*, 81 p.82 According to UNHCR, "[e]xcept in situations of large-scale influx where individual determination of asylum claims may not be practical, all asylum-seekers should, in principle, have access to individual refugee status determination procedures." UNHCR, *Note on International Protection,* A/AC.96/914, 7 July 1999, para.16. Pallis further argues that this is a component of the non-refoulement obligation as "the only way to determine who is a refugee is to conduct a status determination, thus RSD becomes a necessary condition in meeting the obligation" Pallis, "Obligations of States Towards Asylum Seekers at Sea" 14 *IJRL* no.2/3 2002 p.287; Amnesty International, "Refugees: human rights have no borders" (1997) Section 4 p346. See also *Haitian Centre for Human Rights et al v US* Case 10/675 report no 51/96, 13 March 1997, 5 IHRR 1998, para.155; *Vic Council for Civil Liberties Inc v MIMIA* [2001] FCA 1297 (11 Sept 201) para.75.

[25] Article 35, Refugee Convention.

[26] UNHCR Global Consultations on International Protection, Geneva Expert Round Table 8-9 November 2001**,** *Summary Conclusions on Article 31 of the 1951 Convention relating to the Status of Refugees – Revised*, paragraph 10(h).

[27] UNHCR Department of International Protection, May 2000, cited in *Interpreting the Refugees Convention – an Australian contribution*, Department of Immigration and Multicultural and Indigenous Affairs, 2002, p. 145, n.109.

formal qualification by law and by the organ imposing it.'[28] Guy Goodwin-Gill has applied this approach to Article 31(1) interpreting the no penalty obligation as follows:

> "the object and purpose of the protection envisaged by Article 31(1) of the 1951 Convention is the avoidance of penalization on account of illegal entry or illegal presence. An overly formal or restrictive approach to defining this term will not be appropriate, for otherwise the fundamental protection intended may be circumvented and the refugee's rights withdrawn at discretion."[29]

4.8 In further analysing whether administrative detention may constitute a penalty, Goodwin-Gill observes that administrative detention is equivalent to a penal sanction,

> "whenever basic safeguards are lacking (review, excessive duration, etc.). In this context, the distinction between criminal and administrative sanctions becomes irrelevant. It is necessary to look beyond the notion of criminal sanction and examine whether the measure is reasonable and necessary, or arbitrary and discriminatory, or in breach of human rights law."[30]

4.9 This analysis suggests that the Committee should not accept on their face claims by the Government, which is *the organ imposing it*, that the treatment foreshadowed in the bill is merely an administrative measure.

4.10 In ALHR's submission the treatment which constitutes the 'penalty', or arguably a series of related 'penalties', is the combination of transfer, detention and denial of access to fair and effective asylum determination procedures as provided for under Australian law.

4.11 The deterrent character of the measures is clear. The Explanatory Memorandum[31] states that the bill "is designed to operate as a disincentive to people who arrived on the mainland unauthorised by boat to defeat the existing excision provisions." (*emphasis added*) This shows that denial of access to onshore processing procedures is specifically intended to deter flight. The unavoidable conclusion is that the measures are punitive.

5 Ensuring the exercise of ministerial discretion protects human rights in accordance with Australia's obligations

5.1 The Ministerial declaration that a 'declared country' meets certain standards is seriously flawed. First, the Minister makes a declaration, but there appears to be no requirement that the Minister is satisfied that the prescribed standards are met, nor any mechanism for review of that decision. Second, the prescribed standards are problematic in and of themselves.

Concerns regarding the process by which the Minister makes country "declarations"

5.2 The bill confers on the Minister the power to "declare" that a country meets the requirements of s.198A. Such declarations are not readily available butt is

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[28] M. Nowak, *UN Covenant on Civil and Political Rights – CCPR Commentary* (Engel Verlag, Kehl am Rhein, Strasbourg, Arlington, 1993), p. 278 cited in G. Goodwin-Gill, *Article 31: non-penalization, detention, and protection*, in Feller, E., Türk, V., and Nicholson, F., eds., *Refugee Protection in International Law*, 2003, p. 195.

[29] G. Goodwin-Gill, *Article 31: non-penalization, detention, and protection*, in Feller, E., Türk, V., and Nicholson, F., eds., *Refugee Protection in International Law*, 2003, p. 195.

[30] Ibid., p. 196.

[31] See paragraph 21 at p.5

understood that a declaration was made for Nauru and Papua New Guinea and tabled in Parliament in 2001.

5.3 The declaration is curious because Papua New Guinea has a small refugee status determination ("RSD") process and Nauru is not a signatory to the Convention or Protocol and so also does not have an RSD process.

5.4 It is also curious why the Minister would make such a declaration and then, because of the absence of available procedures in those countries, DIMA take up the processing. The approach of then using a procedure that claims to be a UNHCR-type procedure rather than Australian legal and administrative procedures is equally suspect. ALHR understands that cases assessed offshore make little reference to Australian jurisprudence or even close assessment of the country information. Significantly, there is no independent review procedure, a matter which is addressed in greater detail below.

5.5 The approach taken in issuing a declaration as well as subsequent implementation of a lower standard of RSD procedure illustrate the very real dangers of the legislation permitting the Executive non-reviewable and non-transparent powers. Such a declaration has serious consequences in terms of whether Australia is meeting its international obligations, yet a search of the relevant legislation and legislative instruments shows it cannot be easily found and it is not clear on what information the Minister was able to make the declaration.

5.6 In order to satisfy requirements of transparency and accountability, the decision to make such a declaration needs to be judicially reviewable. Furthermore, transparent and effective procedures must be put in place to continually monitor whether Australia has discharged its protection obligations to persons removed for offshore processing. Processes which need to be transparent and subject to judicial scrutiny need to include: the Ministerial declaration regarding a "declared country", Ministerial decisions regarding who should and should not be sent to an offshore processing centre, the RSD process, and the fact of and standards of detention.

RSD procedures in the declared country

5.7 The requirement that individuals have access to effective procedures is highly questionable and does not accord with UNHCR basic requirements of fairness. The issue of appropriate standards is dealt with in section 5.12-5.14.

Effective Protection

5.8 The reference to provision of 'protection' does not include the stipulation that protection must be 'effective' in accordance with international standards.[32]

5.9 To begin with there is no requirement that the declared state be a party to the Refugee Convention. This should be an obvious minimum requirement, because states which are not parties to the *Refugee Convention* "may not feel constrained from forcibly returning those in need of international protection to a place where their life or freedom is at risk".[33] This is not only a concern raised by UNHCR, but courts have also raised the issue that an asylum seeker should not be sent to another country for processing unless the same high standards of law, due

[32] See UNHCR, *Summary Conclusions on the Concept of "Effective Protection" in the Context of Secondary Movements of Refugees and Asylum-Seekers*, Lisbon Expert Roundtable, 9 and 10 December 2002.
[33] "Note on International Protection" A/AC.96/914, 7 July 1999.

process and the same legal obligations apply.[34] This is also a requirement under various treaties including the 1949 *Geneva Convention relative to the Protection of Civilian Persons in Time of War* (Fourth Geneva Convention) where article 45 provides that:

> Protected persons may be transferred by the Detaining Power only to a Power which is a party to the present Convention and after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the present Convention. If protected persons are transferred under such circumstances, responsibility for the application of the present Convention rests on the Power accepting them, while they are in its custody. Nevertheless, if that Power fails to carry out the provisions of the present Convention in any important respect, the Power by which the protected persons were transferred shall, upon being so notified by the Protecting Power, take effective measures to correct the situation or shall request the return of the protected persons. Such request must be complied with.
>
> In no circumstances shall a protected person be transferred to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs.

5.10 It is notable that the Fourth Geneva Convention applies in times of war and occupation when derogation from some human rights obligations is permissible in certain prescribed circumstances. Yet even in such difficult situations, this basic requirement remains. As such this is not a best practice but rather a minimum standard below which it should be impermissible for any government to go.

5.11 The 'declared country' concept is analogous to a more commonly used term of "safe third countries", though the latter term is normally used to describe a country through which an asylum-seeker has already passed. UNHCR has expressed grave concerns about purported "safe third countries" and in the UNHCR *Note on International Protection* (1999) states that:

> "The widespread misuse of the notion of "safe third country" has been another major concern for UNHCR. Due to an inappropriate application of this notion, asylum-seekers have often been removed to territories where their safety cannot be ensured. This practice is clearly contrary to basic protection principles and may lead to violations of the principle of *non-refoulement*. "[35]

5.12 UNHCR urges that "no asylum-seeker should be returned to a third country for determination of the claim without sufficient guarantees, in each **individual** case."[36] (*emphasis added)* Amnesty International notes that several courts have adopted this approach,[37] including the European Court of Human Rights which

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[34] See for example House of Lords, *R v. SSHD ex parte Adan &Aitseseguer,* 19 December 2000 (1999) 1, AC, 293; European Court of Human Rights, *T.I. v. United Kingdom* ECHR [2000] I.N.L.R. 211.
[35] "Note on International Protection" A/AC.96/914, 7 July 1999, para.19
[36] "Note on International Protection" A/AC.96/914, 7 July 1999,
[37] *R v SSHD ex parte Adan &Aitseseguer,* 19 December 2000 (1999) 1 AC, 293; *VwGH,* 08.03.2001, G 117/00 (Austrian Supreme Administrative Court); per Amnesty International, EU Office, "Strengthening Fortress Europe in Times of War: Amnesty International commentary on UK proposals for external processing and responsibility sharing arrangements with third countries", *JHA informal Council, Veria, 28-29 March 2003* http://www.amnesty-eu.org/1/Strengthening_Fortress_Europe_in_Times_of_War.doc

held that to comply with *non-refoulement* obligations it was not enough to "rely automatically… on responsibility-sharing arrangements".[38]

5.13 UNHCR does accept transferral to a safe country if various criteria are met and stresses that analysis of what amounts to a safe country be done on an individual case by case basis for each asylum seeker.[39]

5.14 Although the present proposal cannot be characterised as a 'safe third country' scenario, the UNHCR position with regard to safe third countries is informative. UNHCR sets out a list of criteria (compiled from various sources) namely that:

- the asylum seeker will be readmitted to that country;
- the country is a signatory to the Refugee Convention;[40]
- the asylum seeker will have access to a durable solution, through effective protection against *refoulement*, and the possibility to seek and be granted asylum;
- the asylum seeker will be treated in accordance with accepted international standards and basic human rights standards[41]; and
- the asylum seeker will not be subject to persecution or threats to safety and liberty.[42]

5.15 The bill in its current form compares poorly against this checklist.

Human rights standards in the 'declared country'

5.16 Although the requirement in the Bill to meet relevant human rights standards does not appear to be objectionable, there is a need to spell out what is meant by 'relevant' as well as to ensure that judicial scrutiny can give guidance on this point. ALHR has identified a number of standards relevant to status determination procedures and detention pending resolution of claims. These include the right to due process; access to counsel; freedom from arbitrary detention; conditions of detention that accord with international standards; the right to an adequate to standard of living and other relevant economic, social and cultural rights, including in particular the right to health.

5.17 In order to comply with human rights obligations, ALHR proposes that guidance be sought from the framework for detention of 'protected persons' under Article 45 of the Fourth Geneva Convention cited above. Based on this, the criteria might include the following:

- "Designated unlawful arrivals" shall not be transferred to a state which is not a party to the Refugee Convention, or other relevant human rights instruments;

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[38] *T.I. v. United Kingdom* ECHR [2000] I.N.L.R. 211

[39] "Note on International Protection" A/AC.96/914, 7 July 1999, para.2. Cf. problems identified by UNHCR with processing under the Dublin II Regulation, UNHCR, *The Dublin II Regulation: a UNHCR discussion paper*, April 2006.

[40] "Note on International Protection" A/AC.96/914, 7 July 1999,

[41] Note on International Protection" A/AC.96/914, 7 July 1999, para.19; EXCOM Conclusion No. 58 (XL) – 1989 – *Problem of Refugees and Asylum-Seekers Who Move in an Irregular Manner From a Country in Which They Had Already Found Protection*, paras(f), (g).

[42] UNHCR, *Background note on the safe country concept and refugee status*, Sub-Committee of the Whole on International Protection, EC/SCP/68 (1991); also submission to border protection inquiry, para.9; also UNHCR *ibid*, p.23(ii)

- The right to leave the country and return to one's country of residence would be upheld;
- Australia would have to satisfy itself of the willingness and ability of the receiving country to implement its obligations under the Refugee Convention.
- Based on independent monitoring and accountability mechanisms, if the receiving country fails to carry out its obligations under the Refugee Convention or other relevant human rights instruments, Australia would be obliged to take effective measures to correct the situation or request the return to Australia of "designated unlawful arrivals".
- Protection must at all times be consistent with the principle of *non-refoulement*.

6 Legal Processes and remedies available to the asylum seekers

What type of Refugee Status Determination (RSD) Processes will be applied in 'declared countries'?

6.1 It is not entirely clear how the Government intends the offshore RSD process to take place. During the original incarnation of the Pacific Solution, initial claims on Nauru were processed by UNHCR but subsequent claims on Nauru and all claims on PNG were processed by Australian officials.[43]

6.2 ALHR makes the assumption that, given UNHCR's strong condemnation of the proposed action, UNHCR will not be involved in processing of refugee applications. As such the assumption is that the processing will be the same as during the first incarnation of the Pacific Solution but involving only DIMA officers. According to the Explanatory Memorandum the offshore refugee status assessment process for use in declared countries is modelled on the UNHCR process[44] however this is the source of a number of concerns for ALHR.

6.3 Firstly, it is not clear if this is the case. This process is not set out in any of DIMA's PAMS or in any readily accessible document. It is not possible to comment on the accuracy of such a statement without being able to see the procedures.

Concerns about the likely/ proposed process

6.4 In any event, if the process used is modelled on the UNHCR process this is also problematic, as the UNHCR RSD process has also attracted criticism for lack of transparency, for not providing genuine or independent review and also as being badly in need of reform.[45] There is no separate and independent international monitoring mechanism (like the UN Human Rights Committee) in the refugee context. The only mechanism available is Article 35 of the Refugees Convention which obliges states to cooperate with UNHCR in their role in supervising implementation of the Refugee Convention. Michael Alexander argues that

[43] Senate Select Committee, above n.10 Executive Summary, p. xliv.
[44] See paragraph 6 and 20, Explanatory Memorandum, at p. 2 and 5.
[45] Alexander M, 'Refugee Status Determination Conducted by UNHCR', *IJRL* [1999] Vol 11, No2 pp 251-289; Michael Kagan, (2002) *Assessment of Refugee Status Determination Procedure at UNHCR's Cairo Office 2001-2002,* Cairo: American University in Cairo Forced Migration and Refugee Studies Working Paper No. 1; Mark Pallis (2005) *The Operation of UNHCR's Accountability Mechanisms,* New York University Institute for International Law and Justice Working Paper 12.

many of the UNHCR processes are far inferior to the basic administrative law requirements found in RSD systems.[46]

6.5 While UNHCR has developed RSD procedural standards it has not had the resources to comply with this across the board. A rough calculation of the UNHCR budget for 2006 suggests that funds available through voluntary contributions from states on a per capita basis are miniscule. Of a total population of concern of 19 million, 9.2 million of whom are refugees, and with total budgetary requirements estimated to be $1,145,297,000, resources available calculate out to about $0.60 per person.[47] As such, it is hardly surprising that practice has been inconsistent. ALHR has within its membership individuals who are familiar with RSD procedures in a number of countries, including in particular in Africa (including North Africa) and Asia. From their experience, it is clear that UNHCR determination procedures are often inconsistent from country to country, office to office. Apart from the basic organisational structural concerns outlined above, UNHCR generally undertakes RSD in situations of mass influx and with very limited resources. As such UNHCR is often unable to maintain the high standards of procedural fairness which Australia can and should provide. This is therefore an inferior and inadequate model as distinct from the well-established, fairer and more efficient model used onshore.

6.6 Australia has attempted to say it is fulfilling its obligations by implementing a process akin to that used by UNHCR in the exercise of its mandate. Despite the obvious flaws in any system modelled after UNHCR, whether or not a system is equivalent to that used by UNHCR is in fact the wrong yardstick.

How do the proposed standards compare to Australian standards?

6.7 It is important to assess how these procedures compare to the procedures available in Australia. Both are mechanisms being employed for implementing Australia's protection obligations. For similar reasons as those given above in relation to the prohibition on racial discrimination, deficiencies in the offshore RSD procedure should be understood to fall foul of the anti-discrimination norm. Australia's responsibilities can only be met by applying comparable standards and safeguards to those that would have been available had their claims for asylum been processed in Australia.

6.8 The processing of cases offshore is vastly different to the onshore procedure. There are a number of important legal and procedural differences between the two processes. Despite a number of flaws in the onshore process, it is a far superior process to that which has to date been conducted offshore in Nauru and on Manus Island.

6.9 A major difference is that offshore cases have no access to independent merits review. The explanatory memorandum states that "Australia's offshore refugee processing regime includes provisions for merits review of refugee decisions"[48]. This is not correct. Neither the Act nor the regulations provide for any "merits review". The only "review" of offshore cases in Nauru or on Manus Island that ALHR is aware of has been carried out by officers of DIMA. It is a misnomer to call a review of a DIMA decision by DIMA "merits review". At best it is a

[46] Alexander M, Ibid.
[47] These calculations are based on information from *UNHCR Annual Programme Budget 2006*, A/AC.96/1011, 30 August 2005.
[48] See Explanatory Memorandum, paragraph 20 at p. 5.

reassessment, but it lacks the transparency that is provided for in the independent review system of the Refugee Review Tribunal established under Part 7 of the Act.[49]

6.10 When processed in Australia, an applicant is given a screening interview by a DIMA case officer with an interpreter. That interview is tape recorded and the notes of the interview are kept on the file. DIMA then makes a decision about whether an applicant will be provided with access to counsel through the IAAAS (Immigration Advice and Application Assistance Scheme) to assist them in making an application. IAAAS providers must be at least registered migration agents, but are also commonly practising solicitors or barristers. Previously, some cases have waited many months before they were "screened in". This means that an applicant is able to have their claims assessed through the protection visa process.

6.11 Once "screened in", an applicant is then provided with an IAAAS provider to do the following:

(a) Complete the application forms (866, 1221, 80);

(b) Prepare a statement of the case for refugee assessment;

(c) Attend an interview with the DIMA case officer and client;

(d) Provide other assistance as required for the client, such as help with police clearances if required; [50]

(e) Advise on the refugee criteria and an application to the RRT if required;

(f) Prepare the RRT application and relevant material for the case;[51]

(g) Assist in the remittal of the case from the RRT to DIMA if successful at the RRT.

6.12 Whilst there may be reasonable criticisms of aspects of this process, at its best, it does provide the following which is not available to people who would be covered by the proposed legislation:

- Access to representation to assist in preparing an application;
- Assessment by DIMA officers in accordance with Australian law and jurisprudence;
- Access to an independent merits review;
- Compliance with the requirement that the application and merits review be conducted in such a way that relevant claims are assessed against available country information.

6.13 None of these features are present in the offshore process. There are also other factors considered in offshore cases which are not the same for onshore cases. Firstly, offshore cases can be refused on medical grounds, but not onshore.

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[49] The Administrative Review Council (ARC) has published guidelines on Merits Review in its document "What Decisions should be Subject to Merit Review?" The document is available from www.ag.gov.au/agd/WWW/arcHome. It is not apparent that such a document has influenced the DIMA process.

[50] The interview is tape recorded and a copy kept on the file, though DIMA now refuse to give a copy of the interview tapes to applicants or their representatives.

[51] Whilst commonly they are not contracted to attend RRT hearings, many IAAAS providers made it their practice to attend the RRT hearing.

Downs Syndrome children have, for example, been refused offshore, but would not onshore. Secondly, the offshore classes must show 'compelling' reasons why Australia should accept their case, above and beyond the refugee criteria. Such requirements do not appear in the onshore criteria.

6.14 In Nauru and Manus Island offshore cases, it is understood that DIMA officers interview an applicant but no assistance is provided in preparing the application or independent advice available about what may or may not be relevant for a case. It is not known if the interviews are tape recorded.

6.15 Legal assistance to offshore detainees in declared countries is not only unavailable – it has been actively blocked. Between August 2001 and March 2003 ALHR tried unsuccessfully to get a team of lawyers to Nauru to provide legal assistance to asylum seekers detained there. The aim of the project was to extend to the asylum seekers in Nauru the right to legal advice such as they would have had if their claims had been processed in Australia. Many lawyers volunteered to travel, and many organisations committed their support to the project. However, visa applications were refused by Nauru twice even with support from UNHCR. No reasons were given.

6.16 Furthermore, according to the Senate Select Committee inquiry into *A Certain Maritime Incident,* the asylum seekers on Nauru and PNG were also not given access to country of origin material to assist in the preparation of their applications,[52] even where there had been extreme changes in the country situation, such as in Afghanistan.[53]

What Law will be applied?

6.17 ALHR is deeply concerned about the need for clarity as to which law will be applied on Nauru and in other declared countries in giving effect to protection obligations that are unquestionably Australia's.

6.18 There are also some indications that the criteria utilised by the decision makers may not be in accordance with accepted standards. The rights of the *Refugee Convention* are considered to extend to the family members of refugees,[54] referred to as derivative refugee status. Australia appears not to have recognised this category of claim as there are refugees living in Australia, determined through Australian RSD procedures to be refugees, whose families have not been deemed refugees under the determination processes used on Nauru.[55]

6.19 Australia also has additional *non-refoulement* obligations under the *Torture Convention* which applies to non-refugees and which are not covered by UNHCR guidelines.

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[52] Asylum seekers must rely on information provided to them by the International Organization for Migration (IOM) and the relevant processing organisation, ie DIMIA or UNHCR. See Select Committee Report, *"A Certain Maritime Incident"*, 23 October 2002, Commonwealth of Australia, submissions and report available at http://www.aph.gov.au/senate/committee/maritime_incident_ctte/report/contents.htm ; see also Human Rights Watch, *By Invitation Only: Australian Asylum Policy*, Vol.14, No.10(C) December 2002 p71

[53] *Transcript of Evidence*, CMI 812, Senate Select Committee Report, "A Certain Maritime Incident", 23 October 2002, *Commonwealth of Australia*, Executive Summary, pxliii (submissions and report available at http://www.aph.gov.au/senate/committee/maritime_incident_ctte/report/contents.htm) para.11.17

[54] "Summary Conclusions on Family Unity", *Geneva Expert Roundtable* 8-9 November, 2001 Organized by UNHCR and the Graduate Institute of International Studies in Geneva, Consideration 7

[55] Human Rights Watch ("HRW") "By Invitation Only: Australian Asylum Policy" Vol.14, No.10(C) December 2002 p.77

There is no evidence that officials processing asylum seekers on Nauru and Manus have given due weight to these obligations.[56]

Access to judicial scrutiny of decision making

6.20 The removal of asylum seekers from Australian territory to 'declared countries' does not permit Australia to escape responsibility under international law for the protection of those persons' human rights. What it does achieve, however, is a de facto removal of the jurisdiction of the Australian courts – particularly the High Court – to scrutinise the lawfulness of Government action. In relation to unauthorised boat arrivals, the Pacific Solution enables the Government to achieve what the High Court[57] has ruled the Constitution does not allow: complete impunity for Executive action. As a matter of practical reality, asylum seekers transferred extra-territorially are unable to obtain judicial review of decisions regarding the lawfulness of their detention, or determinations of their status as refugees.

6.21 It is a *de facto* removal because the jurisdiction of the High Court in section 75(v) of the Constitution is not dependent upon the presence of any person in Australia. Section 75(v) was intended to be a broad power to allow the High Court to deal with substantive matters of justice whenever a writ of mandamus or prohibition or an injunction was sought against an officer of the Commonwealth. It is the *exercise* of Executive power which enlivens the court's jurisdiction, not the presence in Australia of the aggrieved party. In the following oft-cited passage from a judgement of (then) Brennan J, His Honour said:

> "Judicial review is neither more nor less than the enforcement of the rule of law over executive action; it is the means by which executive action is prevented from exceeding the powers and functions assigned to the executive by law and the interests of the individual are protected accordingly." [58]

6.22 Section 75(v) secures a basic element of the rule of law. The right to judicial review of administrative action is one of the few 'rights' guaranteed by our Federal Constitution. Not surprisingly, in the face of the Government's attempt to use s.474 of the *Migration Act* to remove that right in relation to decisions made under the Act, the High Court unanimously declared that its jurisdiction to require officers of the Commonwealth to act within the law cannot be taken away by Parliament[59]. The doctrinal underpinning of the court's ruling was that, in a federal nation, whose basic law is a Constitution that embodies a separation of legislative, executive, and judicial powers, it is beyond the capacity of the Parliament to confer upon an administrative body the power to make an authoritative and conclusive decision as to the limits of its own jurisdiction. That power is reserved to Chapter III courts.[60]

6.23 Accordingly, when asylum seekers are intercepted by Australia, transferred to declared countries by Australia, detained in Australian controlled detention centres within those countries, and have their applications for refugee status

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[56] Senate Select Committee Ch.10, p.830; *Transcript of Evidence*, Senate Legal and Constitutional References Committee, "Inquiry into the Migration Legislation Amendment (Further Border Protection Measures) Bill 2002", p.11

[57] *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 211 CLR 476

[58] *Church of Scientology v Woodward* (1982) 154 CLR 25 at 70.

[59] *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 211 CLR 476 per Gleeson CJ at [5], Gaudron, McHugh, Gummow, Kirby and Hayne JJ at [98].

[60] *Supra* per Gleeson CJ at [9], Gaudron, McHugh, Gummow, Kirby and Hayne JJ at [98].

determined by Australian officials, they also acquire *de jure* the right to ask the High Court to scrutinise the legality of those actions.

6.24 That right is, of course, illusory because the Government ensures that none of the asylum seekers in question have any de facto capacity to exercise those rights. Detainees on Nauru or Manus are denied access to any knowledge, advice, representation or even communication, which would enable legal action to be commenced or pursued in Australia on their behalf.

6.25 In short, extra-territorial transfer of asylum seekers enables Parliament to achieve the very result which the High Court has stated is antithetical to the rule of law. This legislation creates the intolerable situation that Australian officials making offshore determinations of refugee status for "unauthorised designated arrivals" are free to make unlawful decisions – they can disregard the rules of natural justice, ignore relevant considerations, be influenced by improper and irrelevant considerations, and make decisions unsupported by evidence. They can do so and remain untouched by the legal safeguards which would operate if those same officials were processing applications onshore. As a matter of international law, this offends the right of all persons to equality before the law.

6.26 We do not suggest that Australian officials will deliberately make tainted decisions. It should be remembered that decisions can be unlawful even when they are made diligently and in good faith. Unlawfulness does not equate with malevolence. As the Chief Justice so eloquently reminds us:

> "Decision-makers, judicial or administrative, may be found to have acted unfairly even though their good faith is not in question. People whose fundamental rights are at stake are ordinarily entitled to expect more than good faith. They are ordinarily entitled to expect fairness."[61]

6.27 Former Chief Justice of the High Court, Sir Gerard Brennan, has also observed that "[u]nder Ch III of our Constitution, all federal legislative and executive power is brought under the supervision of the judicial power in order to ensure conformity with the Constitution and the laws made under it. No exception is allowed. No immunity of a federal legislative or executive act from judicial review is possible. This is the constitutional guarantee of equality under the law for the minority as well as the majority in their relationship with government; for the underprivileged as well as the powerful, for the unpopular as well as the mainstream."[62] He goes on to quote Sir William Wade, who sounds a sobering warning about the risks of conferral of an unfettered power:

> "... to exempt a public authority from the jurisdiction of the courts of law is, to that extent, to grant dictatorial power. ... The law's delay, together with its uncertainty and expense, tempts governments to take short cuts by elimination of the courts. But if the courts are prevented from enforcing the law, the remedy becomes worse than the disease."[63]

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[61] *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 211 CLR 476 per Gleeson CJ at [37].

[62] The Hon Sir Gerard Brennan, AC KBE, [then] Chief Justice of Australia, *The Parliament, The Executive And The Courts: Roles And Immunities,* School of Law, Bond University, Saturday, 21 February 1998.

[63] Wade, "Constitutional Fundamentals", *Hamlyn Lectures* , 32nd series (1980) at 83-84.

7 Access to durable solutions

Lack of provisions to ensure durable solutions

7.1 One notable absence from the system Australia proposes to establish is the absence of access to timely durable solutions. There is nothing in the definition of a declared country requiring that the declared country offer a durable solution. Rather, section 198A of the Migration Act, also referred to in the Explanatory Memorandum of the bill, states that the Minister will declare that the declared country "provides protection to persons who are given refugee status, pending their voluntary repatriation to their country of origin or resettlement in another country".

7.2 There is no requirement for local integration in the third country, a matter specifically required by UNHCR in its definition of a safe third country.[64] According to Francis this means that Australia may expel refugees "to a country where they can be left in limbo, without any chance of local integration in that country, pending voluntary repatriation or resettlement".[65]

7.3 Furthermore, Australia has not committed to grant protection in Australia to those with positive determinations even though it is Australia's protection obligations that have clearly been engaged. The Government has indicated it will seek third countries to take recognised refugees but has made no commitment to take the refugees if no other appropriate destination can be found. Whatever the outcome of such negotiations, which past experience suggests are highly likely to be unsuccessful, such steps will cause unreasonable delays in the identification of durable solutions.

Ramifications

7.4 Resettlement of the successful Tampa asylum seekers occurred only slowly and gradually from 2002 onwards, and a substantial number were accepted by New Zealand.[66] In March 2004 there were over 400 asylum seekers remaining on Nauru,[67] mostly Afghanis, but also a number of Iraqis and others, as well as more than 90 children. Only one asylum seeker remained on Manus Island. In 2005 the remainder were finally accepted by Australia having spent over four years in detention.

7.5 While Australia may endeavour to resettle future recognised refugees who are part of the offshore processing program to third countries, this is likely to prove difficult. Resettlement to third countries generally takes place as a form of burden sharing where more developed countries accept refugees from very poor

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[64] Above n.193, para.19; Conclusion No. 58 (XL) – 1989 – *Problem of Refugees and Asylum-Seekers Who Move in an Irregular Manner From a Country in Which They Had Already Found Protection* requires asylum seekers to have "access to a durable solution" in a safe third country.

[65] Francis, Submission, Inquiry into the Migration Legislation Amendment (Further Border Protection Measures) Bill 2002, Submissions published by the Committee as at 11/10/02 p.19.

[66] As at January 2004 New Zealand had taken 194 asylum seekers detained as part of the Pacific Solution - see Australian Minister for Immigration and Multicultural Affairs, "Border Protection: DIMIA reassures concerned groups about conditions on Nauru," Media resources, http://www.minister.immi.gov.au/borders/detention/nauru_health.htm, New Zealand Immigration Service www.immigration.govt.nz ; "Six Iraqi Women to be among Nauru refugees", New Zealand Herald, 27 January 2004; "Resettlement of Nauru Residents to New Zealand", Australian Minister of Immigration Press release, VPS 026/2004 27 Jan 2004.

[67] Department of Foreign Affairs and Trade "*Republic of Nauru – Country Brief*" March 2004 http://www.dfat.gov.au/geo/nauru/nauru_brief.html

countries of first asylum who do not have the resources to deal with the large numbers of refugees in their territories (for example Kenya and Egypt).

7.6 As UNHCR noted Australia is "a country with a fully functioning and credible asylum system, in the absence of anything approximating a mass influx" which has decided to "transfer elsewhere the responsibility to handle claims made actually on the territory of the state".[68] Third countries are unlikely to be sympathetic to Australia's requests given that Australia is a developed state with, by its own admission,[69] comparatively few numbers of asylum seekers. In short, Australia has no refugee burden which it can credibly request other states to share.

7.7 Third states may also be reluctant to act in a way which may be seen as condoning actions of a country that do not conform with international law and in a manner which indicates that Australia is reluctant to its responsibility within the international refugee protection regime, even when asylum seekers are on Australian shores. Indeed, the Refugee Council of Australia has noted in its recent submission to this Senate Inquiry that "[I]n the previous incarnation of the Pacific Solution, of the 1063 refugees eventually resettled only 46 (4.3%) were accepted into countries other than Australia and New Zealand".[70]

7.8 Given Australia's failure to commit to take successful asylum seekers (and indeed the indication from Indonesia that Australia has committed **not** to take successful asylum seekers), and the expected difficulty in finding willing resettlement countries, it is likely that recognised refugees may remain detained on Nauru for inordinate amounts of time, as happened with the Tampa refugees, some who were recognised and finally released some four years later. UNHCR noted that the arrangement in Nauru "left many people in detention-like conditions for a long period of time with no timely solutions" and that the refugees "suffered considerable mental hardship"[71] as a result.

7.9 Such indefinite detention is contrary to international law, and extremely damaging to individuals, especially children. The problems with indefinite detention are discussed in greater detail in the next section.

8 Human rights violations in Australia's offshore detention facilities

8.1 In addition to its express obligations to protect refugees, Australia is party to a number of international human rights instruments that require it to accord protection to refugees, asylum-seekers and other non-citizens. These include the ICERD, the ICCPR, the ICESCR, the *Convention on the Rights of the Child* (CRC), the *Convention on the Elimination of All forms of Discrimination against Women* (ICEDAW), and the *Convention Against Torture and Other Cruel Inhumane or Degrading Treatment or Punishment* (CAT). By way of comparison, Papua New Guinea is party to the Refugee Convention, ICERD, ICEDAW and the CRC. Nauru is

[68] UNHCR Briefing Notes: Australia Proposed new border control measures raise serious concerns 12 May 2006, http://www.unhcr.org/cgi-bin/texis/vtx/home/opendoc.htm?tbl=NEWS&id=446476372.
[69] *Interpreting the Refugees Convention – an Australian contribution*, Department of Immigration and Multicultural and Indigenous Affairs, 2002, p. 135, noted above.
[70] Refugee Council of Australia, *Position Paper Migration Amendment (Designated Unauthorised Arrivals) Bill 2006*, 17 May 2006 (available on inquiry website).
[71] UNHCR Briefing Notes "Australian Legislation" 12 April 2006, http://www.unhcr.org/cgi-bin/texis/vtx/home/opendoc.htm?tbl=NEWS&id=446476372

party to the CRC and has signed but not ratified a number of other human rights instruments.[72]

8.2 Australia's onshore practices in relation to refugees and asylum-seekers have been criticised to a greater or lesser degree by each UN treaty body responsible for overseeing and providing interpretative guidance on implementation of their respective human rights treaty, highlighting the relevance of refugee protection issues to each of these international instruments.

8.3 ALHR is concerned that the regime proposed under the bill, like the first incarnation of the Pacific Solution, raises many of the same questions suggesting that little has been learned from the negative impact of the Pacific Solution as originally implemented. In particular, if passed, the bill

- would violate the prohibition on arbitrary detention;
- may constitute inhuman or degrading treatment;
- would deny those subject to the legislation the right to equal protection of the law;
- would deny the right to access to counsel and due process of law;
- would deny the right to an adequate standard of living;
- would compromise in particular the right to health given the well documented mental health impact of prolonged detention;
- would not be in the best interests of children affected by it and would violate a number of provisions of the CRC;
- would compromise the right to family unity.

Extraterritorial human rights obligations

8.4 One of the central issues in the debate over the Pacific Solution is whether Australia remains legally responsible for violations of rights of persons transferred to Manus Island, Nauru, or any other 'declared country'. The development of international human rights law has taken a clear and decisive direction towards recognising that international human rights responsibilities can have extra-territorial application, in a number of circumstances:

a) Where actions (usually deportation or expulsion) are taken within a State's territory or jurisdiction which can foreseeably lead to a breach of the person's rights once they leave the jurisdiction.[73]

b) Where the territory in which the breach occurred was under the "effective control" of the State in question.[74]

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[72] ICERD, ICCPR, and CAT.

[73] For example the European Court of Human Rights in *Soering v UK* , 7 July 1989 Series A no.161 p 86, held that the UK could not be absolved from responsibility for "all and any foreseen consequences of extradition suffered outside their jurisdiction. See also *R v. Special Adjudicator ex parte Ullah* (FC), [2004] UKHL 26, 17 June 2004.

[74] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)* (1970) ICJ Reports 1971 p12 - the International Court of Justice ("ICJ") held South Africa to be liable for acts in Namibia as South Africa had actual control even if no legitimacy of title or a legal right to control; ECHR *Bankovic v Belgium* (ECHR) 4 ILM 517 (2002) para 71 where the court noted that extraterritorial jurisdiction will exist where a State has: " effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or

8.5 The critical feature of the notion of extra-territorial responsibility is the notion that a person outside the territory of a state may nevertheless be within its "power or effective control". In its General Comment No. 31 on the *Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, adopted 29 March 2004, the UN Human Rights Committee observed:

> [10] States Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the **power or effective control** of that State Party, even if not situated within the territory of the State Party. As indicated in General Comment 15 adopted at the twenty-seventh session (1986), the enjoyment of Covenant rights is **not limited to citizens** of States Parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves **in the territory or subject to the jurisdiction of the State Party**. This principle also applies to those within the power or **effective control of the forces of a State Party acting outside its territory**, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation.[75] (*emphases added*)

8.6 Examples of incidents where the requisite authority will exist include:

- if the person is detained;[76]
- if the person is otherwise physically controlled,[77] including by the armed forces of a state;
- if the person is subject to a judicial process;[78] or
- if the person is otherwise subject to the authority of the State in relation to the exercise of powers of diplomatic or consular agents.[79]

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acquiescence of the Government of that territory, exercises some or all of the public powers normally to be exercised by that Government; *Cyprus v Turkey*, (1982) 4 EHRR 482; UK Cases: *Adan*, [2001] 2 AC 477; *Loizidou v Turkey* judgment 18 Dec 1996 (merits), 1996-VI, No 26; *Abbasi and another v the Secxretary of State for Foreign and Commonwealth Affairs*, [2002] EWCA Civ 1958 (CofA); *the Matter of Foday Saybana Sankoh* 2000 WL 33148734 (CofA); US Cases: *Ralpho v. Bell*, 569 F.2d 607 (D.C. Cir. 1977), but c/f *Johnson v. Eisentrager*, 339 U.S. 763 (1950); InterAmerican Court of Human Rights: *Coard et al v the United States* (Report No 109/99 Case no 10.951) Inter-Am.C.H.R.29 September 1999; Human Rights Committee: *Lopez Burgos v Uruguay* – Communication No 52/1979, Views of the Human Rights Committee, 29 July 1981; "The Nature of the General Legal Obligation Imposed on States Parties to the Covenant" Human Rights Committee, General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004) Adopted on 29 March 2004 (2187th meeting), para 10

[75] CCPR/C/21/Rev.1/Add.13, 26 May 2004, para 10.

[76] *Coard* ibid; *Lopez Burgos* ibid

[77] *Xhavara et quinze autres v Italy and Albania* decision of 11 Jan.2001, App.no.39473/98,

[78] *Drozd and Janousek v France and Spain* judgement 26 June 1992, Series.A, no.240

[79] *Bankovic* above [above n80]**;** see *also Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Request for advisory opinion)*, International Court of Justice, 9 July 2004.

8.7 Thus, even if Australia removes people from its territory in the manner proposed, there are strong arguments that Australia exercises effective control over 'designated unlawful arrivals' and may be considered responsible for the protection of their human rights in that context. It is important to note here that these obligations would not be circumvented by, for example, sub-contracting detention centre management to the International Organization for Migration (IOM).

Arbitrary indefinite detention

8.8 The right not to be arbitrarily detained is contained in a number of conventions and is considered part of customary international law.[80] Article 9 of the UDHR provides that "no one shall be subjected to arbitrary arrest, detention or exile." The ICCPR contains similar provisions[81] while the Refugee Convention contains relevant provisions on freedom of movement.[82] The International Court of Justice has stated that "[w]rongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself manifestly incompatible with the principles of the charter of the UN, as well as with the fundamental principles enunciated in the UDHR".[83]

8.9 UNHCR, while stating as a general principle that asylum seekers should not be detained,[84] provides guidelines in determining the conditions under which detention of asylum seekers may be deemed acceptable, including verification of identity, to "determine the elements on which the claim for refugee status is based" (as distinct from the entire status determination procedure)[85] and for reasons of national security. Detention should be avoided and if not, then should be only "for a minimal period". Detention as a deterrent is not permitted, as it is considered punitive.

8.10 The detention of asylum seekers on Nauru and Manus Island is a breach of Australia's human rights obligation as it is without limits and not subject to review by a court. Asylum seekers who were determined to be refugees have remained detained for substantial periods of time as no country was willing to accord them protection. This issue was covered in detail during the Senate Inquiry into a "Certain Maritime Incident" (the "Maritime Incident Inquiry").[86]

Treatment while detained

8.11 Other provisions under the above conventions are relevant to the standards of detention;[87] as are various rights under ICESCR[88] and under CRC.[89]

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[80] The *Restatement of Foreign Relations Law of the US* (1987) para 701; Schachter *International Law in Theory and Practice* 178 Recueil de Cours 334 (1982-V); *Fernandez-Roque v Smith* 622 F.Supp 887 (ND Ga 1985) USA; Koh, *the US as world forum, civil remedies for in civil wrongs, combating terrorism through transnational public law litigation* 22 TEX ILJ 169 (1987)

[81] Art.9

[82] Arts.26, 31(2)

[83] *United States Diplomatic and consular staff in Tehran (USA v Iran)* ("*Tehran Hostages Case*") 1980 ICJ rep 3 p.42

[84] UNHCR, "Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers", February 1999, Guideline 2

[85] *ibid* Guideline 3(ii)

[86] Select Committee Report, "A Certain Maritime Incident", 23 October 2002, *Commonwealth of Australia*, submissions and report available at http://www.aph.gov.au/senate/committee/maritime_incident_ctte/report/contents.htm

[87] *ICCPR* Art.10 requires that all persons deprived of their liberty be "treated with humanity and respect for the inherent dignity of the human person". Art.7 provides that "no one shall be subjected to

8.12 It is difficult to make an assessment of the standards of detention due to the extremely limited access permitted to the media, NGOs and lawyers. This lack of external observation is of concern. However, what reports do exist have been damning. For example, Mr John Hodges, Chairman of the Government's Immigration Detention Advisory Group, visited the camp in Nauru and reported that "Nauru is by far the worst of the detention centres… and the facilities are just not as good as they are in Australia."[90]

8.13 There were numerous allegations of health problems, lack of fresh drinking water and physical abuse and these were outlined in detail in submissions to the Maritime Incident Inquiry.

Transparency and accountability

8.14 Transparent and effective procedures must be put in place to continually monitor whether Australia has discharged its human rights obligations to persons removed for offshore processing. Processes which need to be transparent need to include: the Ministerial declaration regarding a safe third country or "declared country", Ministerial decisions regarding who should and should not be sent to an offshore processing centres, the RSD process utilised, the RSD itself and the standards of detention.

8.15 The annual reporting requirement prescribed by the bill[91] however is hopelessly inadequate given that it reports on basic data but not compliance with standards. The bill makes no provision for independent monitoring and accountability mechanisms either with regard to the RSD procedure, or the conditions or fact of detention. Nor are effective remedies available to persons subject to the legislation (apart from acquisition of property on other than just terms), should the legislation be wrongly applied, or should injustice be done either in the course of the RSD procedure or in the context of detention.

8.16 Without the transparency provided by the independent merits review process of the RRT, it is not possible to be satisfied that Australia is making serious efforts to comply with its obligations under the Refugee Convention and Protocol. This is particularly important given the political context for the bill.

9 Other domestic policy considerations

Retrospective application

9.2 The provisions of the bill will apply from 13 April 2006, irrespective of when it achieves passage through Parliament or royal assent, and will invalidate any applications for protection which were otherwise validly made onshore.

9.3 Retrospective legislation in any form is inherently undesirable. The objection is even greater when it affects the fundamental right of a person to seek, apply for and enjoy asylum.

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torture or to cruel, inhuman or degrading treatment or punishment". This is echoed in Art.5 of the *UDHR* and Art.2 of CAT.

[88] eg Art.12 which provides for the right of everyone to "the enjoyment of the highest attainable standard of physical and mental health".

[89] Art.3 provides that in all actions concerning children the best interests of the child shall be a primary consideration. Art.24 provides for the highest attainable standard of health and Art.27 standards of living adequate for the child's physical, mental, spiritual, moral and social development. Art.28 provides for a right to education, and art.31 the right to leisure and to participate in cultural life.

[90] *Transcript of Evidence*, CMI 811, per .Senate Select Committee, above n.10, para.10.90

[91] See new Part 8D inserted by Item 27

Financial impact of the bill

9.4 The statement in the Explanatory Memorandum that there will be "no direct financial implications from the Bill" belies the immense cost of maintaining and utilising offshore processing centres.

9.5 From 2001, over $42 million was spent to establish and run the Manus centre for less than 400 refugees. In July 2003, the Manus detention centre was wound down, leaving one last remaining asylum seeker, Aladdin Sisalem, who was imprisoned on Manus by himself for another ten months at a cost of over $250,000 a month.[92]

9.6 If all unauthorised boat arrivals are to be processed offshore, then the centres on Nauru, Manus, and Christmas Island will need to be maintained on an indefinite basis, at exorbitant cost to the Australian taxpayer.

10 Ramifications of the legislation

10.1 The long-term consequences of this bill can be divided into three broad categories. First, the consequences of failure to address the root causes of the movement of West Papuan asylum-seekers. A second concern is the impact of such legislation on the rule of law in Australia. Finally, damage to the international protection regime, including undermining first country of asylum responsibilities and manipulating the principle of burden and responsibility sharing.

10.2 There are a significant number of General Assembly Resolutions which call upon states to address the root causes of refugee movements. Although the primary state responsibility will normally lie with the country of origin, this does not exclude the obligation of other states to address the root causes and seek to mitigate the need for refugee flight. This is not done by closing land or sea borders, and is not done by ignoring human rights conditions in the country of origin. Highlighting the clear link that exists between the identification of durable and timely solutions and the obligation, the General Assembly has emphasized:

> "…the need for States to assist the High Commissioner [for Refugees] in seeking durable and timely solutions to the problems of refugees, as well as to take part in efforts to prevent conditions that might give rise to the flight of refugees, and to address the root causes of refugee outflows, and underlining, in this connection, State responsibility, particularly as it relates to countries of origin."[93]

10.3 Oppressive state apparatus that violates individual human rights is a gradual process that progressively undermines the rule of law. The deterioration in respect for the rule of law in Australia has been marked, especially in relation to non-citizens, over the last decade. Although the downward spiral started before that time, the current Government has progressively eroded rights, whether to liberty, judicial review, or secure protection. It is foreseeable that the current bill may not have the desired effect. For example, how will the Australian Government respond if a West Papuan arrives in Australia by air, and

[92] Article, *West Papua's forgotten asylum seekers*, N. Maclellan, 13 April 2006, available online at www.apo.org.au

[93] GA Resolution, 48/116, PP12, 20 December 1993. Sourced from UNHCR, *Responsibility for Refugees*, http://www.unhcr.org/cgi-bin/texis/vtx/home/opendoc.pdf?id=3e96a12020&tbl=PUBL.

documented, and seeks Australia's protection? How will the Australian government respond if a family member of an already recognised refugee seeks to enter Australia and seek protection? Will she be sent to Nauru or Manus Island for processing and resettlement to a third country without any prospect of family reunification?

10.4 The current bill does not address such situations. The pattern of re-legislating over old ground or extending harsh measures to a wider class of people has become all too familiar. Unforeseen situations are 'overcome' by further undermining the rule of law, and most particularly international refugee and human rights law standards, the ends being justified by any means.

10.5 Australia's abrogation of its responsibilities may well encourage (or embolden) other States to follow suit. As states that bear real pressures of refugee movements witness capricious state action on the part of others where there is no willingness to resist political pressure states may be tempted to depart from accepted international standards bringing about the collapse of the international refugee protection regime. Before considering taking this Bill any further, the Australian Parliament needs to consider carefully the broader ramifications of its actions. What impact will it have on the wider protection regime? Why should other countries host refugee populations if Australia will not? And why should other host countries allow media, lawyers or civil society access to asylum seekers whether detained in centres or in camps?

10.6 Australia loses credibility when advocating with other Governments to improve their treatment of people in their territory. Why should they act one way when we act another? Why should they do what the UN says when Australia will not? Why should they comply with international law when Australia will not?

11 Some pressing questions for the inquiry

11.1 ALHR is of the view that the Senate Legal & Constitutional Committee should consider a number of issues in its deliberations of the bill and in formulating its questions to the relevant Government and/or DIMA officials who appear before the Committee in any hearings. The appendix to this submission lists these issues in greater detail. In summary, they include:

- Papua New Guinea is not party to the ICCPR, ICESCR, or CAT. What measures does Australia have in place to ensure that effective remedies are available in the event of violations of provisions of these instruments? What are those remedies? How are they given effect? How is the existence of the rights and availability of the remedies communicated to detainees?

- Whether or not any asylum seekers are actually transported for processing in Nauru or Manus, or are forcibly returned to West Papua, depends upon what happens at the point of interception. What will be the instructions to Australian navy and customs personnel if they encounter a boat on the open water? How will the Indonesian navy respond? Will we model some of the appalling practices used in the Mediterranean and by the US in relation to Haitian boat people?

- For the last two decades, Papua New Guinea has tolerated virtually uncontrolled border crossings from West Papua. The Port Moresby office of the UNHCR is monitoring a "population of concern" of over 8000 people in Papua New Guinea. On the latest available figures, this includes 7627

refugees and another 198 asylum seekers whose cases are being processed. Half of this refugee group are children under the age of 18. According to UNHCR, by early 2005 there were 2677 West Papuans at the East Awin camp in Western Province, 138 "stateless persons" in Daru, Western Province, another 5400 people dispersed in five unofficial camps along the border, and a handful of refugees in other urban centres.[94]

- Does Australia expect PNG to keep its borders open and accept all West Papuan refugees in future?

12 Conclusions and recommendations

12.2 By way of conclusion, ALHR makes the following recommendations for action in relation to this Bill:

i. In view of the fact that the object and purpose of the Bill is to abrogate Australia's obligations under international human rights and refugee law, the Bill should be withdrawn;

ii. The Australian Government should take immediate steps to explore, in collaboration with UNHCR and other states, measures which will assist Indonesia to address the root causes of the movement of West Papuan asylum-seekers and which are consistent in every way with international human rights and refugee law standards;

iii. The Australian Government should take steps to ensure that all extraterritorial actions undertaken by it, or by its agents, are consistent with international human rights and refugee law standards, including by ensuring the availability of adequate safeguards and effective remedies that are legally enforceable, including judicial scrutiny of extraterritorial actions;

iv. In order to preserve the integrity of the international protection regime, the Australian Government should ensure that all actions taken by it in relation to the protection of refugees are consistent with the principle of burden and responsibility sharing.

94 Article, *West Papua's forgotten asylum seekers,* N. Maclellan, 13 April 2006, available online at www.apo.org.au

Appendix:
Questions for Government regarding the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006

Rationale for the legislation

- Given there is no likely wave of asylum seekers, what is the rationale for this legislation coming now?
- Does the Government consider asylum seekers who approach Australia directly (ie as a country of first asylum with no transit countries) differently to secondary movers? How?
- Is the Government's desired outcome from the passage of this legislation that those in West Papua get the message that they are not welcome and therefore do not come to Australia?
- If a person from West Papua wished to apply for asylum in Australia how would you suggest they do so?
- If the Government is committed to an outcome where no West Papuan is granted asylum on Australian shores, then what will be its response if a West Papuan arrives by air using false documents? (We think it can be safely assumed that Australia will not actually grant a visitors visa to anyone from the province).

If West Papuans cannot seek asylum in Australia, what then?

- If persons from West Papua should not apply for asylum in Australia what should they do? Go to PNG?
- For the last two decades, Papua New Guinea has tolerated virtually uncontrolled border crossings from West Papua. The Port Moresby office of the UNHCR is monitoring a "population of concern" of over 8000 people in Papua New Guinea. On the latest available figures, this includes 7627 refugees and another 198 asylum seekers whose cases are being processed. Half of this refugee group are children under the age of 18. According to UNHCR, by early 2005 there were 2677 West Papuans at the East Awin camp in Western Province, 138 "stateless persons" in Daru, Western Province, another 5400 people dispersed in five unofficial camps along the border, and a handful of refugees in other urban centres.[95] Does Australia expect PNG to keep its borders open and accept all West Papuan refugees in future?
- What does PNG think about Australia deciding that West Papuan asylum seekers should all go to PNG?

Discrimination

- Does the Government acknowledge that recognition of a person's refugee status is a neutral, humanitarian and non-political act, as is constantly reaffirmed by UNHCR and 1951 Refugee Convention signatory states? If not, why not?
- Does the Government acknowledge that it should uphold its refugee protection obligations regardless of an asylum seeker's country of origin? If not, why not?
- Does the Government consider it appropriate for other State parties to the 1951 Refugee Convention to amend their asylum processes so as to exclude particular ethnic or racial groups from accessing these processes? If not, why not?

[95] N.Maclellan *West Papua's forgotten asylum seekers,* 13 April 2006, available online at www.apo.org.au

Discrepancies between Australian Actions and expectations

- Is the Government aware that the overwhelming majority of refugee movements around the world are unauthorised border crossings?
- Does the Government recognize that refugees seeking asylum often have no choice than to enter a country by crossing a border without authorization?
- Does the Government acknowledge that its offshore program (whereby refugees in foreign countries are resettled to Australia) depends upon other States permitting un-authorised border crossings into their territories, and a willingness to host refugee populations pending a durable solution? If not, why not?
- If so, does the Government recognize that Australia is requiring other countries to act one way, permitting unauthorised border crossings, while exempting itself from the same obligations?

Interception

- Where does the Government plan to intercept West Papuan asylum seekers? In Indonesian waters? On the High Seas? In Australian territorial waters?
- Whether or not any asylum seekers are actually transported for processing in Nauru or Manus, or are forcibly returned to West Papua, depends upon what happens at the point of interception. What will be the instructions to Australian navy and customs personnel if they encounter a boat on the open water? Will we model some of the appalling practices used in the Mediterranean and by the US in relation to Haitian boat people?
- How will the Indonesian navy respond to whichever course of action is decided on?
- How likely are joint Australian/Indonesian exercises? If this was a joint exercise how would the response at the point of interception be different?
- Does the Government have any concerns about working with the Indonesian Government to intercept asylum seekers from West Papua?

Questions regarding the Australian Government offshore program

- Does the Government acknowledge that the majority of countries of first asylum (upon which the Australian offshore program depends) are developing countries? And that the numbers of asylum seekers and refugees in these countries are often in the tens and hundreds of thousands? If not, why not?
- Does the Government acknowledge that the number of countries of first asylum where asylum seekers can access the offshore program is limited? Is the Government prepared to provide a list of the countries of first asylum where persons access the Australian offshore program, the numbers of persons and the countries of first asylum from where they were accepted for resettlement to Australia? Can the Government provide the total numbers of refugees currently living in each of these countries of first asylum?
- Where is the "queue" that the West Papuan asylum-seekers should have joined?

Non-Refoulement

- Does the Government consider that it has *non-refoulement* obligations under international refugee law towards persons who reach Australian territorial waters and wish to seek asylum? If not why not?
- Does the Government consider that it has *non-refoulement* obligations under international refugee law towards persons who are picked up/ intercepted by Australian vessels (in the context that the Tampa was a Norwegian vessel) and wish to seek asylum? If not why not?

Treatment of persons in offshore processing centres

- Does the Government consider that it retains 'effective control' over the populations intercepted, transferred and subsequently detained on Nauru and Manus Island?
- If so, does the Government acknowledge that it remains legally accountable for human rights violations taking place extra-territorially?
- If not, who does? And are they then bound by the same human rights standards as the Australian Government?
- How does the Government ensure that the human rights of persons outside Australian territory but under Australia's effective control are respected, protected and fulfilled under the 1951 Refugee Convention, and other international human rights treaties to which Australia is a State Party (ICERD, ICCPR, ICESCR, CRC, CEDAW, and CAT)?
- Papua New Guinea is not party to the ICCPR, ICESCR, or CAT. What measures does Australia have in place to ensure that effective remedies are available in the event of violations of provisions of these instruments? What are those remedies? How are they given effect? How is the existence of the rights and availability of the remedies communicated to detainees?
- Nauru is party to the CRC and has signed but not ratified a number of other human rights instruments. It is not party to the Refugee Convention. What measures does Australia have in place to ensure that effective remedies are available in the event of violations of provisions of these instruments? What are those remedies? How are they given effect? How is the existence of the rights and availability of the remedies communicated to detainees?
- How does Australia ensure that there is monitoring, reporting and action taken on any breaches of the above mentioned human rights standards? Who will do this?
- If those rights are not given due recognition and respect, what arrangements does the Government have in place for taking back those whom it has exposed to human rights violations or abuses?

Detention

- The Government has stated it does not detain children and has claimed that all asylum seeker children have been released from detention. How does the Government plan to reconcile this current bill with the policy that asylum seeker children should not be detained?
- Does the Government acknowledge the damage detention can cause to vulnerable persons, in particular children? What measures does the Government have in place for alternatives to detention in 'declared countries'?

Refugee Status Determination

- Who will be performing the RSD processing? If DIMA, what law and standards will it apply?
- Will asylum seekers be given access to legal advice? If not why not?
- Will asylum seekers be given access to up to date country of origin information?
- Will asylum seekers be able to apply for derivative status?
- What is the rationale for denying offshore asylum seekers access to fair and effective merits and judicial review procedures?

Ramifications internationally of this legislation

- Does the Government acknowledge that other countries might adopt the Australian model of offshore processing? If not why not?
- Does the Government acknowledge that if other countries adopted the Australian model, the offshore processing centres could be located in countries with very poor human rights records? If not why not?
- Does the Government acknowledge that if other countries adopted the Australian model, this might include denying access by media or human rights groups to such centres? If not why not?
- Does the Government acknowledge that if other countries adopted the Australian model, the international system of protection will be undermined? If not why not?
- How does the Government propose to deal with these ramifications?

Resettlement and international burden sharing

- Does the Government acknowledge that as a good international citizen, a member of the international community, and as a signatory to the Refugee Convention it has international burden and responsibility sharing obligations within the international refugee context? If not, why not?
- Does the Government commit to resettling in Australia refugees recognised through the Australian offshore processing program in 'declared countries'? If not, how does the Government reconcile this with its international burden and responsibility sharing responsibilities?
- If recognised refugees are not going to be resettled in Australia, where does the Government propose they should go?
- Does the Government commit to a maximum detention time for persons recognised as refugees and accepted for resettlement in Australia prior to their resettlement?
- Does the Government foresee any problems with asking third countries to accept refugees recognised through the Australian off shore processing program? How will these be addressed?

Ensuring the place where processing takes place will accord effective protection

- Will the Minister's declaration that a country is appropriate for processing (a "declared country") be transparent and will the process and reasoning be made publicly available? If so how? If not, why not?
- Can the Minister's "declaration" of a country for processing be reviewed by a court? If so, how? If not, why not?
- The UNHCR has created a list of criteria when designating a safe third country or where countries may be considered to accord effective protection. Why has the Government not incorporated these requirements into the process of assessing whether a country should be "declared country"?